

Access and Copyright in Literary Collections

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Few archivists can expect to be totally unaffected by problems arising from public access to their collections nor can they remain uninvolved in the complexities of Canadian copyright legislation as it affects their ability to respond to requests for reproduction of material. Such problems are, however, an almost constant concern of the archivist responsible for literary collections. Ethical concerns involving the protection of the authors' reputation and privacy, and considerations of their rights to financial profit from unpublished material, are added to the basic archival duties of ensuring the physical security and accurate description of collections. This paper will suggest a workable approach to access, given the lack of any clearly defined policy regarding literary materials in Canada, and it will explore the copyright conundrum for a practical response which may serve until the long-promised new copyright legislation appears.

It is surely axiomatic that for the archivist of any type of collection, the full and immediate availability of all material is the most desirable state of affairs. However, restrictions limiting access are sometimes imposed by donors or sellers of literary collections, and many archival institutions have developed their own structures for controlling access to their material. The archivist is sometimes confronted by a donor or seller who, while willing to dispose of an archive, insists upon limiting the availability of some parts of it for a certain period. Often such a stipulation is made to protect the privacy of people still living with whom the author has corresponded, or who may have been mentioned in letters or diaries.¹

The Association of College and Research Libraries' *Guidelines on Manuscripts and Archives* recognizes that while "every private donor has the right to impose reasonable restrictions upon his papers to protect confidentiality for a reasonable period of time ... the repository should discourage donors from imposing unreasonable restrictions and should encourage a specific time limitation on such

* This paper has been adapted from the first part of an address given at the 1983 annual meeting of the Association of Canadian Archivists in Vancouver.

1 That such restrictions are not merely empty formalities is illustrated by Canadian scholar and author Phyllis Grosskurth's experience in obtaining access to, but not permission to quote from, the papers of John Addington Symonds, and by the same author being forced to abandon a planned biography of Marie Bonaparte because of a total restriction on access until the year 2020. See William French's article in the *Globe and Mail*, Toronto, 30 November 1982, p. 19.

restrictions as are imposed.”² Clearly, as the Social Sciences and Humanities Research Council’s Consultative Group on Canadian Archives observed, archivists should “try to ensure maximum general access to their holdings.”³ Robert Clarke has called the attempt to control material even after it leaves the author’s possession a “questionable practice,” acceptable only because it ensures “that a collection of important papers is saved where the donor would be reluctant to deed them if unrestricted access were to be permitted.”⁴ In these rather difficult economic times, writers seem sometimes to amass their papers with at least half an eye on the possible future purchase of their archives. Therefore, an inflexible policy of refusing to accept any restrictions on access might result in the prior destruction or the withholding of material regarded as “sensitive.”

The archivist may sometimes even be placed in the position of suggesting to the author that certain material ought to be embargoed until such time as it can no longer do harm. Such material as testimonial letters written about still-living colleagues, and vindictive or even scurrilous letters written by others to the author in strictest confidence, have clear potential for use in libel suits and may have been included unwittingly by the owner of the collection. These items should be identified by the conscientious archivist and referred back to the donor for a decision. However, when discussing the length of an embargo with an author or author’s heir, the archivist should always try to secure the shortest period of closure consistent with protecting the interests of those involved. The archivist should suggest a fixed term of perhaps five or ten years in preference to such indeterminate terms as “a year after my death.” Authors are invariably appreciative of the archivist’s concern and will develop a sense of trust in the archivist’s judgement, becoming more willing to compromise on other questions which may arise.

When dealing with literary archives, and particularly with the collections of still-living authors, the archivist may thus sometimes have to compromise the principle of full and immediate access. However, there must clearly be limits to the extent of such compromises. A writer who requests the closing of an entire collection for a lengthy period, or even of a portion of it for an indeterminate period, can surely not expect to find repositories eager to obtain his archive. No matter how prestigious the writer, the archivist must certainly refuse to accede to restrictions which would exclude certain individuals or groups from access, even at the risk of losing the collection.

The archival profession has not yet declared itself clearly enough on the fundamental question of free access. While the Council of the Society of American Archivists states that “a repository should not grant privileged or exclusive use of materials to any person or persons,” this stipulation is qualified by the addition of “unless required to do so by law, donor or purchase stipulation.”⁵ Even Yale

2 Association of College and Research Libraries (A.C.R.L.), *Guidelines on Manuscripts and Archives* (Chicago, 1977), p. 5, clause #8, Statement on Access to Original Research Materials. The A.C.R.L. is a division of the American Library Association.

3 *Canadian Archives*, Report to the Social Sciences and Humanities Research Council by the Consultative Group on Canadian Archives (Ottawa, 1980), p. 17.

4 Robert L. Clarke, Jr., ed., *Archive-Library Relations* (New York, 1976), p. 32.

5 “Standards for Access to Research Materials in Archival and Manuscript Repositories,” *American Archivist* 37 (January 1974), pp. 153-54.

University Library in its *Rules Governing the Use of Manuscripts* states that “exclusive rights to examine or publish manuscripts may be granted for a limited period of time.” At least one Canadian university archive has recently given a single scholar teaching at that university exclusive rights of access to a major literary collection. Surely the elitist days of waiting for the “official” biographers to complete their work before opening collections to others are gone. If donors of collections still attempt to confer such favours, the conscientious archivist should make vigorous efforts to dissuade them.

