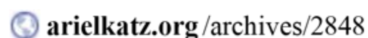
Some Questions on the Héritage Project



by

There have been very few details but a great deal of controversy about Héritage project, the ten-year digitization project undertaken by Canadiana.org. The project promises to digitize and make available some of Canada's most popular archival collections—encompassing approximately 60 million pages of primary-source documents from the collections of Library and Archives Canada, Canada's national library.

Despite the lack of full details, a project summary document dated April 30, 2013 reveals the following:

- The agreement between LAC and Canadiana.org provides for 10 years of exclusive rights for Canadiana.org to monetize the collections in exchange for making them accessible online.
- Costs will be funded out of revenues.
- Each year 10% of the collections will be made Open Access to Canadians. At the end of the project term 100% will be Open Access.
- Users will be charged access fees for non-Open Access content during the 10-year exclusivity term.
- Basic and Premium Access accounts will be offered. Basic Access will offer virtual microfilm tape images with collection descriptions with basic finding aids.
- Premium access will provide enhanced searching and data analyses using the metadata created and content images transcribed during the project.
- Ongoing creation of metadata, RDA linking and images content transcriptions will be funded primarily by subscription revenues and supplemented by other revenue sources such as derivatives, advertising, licenses, grants, charitable donations and sponsorships.

From a legal perspective, the decision to grant Canadiana.org a 10-year exclusive right to monetize the collections raises a few interesting questions: (a) can LAC monetize its collections; or (b) can LAC enter into an agreement with third parties for that purpose; and (c) can it do it by granting an exclusive right?

The short answer, in my view, is: (a) LAC does not have the power to monetize its collections; (b) LAC can allow (or indeed cannot prevent), others from providing services based on its collections and monetize those services; but (c) LAC cannot grant an exclusive right to monetize the collections.

Here's the long answer.

Can LAC monetize its collections?

The starting point is that LAC, which, according to s. 4 of *Library and Archives of Canada Act,* is "a branch of the federal public administration", can only act within the powers granted to it by Parliament.

The preamble to the *LAC Act* states that "Canada [will] be served by an institution that is a source of enduring knowledge accessible to all, contributing to the cultural, social and economic advancement of Canada as a free and democratic society". Indeed, providing better, easy, and integrated access to Canada's knowledge, information and documentary heritage, and making "that heritage known to Canadians and to anyone with an interest in Canada and to facilitate access to it" is one of the stated goals of creating LAC (as a merger between the former National Library of Canada and the National Archives of Canada). Since LAC was created in 2004, it is fair to assume that making LAC records accessible by means of mass digitization is one of the things that were on Parliament's mind. Therefore, there can be little doubt that digitizing LAC collections so that they would become widely and easily accessible is within the mandate of LAC.

Obviously, attaining those goals is costly, and budget constraints may limit what LAC can do. This raises the question of whether LAC has

the power to raise additional funds by “monetizing” access to its collections. I suspect that the answer is no.

Few things are noticeably missing from the *LAC Act*. The Act does not give LAC any power to “monetize” its collections, to provide “premium” services, to sell products or services, or otherwise charge fees. Presumably, the lack of such statutory powers means that LAC has to make its collections accessible for free and fund its operations from the budget approved by Parliament. The lack of powers to charge money is not an oversight, and it’s not very likely that such powers can be implied. When Parliament wants to grant such powers it often does it quite explicitly. For example, the *Canada Parks Agency Act, 1998*, dealing with the preservation of and accessibility to Canada’s natural, environmental, and historical heritage, explicitly contemplates fee-based provisions and sale of products and services.

Not only the *LAC Act* does not contemplate monetizing LAC’s activities, s. 8(1)(j) actually empowers LAC to provide financial support to other organizations involved in documentary preservation and access activities. In other words, while the *LAC Act* does not mention any option of collecting revenue to fund its operations, it explicitly permits LAC to spend part of its budget to subsidize preservation and access activities done by others. It would appear, therefore, that unless there is another statutory basis giving LAC such powers (which I’m currently not aware of), LAC does not have the power to “monetize” its collections, even if it believes that such monetization it the best or only way to fulfill its mandate.

Can others monetize the LAC collections?

LAC’s lack of power to monetize its collections does not mean that others cannot do that. Indeed, since LAC is required to make its collections accessible to all, then, barring copyright in the documents (more on this below), anyone should be allowed copy the documents and then offer others to access them for free or for a fee.

While it’s true that the *LAC Act* does not mention the possibility of monetizing by others, it does not have to. This conclusion that others are free to access, copy, and monetize simply reflects the principle that while LAC, as a branch of the government, can only act within its enumerated powers, individuals in a free and democratic society can act as they wish, unless there is a valid law that prohibits the activity. Obviously, when original archived documents are concerned, there might be some legitimate reasons, e.g., the need to ensure preservation, justifying some restrictions on who can copy them and how, but when the documents have already been microfilmed, and clearly once they have been scanned and digitized, such legitimate reasons largely disappear.

A good example for various business models that build on freely accessible public documents is how the laws of Canada and court decisions are currently reported and accessed. Even though conventional wisdom holds that such documents are subject to Crown copyright, the Crown wisely does not exercise this copyright to monetize access to them, and effectively treats them as a shared resource, open and accessible to all (except in Quebec, I was told, noting the irony). Increasingly, most laws and court decisions are freely available through government and court websites, but they are also openly and freely available through CanLII, owned by the Federation of Law Societies of Canada, and operated by Lexum, a private company. Those documents are also available through paywalled services offered by for-profit companies such as Westlaw or LexisNexis. The crucial point is that the government and the courts do not “monetize” access to legal documents, and do not give anyone an exclusive right to do that. Rather, they provide free access to the documents, and anyone is then free to offer enhanced features for free or for a fee. Arguably, LAC’s collection should be treated in the same way.

