Canadian Federation for the
Humanities and **Social Sciences**

Fédération canadienne
des **sciences humaines**

Call for Action on Current Copyright Consultation

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by L. Murray, Chair, CFHSS Copyright Committee

On July 20th, the Ministers of Industry and Canadian Heritage announced a public consultation on copyright issues, to continue until September 13th. They say they intend to introduce new legislation in the fall.

It is very important that member organizations and institutions submit a comment in this consultation. The Copyright Committee of CFHSS will be preparing a Federation-wide statement over the next month. But it is imperative that individual scholarly organizations and scholars participate in this consultation: this is where the Ministers will be able to put a face to issues that often seem abstract. Why would DRM impair *your* work? Why do *you* need fair dealing? Why would a longer copyright term be a problem? What other issues and provisions matter to *you*, and why? And why is your work important anyway? Aim for a combination of specific examples of your scholarly practice, invocation of principles of freedom of expression and access to intellectual heritage, and statements about specific desired or problematic provisions. Short is fine. If you would like a member of the Copyright Committee to review a draft, just email it to laura.murray@queensu.ca, and we will direct feedback your way.

The government has set up a website, http://copyright.econsultation.ca/, to which Canadians can send comments on five questions:

- How do Canada's copyright laws affect you? How should existing laws be modernized?
- Based on Canadian values and interests, how should copyright changes be made in order to withstand the test of time?
- What sorts of copyright changes do you believe would best foster innovation and creativity in Canada?
- What sorts of copyright changes do you believe would best foster competition and investment in Canada?
- What kinds of changes would best position Canada as a leader in the global, digital economy?

These questions may frame your response, but it would be appropriate too to bend them in the directions that best reflect your concerns.

The timeline is tight, and the issues are complicated. This communiqué is intended to facilitate your contribution to the consultation.

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Part I: Copyright Principles for Humanists & Social Scientists

Representing as it does scholars who cherish and produce copyrighted works, the Canadian Federation of Social Sciences and Humanities certainly supports efforts to reduce the commercial-scale piracy. However, we call for a law that balances the economic rights of creators and/or owners with society's right to gain access to knowledge. Access to knowledge is a crucial stage in the life cycle of new creativity and innovation. The rights of scholars, students, universities, libraries, taxpayers and consumers must be preserved in order that this cycle can continue to generate novelty, critique, meaning, and collective cultural experience. Scholars in the humanities and social sciences work primarily with human creations, human ideas and human interaction – much of which falls under copyright. Our work in turn, once fixed in print or other media and shared with the academic community and the public at large, falls under copyright. Copyright thus to a large extent determines the conditions of possibility for our research and knowledge sharing. Many legislative amendments proposed and even introduced over the past several years would severely impede the ability of scholars to carry out their work, and the ability of Canadians to share with and learn from one another: we must be wary, creative, and outspoken about the next stages of copyright reform.

It has been said that digital technologies create a necessity for greater protection for rights-owners in order that the economic effects of the tech sector can be maximized. In our view, it is short-sighted and narrow-minded to think of new rights for creators or publishers as the only way to increase activity in the cultural and cyber industries. Commerce in IP rights and new gadgets is not the only boon new technologies bring to Canadians. These technologies can also make our lives and work easier, and allow us to connect with each other, build understanding, and develop new ideas. It is this understanding that allows us to generate creative solutions to problems we all face. Recent years have seen an explosion of new models of creativity and new tools for knowledge dissemination, ranging from wikipedia to Open Source software to online museum exhibits and courses. An appropriate copyright policy for new technologies will apportion the benefits of new technologies, rather than allotting them all to owners of the IP rights.

We call on the government to pursue the following possibilities for amendment to the Copyright Act:

1. Make the concept of fair dealing more clear and flexible to encompass the reality of teaching, learning and research in the context of digital technology by integrating the Supreme Court's tests for fair dealing from CCH v. LSUC (2004) into the Copyright Act.

2. Forbid the circumvention of digital locks (DRM) only if the locks are broken for infringing purposes.

3. Avoid specific exceptions, such as those in C-61 for digital interlibrary loan and educational use of the internet: fair dealing already covers many educational uses, and specific exceptions are often entirely unworkable.

4. Work towards format neutrality in the Act, so that various media are treated in an equivalent way.

5. Add a provision that contract law may not trump fair dealing.

6. Refrain from lengthening copyright term.

7. Make provision for more practical access to orphan works.

8. Eliminate Crown copyright.

Part II: Where are we now? A brief review of recent copyright developments

Federation members might be forgiven for confusion about whether or not new copyright legislation has been passed in recent years, given the dynamism of public discussion and pieces of legislation introduced. What follows is a selective timeline of Canadian copyright developments since 1997, the date of the most recent substantial revision of the Copyright Act, through the most recent bill, the Conservatives' C-61, which died on the order paper in fall 2008.

