

Submission by the Canadian Historical Association to Industry Canada and the Department of Canadian Heritage regarding the 2009 Copyright Consultations

INTRO

The Canadian Historical Association (CHA) welcomes the opportunity to participate in the copyright consultations.

Founded in 1922, the CHA is a bilingual organization with 1,200 members scattered across Canada, the United States and the rest of the world, dedicated to scholarship in all fields of history. It serves professional historians but membership is open to anyone with an interest in history. The CHA represents the interests of historians and the heritage community to government, archives, granting and other agencies; organizes conferences; publishes the best of Canadian historical scholarship; and awards a range of prizes to historians who have produced exceptional work.

As the leading scholarly organization of historians in Canada, the Canadian Historical Association assumes an advocacy role regarding issues of concern to its members and other practitioners interested in advancing the discipline of history in Canada.

Copyright is one of those issues: it is of concern to CHA members, who, like all cultural producers in Canada, are both creators and consumers of copyrighted material. The award-winning and internationally-acclaimed research of CHA members like military historian and political commentator Desmond Morton and the Canadian historians of France and Great Britain, Natalie Zemon Davis (*The Return of Martin Guerre*) and Margaret McMillan (*Paris, 1919: Six Months that Changed the World*), rely on access to copyrighted works and robust provisions for fair dealing. Moreover, the copyrighted publications of CHA members have been used by the likes of Margaret Atwood, Rudy Wiebe, Lawrence Hill, and Anne Hébert whose novels are crucially informed by the scholarly literature on nineteenth-century Toronto (in *Alias Grace*), Louis Riel (in *The Temptations of Big Bear*), the African slave trade (in *The Book of Negroes*), and rural Quebec (in *Kamouraska*). Nor is the influence of CHA members and historical scholarship limited to literature: the work of Quebec filmmaker Michel Brault as well as that of Alberta folksinger James Keelaghan is also shaped by the existing historical literature.

The scholarship that undergirds the best Canadian literature, film, and music is itself dependent on the publications of other historians, as well access to and use of the letters, diaries, photographs, newspapers, and government reports housed in archives across the country. Indeed, new cultural products are only created by the consumption of existing ones. Any new Copyright Act must recognize this kind of sharing and exchange as the central dynamic of the creative process.

While the members of the CHA have concerns about the impact amendments to copyright legislation may have on teaching and on archives, its views on those subjects are consonant with those expressed by the Canadian Association of University Teachers (CAUT) and the Canadian Council of Archives (CCA), as well as the general position of the Canadian Federation of Humanities and Social Sciences (CFHSS). The remarks offered here outline the ways in which the legislation might affect innovative scholarly research in history, and offer recommendations for reforming the Copyright Act.

AREAS OF CONCERN

1. Term of Copyright in Photographs and “orphan works”

Photographs are an important source of information for historical research about Canada. Not only are they used to illustrate events, but they also tell us much about the material conditions of ordinary people, many of whom are not represented in the written record.

In many cases, the images that are most valuable to historians are not those commissioned or taken by professional photographers, but the ones that were snapped by unnamed and unknown amateurs; clergy who ministered to aboriginal people, government agents who were employed by experimental farms on the prairies, social workers who visited inner city families. Such photographs have little or no commercial value, but they are priceless to historians who seek to understand the lives of ordinary people.

The proposal to change the term of copyright from the time the photograph was taken plus fifty years to the lifetime of the author/photographer plus fifty years poses a considerable challenge to historical research and writing. Because it is impossible to determine who took most of these images, the proposed new term of copyright means these photos will become “orphan works.” As such, it will be impossible to obtain permission for their use beyond research, private study, criticism, etc. which are allowed under fair dealing.

- *The CHA recommends that the existing term of copyright in photographs held by Canadian repositories, which uses the date the photograph was taken plus fifty years, be retained.*
- *Moreover, it recommends that a review be carried out to determine how to make all “orphan works,” whether visual, textual, or aural, accessible and*

available for use in a practical manner.

2. Crown copyright in unpublished materials

Much historical research depends on material generated by the government; not only published documents like the annual reports produced by different departments of state or the findings of commissions of inquiry, but also unpublished material. Examples of such unpublished material include correspondence between government bureaucrats, or letters written from a government office to a member of the public.

According to Section 12 of the Copyright Act, the Crown holds copyright in any work it prepares or publishes. This provision is consistent with the Commonwealth tradition that vests copyright in the Crown as creator of works under the same rules that protect the creators of other kinds of works. In the United States, however, there is no copyright in government works. The United Kingdom and Australia have reviewed the continued existence of Crown copyright in their jurisdictions. Whether Crown copyright should continue to exist in Canada requires a similar review.

The term of copyright for works published by the Crown is fifty years after publication. But because Section 12 of the Copyright Act protects any work that is *prepared* by the Crown and not just that which is published, Crown works that are never published are protected by copyright *in perpetuity*.

This means that historical researchers planning to publish books or articles that use unpublished materials like correspondence between government bureaucrats or between a government department and a member of the public must seek permission from the Crown.

