

Copyright consultations

Currently Heritage Canada and Industry Canada are holding public consultations across Canada about how to change copyright for the benefit of all Canadians.

As producers of one of Canada's most notable artforms, make your voices heard by answering the 5 questions copied below on [the copyright consultation website](#) or by attending the townhall in [Toronto](#) on August 27th, 2009.

To assist you, we are providing some talking points which can be incorporated into your answers to argue for a better Fair Dealing system in Canada.

Questions being asked by Heritage Canada and Industry Canada

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

Fair Dealing and Documentaries - A bit of context

According to the Canadian doctrine of Fair Dealing, you are not infringing on copyright if you are dealing with copyrighted material for the purposes of creating:

- 1) a news broadcast
- 2) a review of the material
- 3) a critique of the material itself
- 4) research
- 5) for your own private study,

However, documentaries do not fit nicely into such categories. As a result, documentarians routinely clear the rights to use copyrighted material, costing up to 27% of their budgets.¹

In 2004, the Supreme Court of Canada devised a test that evaluates whether the dealing is fair, based on 6 non-exclusive criteria: the Purpose of the Dealing, the Character of the Dealing, the Amount of the Dealing, Alternatives to the Dealing, the Nature of the Work and the Effect of the Dealing on the Work.²

DOC considers that the test should be the only method of judging whether a dealing is fair, instead of limiting the dealing to the stated 5 categories.

A Documentarian's POV on Fair Dealing

Fair Dealing and Fairness

Documentarians create projects that involve many of the exclusive categories exempted from infringement by Fair Dealing, but their projects are not entirely protected. The categories should be non-exclusive examples and as broad as possible, so that documentaries, satires, and parodies can be allowed the use of copyrighted material for the purposes of exploring their subject matter.

Fair Dealing and non-exclusivity

Fair dealing should not be limited to 5 different categories as this inhibits new and creative forms of non-fiction. By making Fair Dealing flexible and non-exclusive, documentaries and other forms of non-fiction storytelling can flourish.

Fair Dealing and unknown authors

The Internet has opened up archives from around the world and Canada. Much of the material does not have an author. Discovering whether the material is copyrighted or in the public domain takes valuable time and money out of the documentarian's budget. Fair Dealing should allow for this to be bypassed.

Fair Dealing and the Internet

The Internet provides legal and illegal copies of copyrighted material. Documentarians use this material in a legal way according to Fair Dealing. They should not be penalized for downloading material that could be copyrighted when their use is legitimate. Piracy prosecution on the Internet needs to include Fair Dealing exemptions.

Fair Dealing and international distribution

In order for documentarians to release their productions worldwide, they need to clear the rights for copyrighted material for each of the countries with the copyright owner.

Clearing the rights for an international production would not be necessary if such use would be considered Fair Dealing. More documentaries would be available worldwide and more foreign investment in Canadian documentaries would result.

Fair Dealing and DRMs

Digital Rights Management (DRM) mechanisms and Technological Protective Mechanisms (TPM) hinder documentarians from accessing material that they are legally entitled to use. Documentarians should be allowed to circumvent these mechanisms.

Fair Dealing and high quality material (technical, form, and narrative)

Documentarians are being pushed to produce higher quality films. However, how can that be possible if there are Digital Locks impairing their access to HD material, well produced footage, and the most topical material on television? Digital Locks should be allowed to be circumvented for Fair Dealing purposes, so that Canadian documentaries can improve their technical, formal, and story-telling qualities.

Fair Dealing and Historical Accuracy

Documentarians provide a point of view about reality. If copyright holders are stopping them from documenting reality as it is by demanding to clear rights, the historical accuracy of the narrative suffers. Archives, and footage often need to be cleared by documentarians, but not by news reporters. Fair Dealing needs to be revised so that documentarians can continue to tell stories as accurately as possible.

Fair Dealing and Topicality

In order for documentarians to tell stories about what is happening today, Fair Dealing must be flexible and non-exclusive so that documentarians can access and use current footage rather than relying on archives, public domain, or commissioning dramatic performances.

Fair Dealing and Open discourse and Objectivity

Canada is a democratic nation that values a fair and balanced discourse about current issues. If Fair Dealing is not flexible and non-exhaustive, it will be the copyright holders who will decide what is objective. Their criterion for truth will be the dollar.

Fair Dealing and technological neutrality

Copyright should remain technologically neutral as to ensure that all media forms are available to access. Fair Dealing should be applicable to video sources off the Internet as well as videos, films and other physical media.

Fair Dealing and Canadian Values

A flexible and non-exhaustive Fair Dealing doctrine allows for more perspectives to be filmed and presented to the public.

Fair Dealing and Competition

With a flexible Fair Dealing doctrine, filmmakers are in a better financial position to produce projects. The costs of clearing rights could be reallocated to other production costs and staff.

Fair Dealing and the Other Costs of Investment

Often clearing the rights of copyrighted materials causes documentarians to purchase limited licenses to the material. Once the license runs out, the film must be modified to suit the conditions of license, the producer may extend the license, or if the producer cannot afford it, the film is removed from public circulation unless the producer chooses to incur additional editing costs. Flexible and non-exclusive Fair Dealing allows for more films to enter the market and stay on the market. Moreover, previous unlicensed films would be rereleased ushering in a larger market of older material.

❖❖. Cox, Kirwan. *Censorship by Copyright: Report of the Copyright survey*. 2005

❖❖. CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13