1997 **Most recent major amendments** to the Copyright Act: added educational and library exceptions, statutory damages, private copying levy
Canada signs World International Property Organization **(WIPO) "Internet Treaties"**

2001 Liberals conduct public consultations on copyright as mandated in 1997 amendments

2002 **Théberge v. Galerie d'Art du Petit Champlain**: Supreme Court talks of importance of balance in copyright law between creators' rights and purchasers' rights

2003 Bill C-36, The Library and Archives of Canada Act, introduced with a copyright term extension for certain unpublished works. After academic outcry, the term extension is scaled back in what has then become Bill C-8, but is known now by many as the "**Lucy Maud Montgomery Term Extension Act**"

2004 "**Bulte Report**" from the Heritage Committee of Parliament advocates extremely rights-holder-biased copyright reform; is met with extensive criticism from educational & library community

CCH v. Law Society of Upper Canada: Supreme Court articulates tests for fair dealing, asserts it is a "user's right," an "integral part" of the Act that "must not be interpreted restrictively"

2005 Liberals introduce **Bill C-60**, with stated goal of bringing Canada into line with WIPO treaties. It gets mixed reviews. Minority government falls; Bill dies.

2008 Conservatives introduce **Bill C-61.** It takes a stronger line on protecting owners' rights; creates furor in consumer, educational communities. Minority government falls; Bill dies.

Part III: CFHSS' concerns with Bill C-61

The amendments proposed in Bill C-61 would have caused harm to essential established practices of the education and research community, and as they may reappear in any new bill tabled by a Conservative Government, they merit forceful critique.

1. Impenetrable locks on digital materials would have limited our right to fair dealing.

The fair dealing clause we now have in the Copyright Act (Section 29) lets Canadians use copyrighted works within reasonable limits without permission for research, private study, criticism, review or news reporting. Fair dealing, a mechanism that resonates with the Charter right to freedom of expression, acknowledges that while creators hold rights to most reproduction of their work, some freedom of unauthorized use is necessary

in order to facilitate independent study and critique. Scholars all around the world expect by long-established custom to quote without permission.

By outlawing the bypassing of digital locks on materials and also the software that allows these locks to be circumvented – even if the user were not violating copyright in their use of the materials -- Bill C-61 would have allowed vendors of digital materials to unilaterally prevent fair dealing.

2. C-61 built barriers to reasonable use of the Internet.

Bill C-61's "educational exception" would have allowed limited use of online materials for educational and training purposes. This provision would have permitted multiple copies of information posted publicly on the internet to be reproduced and distributed to students. In promoting the presumption that such use of Internet materials is currently infringing, this exception promoted the idea that fair dealing and other users' rights do not exist in new technologies until the Act specifically says so. Instead, we ought to assert the principle of technological neutrality. Furthermore, this approach drew a perimeter around usage in an educational setting, leaving many researchers outside the exception.

3. Other exceptions were unmanageable or useless.

Many members of our community were concerned with the logistical, financial, and resource challenges posed by other exceptions in Bill C-61. In its various consumer and education exceptions, C-61 would have constrained normal research and teaching practices in unreasonable ways, and actually weakened users' rights as understood from the Supreme Court decision CCH v. LSUC (2004). For example, the interlibrary loan provision (30.02(5)) would have required that digitized materials evaporate after 5 business days, far too short a time for busy researchers. Consumer time and format-shifting exceptions (29.21 & 29.22) would have been of no use to teachers because they require the use be contained within the home. The digitization exception (30.02 & 30.03) carried with it unreasonable record-keeping and cost expectations. And the distance education provision (30.01) was also limited in impracticable and costly ways: it would have required destruction of materials after a course is over (surely an unwise practice for an institution trying to save costs), and placed the burden of encryption of lessons onto educational institutions.

Part IV: Resources

CFHSS Copyright Statement, December 2007: http://www.fedcan.ca/english/advocacy/copyright/position2007.cfm
The basic principles of this statement still stand.

Film Studies Association of Canada statement:
http://www.filmstudies.ca/FSAC_copyright.htm
While this is a longer statement than organizations will want to generate for this consultation, it is a model in its framing of copyright issues within the practice of a particular discipline.

CAUT Intellectual Property Advisory, December 2008:
www.caut.ca/uploads/IP-Advisory3-en.pdf
Lays out the current state of the art on fair dealing. Essential reading.

Murray, Laura J. and Samuel E. Trosow. *Canadian Copyright: A Citizen's Guide.* Toronto: Between the Lines, 2007.
Not out of date yet! See the chapters on fair dealing and education in particular.