While this is not impossible, it does pose a burden – in terms of time and financial resources – on both the researcher and the government department involved. Moreover, it is a burden that will only become heavier as each year passes, as more and more government records are deposited in archives and become available to historians.

- *The CHA thus recommends that the federal government undertake a review of the continued existence of Crown copyright in Canada. It further recommends that perpetual copyright protection for unpublished Crown copyright material be eliminated. There should be the same term of copyright protection for Crown and non-Crown works whether the material is published or not.*

3. Digital materials and fair dealing

Whereas the first two concerns affect historians of Canada, this one affects all historians whatever their field of expertise. Not only does historical work rely on materials held by archives, but it also depends on access to materials contained in digital databases or in digitized form like CDs or DVDs.

These databases contain material of two kinds: “primary source material” and “secondary source material.” Primary sources, sometimes called original sources, are those that contain information that is closest to the period, person, or idea that is being studied. John A. Macdonald’s letters, newspaper coverage of the debates surrounding Confederation, and Susanna Moodie’s diaries are all examples of primary sources. Secondary sources are those that discuss or analyze ideas or events originally presented elsewhere. A biography of John A. Macdonald, an analysis of the political alliances that made Confederation happen, or one dealing with the experience of women in the backwoods of nineteenth-century Ontario are examples of secondary sources.

While these examples come from Canadian history, there are digital materials for almost all areas of history, from medieval to modern, and spanning all geographic regions. The availability of these sources in digital form has facilitated research by historians working in Canada greatly.

These sources are made available through licencing agreements – contracts – between libraries or individual researchers (as product purchasers) and a variety of commercial vendors thus introducing the issue of digital rights management and its relationship to fair dealing. The provisions for fair dealing must be safeguarded. To that end:

- *The CHA recommends that any reform to the Copyright Act include a provision that no contract may override fair dealing and its allowances for use of copyrighted material for the purposes of research, private study, criticism, or review as outlined in sections 29 and 29.1 of the current Copyright Act.*
- *Further, it recommends that penalties for circumventing of “digital locks” (mechanisms that prevent copying digitized material) and format-shifting be tied to infringement. The circumvention of digital locks for non-infringing purposes like research, private study, criticism, or review should not be subject to penalty. For instance, if a researcher wishes to copy and insert a clip of a film or music into his/her conference presentation from a DVD or CD and/or convert that clip into a compatible format, this should be considered fair use, falling under research (see (4), below).*

Although the amount of material available in digitized form to historians in all fields is growing, there are still instances where researchers must rely on interlibrary loan to get what they need. This is particularly the case for articles in scholarly journals that were published in the era before digitization was commonplace. In such instances, the library holding a hard copy of the journal will scan the requested article and send it electronically to the researcher, who receives it as a PDF via his/her library’s interlibrary loan office.

Section 30.2 (5 c) of Bill C-61, the proposed amendment to the Copyright Act which

died on the order table in late 2008, allowed researchers only five days to examine digital documents borrowed from libraries, after which those documents had to be destroyed.

This provision flies in the face of the research process: historians, like other researchers, return again and again to their sources while developing their own ideas. Because writing a scholarly article or a book can take a number of years, it is not unusual to accumulate research materials over that time, or, indeed, to retain them for a lifetime. If the reformed Copyright Act contains such a provision, all historical research in Canada – not just that which deals with Canada – will be undermined.

- *The CHA recommends that digital documents provided by libraries for the purposes of research, private study, criticism, or review have the same status as other copyrighted works; in other words, the CHA recommends that fair dealing should extend to digital formats and that there should be no requirement to destroy digital interlibrary loan materials.*

4. Fair dealing and the research process

Presenting preliminary findings at scholarly conferences is an integral part of the research process for all disciplines, including history. It is at such gatherings of experts that ideas are refined and innovative theories are challenged and tested.

In sharing their preliminary findings with other experts in the field, it is customary practice for historians to show material from a website, a copyrighted photograph, play a brief film clip or a few bars of a musical performance, among other things. Such public exhibition is an essential part of the established scholarly research process and should be considered fair dealing.

- *The CHA recommends that the concept of fair dealing be made clearer and more flexible to encompass the reality of research, particularly in the context of digital technology, by integrating the Supreme Court's tests for fair dealing from *CCH Canadian Ltd. v. The Law Society of Upper Canada (2004)* into the Copyright Act.*

In that decision, the Court urged a liberal and expansive understanding of the rights of users of copyrighted material, arguing that “The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.” [paragraph 48] The categories of “research,” “private study,” “criticism,” and “review” must be interpreted broadly. For instance, research may include work done for profit and not-for-profit.

SUMMARY

In seeking to foster innovation and the artistic and intellectual investment in understanding the past, reforms to copyright law must carefully balance between

the rights of cultural creators and those of consumers or risk stifling the country's creative potential. It must be flexible and, given the speed at which technological change occurs, it must also be technologically neutral; its provisions not tied to particular media formats (text, JPEG, PDF, MP3, CD, DVD etc.).

Above all, a new copyright act must have as its centerpiece a clear, capacious, and robust concept of fair dealing.

Respectfully submitted,

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