

In the late summer and early fall of this year, the CHA's Advocacy Committee dealt with three issues. Complete texts of the letters or submissions (in French and English) of the CHA's position can be found at the CHA website (<http://www.cha.virtuo.ca/splashpage.html>), and as a member, you are urged to read them in their entirety complete with detailed footnotes.

I **Borrowing Privileges at the University of Toronto** (2 page letter)

In a letter to the University of Toronto, the CHA expressed deep concern over the recent decision taken by the University of Toronto to cease offering complementary direct library borrowing privileges to students, faculty, and staff from other Canadian universities as of 30 September 2009, thereby requiring them to pay a substantial fee for this service – \$200 per year, \$130 for six months, \$75 for three months, or \$20 a week.

II **Comments on the draft of the Tri-Council Policy Statement: Ethical Research Involving Humans, 2nd Edition (December 2008) submitted to the Interagency Secretariat on Research Ethics.** (5 page submission)

In general, the CHA is supportive of the changes that have been made in the second edition and consider it a very good policy paper. In particular, we appreciate how the new Tri-Council Policy Statement (TCPS-2):

- Directs Research Ethics Boards (REBs) to view the TCPS as a set of guidelines, not hard-and-fast rules;
- Addresses explicitly the concerns raised by Aboriginal people themselves over their historical marginalization, and sometimes victimization, at the hands of academic researchers;
- Recognizes that consent to participate in research can take a variety of forms, written being only one of them (and not the most important in qualitative research);

- Reorients the discussion about consent away from its form and toward its quality;
- Understands that “although initial research questions may be outlined in the formalized research plan...it is quite common for specific questions (as well as shifts or discovering of data sources) to emerge only during the research project,” and that the “resulting changes to the research design will not merit requiring additional REB review”; and
- Acknowledges that “data destruction is not a typical part of the qualitative research process.”



*Robarts Library (Humanities and Social Sciences at the University of Toronto)
Bibliothèque Robarts (Sciences humaines)
de l'Université de Toronto*

The CHA respectfully suggests that at a minimum, the Advisory Panel make the following specific revisions:

- Expand and foreground the discussion of critical inquiry and its value;
- Include a separate chapter in the TCPS-2 on oral history that describes oral history methodology and refers REBs and researchers to the Oral History Association's Evaluation Guide. REB members should be made aware that anonymity is an exception in oral history practice.
- Include more examples drawn from qualitative research in all the “Application” sections of the TCPS-2.

More broadly and fundamentally, the CHA urges the Advisory Panel to consider the position of the Oral History Association (US) which since 2003 has argued that oral history should be excluded from institutional review boards. It is a position that the US Office for Human Research Protection (OHRP) agrees with.

III Submission by the Canadian Historical Association to Industry Canada and the Department of Canadian Heritage regarding the 2009 Copyright Consultations (6 page submission)

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.

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

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*.

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 sources are made available through licensing 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).

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.

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.

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.

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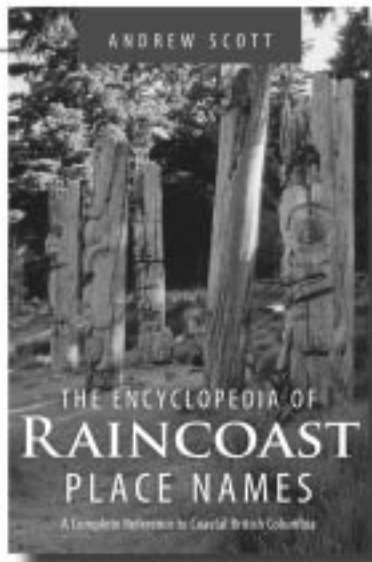
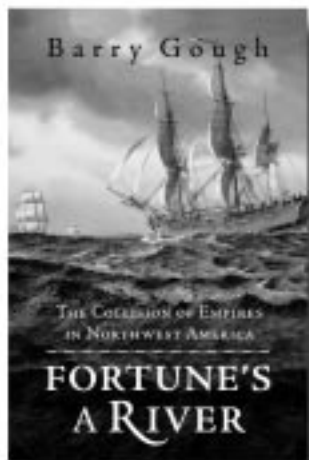
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