It may be argued that the analogy to legal documents is imperfect because current legal documents were born digital and therefore can be made searchable immediately, and even transcribing older ones does not require the same amount of work that describing and transcribing the LAC collections requires. This may be true, but even if it is, it does not necessarily follow, economically speaking, that: (a) describing and transcribing the collection (estimated to cost around $60 million over ten years) is beyond what can be reasonably expected from LAC itself, or, that even if it is, that no private sector entity (non-profit, or for-profit) would undertake to invest in describing and transcribing them without being granted an exclusive right to monetize the transcribed collections. But even if exclusivity is indispensable, it still does not mean that LAC has the legal power to grant it.

Can LAC grant an exclusive right to monetize?

Since very few details about the project have been disclosed, it’s not entirely clear what is the nature or the legal basis of the exclusive right that Canadiana.org was granted. There might be three hypothetical theories, none of which seem to hold.

If the Crown held any copyright in the materials to be digitized, then as a matter of copyright law it could grant an exclusive right to some forms of using it (I’m setting aside the question whether LAC itself could do that, and whether it would be a proper exercise of such power). However, I cannot think of any basis on which LAC could claim any copyright in the materials in its collections, and which could

be the basis of a grant of exclusive right to Canadiana.org.

It is also not entirely clear whether there is any basis on which Canadiana.org might be able to assert copyright in what it would produce. Producing a digital image of a microfilmed document is unlikely to meet the standard of "originality" as set by the Supreme Court in *CCH v LSUC*, because "for a work to be "original" within the meaning of the *Copyright Act*," the Court explained, "it must be more than a mere copy of another work. … What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment … [that] must not be so trivial that it could be characterized as a purely mechanical exercise." If one had to think about a good example of something that is clearly no more than a mere copy, that does not express any idea, and that does not require the requisite skill and judgment, then the scanning of a microfilmed image to produce a digital image would be such an example. Likewise, manually transcribing a document does not result in a copyrighted work. While transcription might be labour-intensive, "sweat of the brow" is not a basis for copyright protection in Canada.

Under some limited conditions Canadiana.org might be able to assert a thin copyright in the compilation of images and metadata, but even if this is correct—not a trivial assumption at all—it's not clear that this is the basis for the promised exclusivity. After all, if such activities resulted in any copyright, Canadiana.org would be the first owner of the copyright, the copyright would last for 50 rather than 10 years, and the source of the exclusivity would be the *Copyright Act*, not an agreement with LAC.

Maybe LAC believes that its statutory mandate includes the power to grant an exclusive right to monetize its collections, but as discussed above, the *LAC Act* does not mention any such power, and inferring such power will be contrary to the constitutional principle, crystalized in the *Statute of Monopolies, 1623* that all grants of exclusive rights are void and illegal, unless under or in accordance with an Act of Parliament.

Furthermore, since an exclusive right to monetize the documentary heritage of Canada would be a right akin to copyright, granting it requires an Act of Parliament and not any other form of regulation or statutory power. The Supreme Court confirmed this point in the *CRTC Reference* case from last December. In that case, the Court held that the CRTC did not have the power to issue regulations or licensing conditions that would empower local TV stations to authorize or prohibit cable and satellite companies from retransmitting their programs, and that the power to create exclusive rights akin to copyright can only be granted by and Act of Parliament.

Perhaps what LAC and Canadiana have in mind is merely a contractual obligation by LAC to Canadiana to refrain from giving access the microfilmed collections within the next ten years, to make those collections accessible only to those who agree not to copy them or not to engage in any activity that would compete with Canadiana.org, or simply to hand over custody over the collections to Canadiana.org during the next 10 years. It is doubted, however, whether LAC—as a branch of the federal public administration—has the power to enter into such an agreement. Not only it might conflict with *Statute of Monopolies* and the *Copyright Act*, it would seem to conflict directly with the requirement in the *LAC Act* to make its collections accessible to all.

In sum, it would be interesting to read the agreement between LAC and Canadiana.org and see whether it sheds some light on this legal conundrum. Until then, these legal questions can be added to the list of other questions surrounding this project.

Final economic point

Lastly, I would like to make another point about the economic justification for the project. Again, very few details have been disclosed, but from those that have been disclosed things do not seem to add up. The decision to place full searchability and other "premium" features behind a paywall has been justified on the basis of the high cost of manual transcription, estimated to be around $60 million. At the same time, concerns that such a paywall might prevent Canadians from accessing these features have been dismissed on the grounds that many Canadians would be able to access them through the libraries of the contributing institutions.

The contributing institutions are the members of the Canadian Research Knowledge Network (CRKN), namely most research universities and their libraries, who agreed to contribute to the start-up fund in return to lifetime access to the "premium' services. The goal was to collect $2 million, whereas in practice only $1.7 million was collected. This means that the project requires raising at least additional $58.3 million to be completed.

But here's the puzzle: the contributing institutions will not be required to pay beyond their contribution to the start up fund. But if most members of the public will be able to access the searchable collections through those institutions, then who will generate the additional $58.3 million? If a paywall is necessary to generate revenue, and this revenue will not come from the big institutional users, then it must be the case that LAC and Canadiana.org anticipate that the rest of the public will pay. Therefore, the answer to those who criticize the decision to erect a paywall cannot be that it won't really affect users and restrict access. Either most users will have to pay but a paywall is necessary

and justified, or most users won't have to pay and the paywall is superfluous. You can't have it both ways.