It is not only the creators or donors of literary archives who place obstacles in the way of open access. Institutions are rightly determined to balance the needs of the scholar with the safety and security of their materials. While not all literary collections have a high value on the illicit manuscript or autograph market, each one of them is unique and irreplaceable. It has thus been a generally accepted part of the evolution of archival practice that some preliminaries take place before access to manuscript material is permitted. The most common security procedure is the obtaining of identification from the researcher. It is also vital for the safeguarding of the collection that researchers are instructed in the careful handling of material and are closely supervised during use so as to prevent damage, loss, or theft of material. However, once such steps have been taken, does the custodian of a literary archive have any right to “screen” would-be users? Is there some abstract “standard of qualifications” against which an applicant must be measured in order to ensure, in the words of the Keeper of the British Museum, that he or she is a “fit and proper person?”⁶ Does the custodian need to be convinced that access to original manuscript material is essential to serious scholarly needs?

In an article which may be taken as an example of unabashed archival elitism, Howard H. Peckham suggested that if a manuscript repository should open its doors to competent scholars “then it should close them to those who are not competent.” Peckham condemned as non-competent “those who have not read the secondary works in their field and consequently are not ready to use [primary archival] sources.”⁷ He also recommended the exclusion of those whose researches will be “superficial or of no real significance,” into which category he consigned the newspaper feature writer (the representatives of Sunday papers incur particular odium) and the genealogist “who wants family data which will be of interest only to her children and a few relatives.”⁸ Peckham was writing almost thirty years ago and it would be hoped that such a patrician and unenlightened attitude would find few apologists among today’s archival community. Yet as recently as 1974, James Thorpe, in his guide for scholars on the use of manuscript material in literary collections, issued a warning “that the visiting scholar will, in many places, be treated (initially at least) with chilliness and impersonality,” but he reassured the scholar that the visitor will “almost universally, be afforded the full faculties that the repository has to offer provided he can retain his patience and understanding of the local situation.”⁹

6 Quoted by James Thorpe, *The Use of Manuscripts in Literary Research: Problems of Access and Literary Property Rights* (New York, 1974), p. 10.

7 Howard H. Peckham, “Aiding the Scholar in Using Manuscript Collections,” *American Archivist* 19 (July 1956), p. 224.

8 *Ibid.*, p. 225.

9 Thorpe, *The Use of Manuscripts*, p. 11.

Such counsel seems to belong more to the nineteenth than to the twentieth century, if indeed it belongs anywhere at all. The Association of College and Research Libraries' guidelines are not of any real assistance, for they leave it to the individual library, archives, or repository to define the term "qualified researchers" so long as the institution enforces it equitably.¹⁰ Surely no archival institution should take it upon itself to question or to judge the reason for which access to a literary collection is requested. An exception might well occur if particular items were in poor physical condition, but a photocopy or microfilm should be made available to all who ask to see the material. The qualifications of a post-doctoral fellow brandishing a commission from the Canada Council and hard at work on her umpteenth book may be far more impressive than those of an interested reader who has somehow located the "shrine" of his favourite author. However, why should not both experience the rewards of having sight of a working manuscript? Why should a battery of questions and application forms be used to keep either away? As the Ninth International Congress on Archives declared:

Considering the growing interest in archives shown by the general non-specialist public, conscious of the educational and cultural role which archives should play in society, the Congress urges all archive institutions to pay particular regard to the aspirations of the general public and to take all possible steps to bring to that public's attention the possibilities offered by archives for research.¹¹

While it may be possible, by persuasion or refusal to cooperate, to convince authors to dispense with all but the most essential restrictions on their papers, and by a well-supervised "open door policy" to avoid intimidating formality, the area of literary property rights *vis-à-vis* manuscript reproduction would seem to present problems which are not as easily overcome.

Everywhere in the world, copyright protection for published material is of limited duration, being most commonly for the life of the author and fifty years thereafter. There is in Canada no such limitation for works which have never been published and the author and the author's heirs retain full rights in perpetuity. This literary property right has been defined as "the intangible, but still very real, right of the author of any writing or his heirs to the first publication of that writing."¹² While an institution may purchase, or otherwise obtain possession of a literary collection, this does not mean that it acquires any right to publish or disseminate the collection's unpublished contents. Few institutions are likely to wish to publish material from their collections in the commonly accepted sense of the term "publication." An article in the *Canadian Bar Association Journal* suggests, however, that "publication of a work is defined as the distribution of copies of the work to the public. It does not mean the printing of the work."¹³

10 A.C.R.L. *Guidelines*, clause #1, Statement on Access.

11 The fourth recommendation, Proceedings of the Ninth International Congress on Archives, *Archivum* 29 (1982), p. 199.

12 Henry Bartholomew Cox, "The Law and the Manuscripts Curator," in R.H. Lytle, ed., *The Management of Archives and Manuscript Collections for Librarians* (Chicago, 1980), p. 72.

13 Gordon Henderson, "Copyright: Protection for Originality," *Canadian Bar Association Journal* 1, no. 2 (April 1970), p. 22.

Yet, as Dr. Kaye Lamb has observed, the copying of archives, even systematic copying, is a time-honoured practice to which thousands of handwritten transcripts in the Public Archives of Canada of French and British originals attest.¹⁴ However, the rapid pace of technological developments in the areas of microfilming and copying has raised new problems, or at least made old problems more acute for the archivist responsible for literary collections. In the archive of even the most successful writer, there is always a quantity of unpublished material, not only in the form of books which fail to see print, but also in the guise of letters, diaries, and working notes which were never intended for publication.

How, then, is the embattled archivist to respond to the demands of researchers for photocopies of unpublished material? In recent years, the "right to photocopy" seems have all but achieved the status of a constitutional entitlement. A recent writer in *Archivum* asserted that "adequate reprographic facilities are essential for the effective use of archives. This is universally accepted. It is hoped that the encouraging progress in this field will continue at a faster pace in the future."¹⁵ Another writer in *Archivaria* has claimed that "if archives cannot copy for security reasons, international loans and the diffusion of documents to researchers, then they cannot effectively fulfill their social function."¹⁶

Almost a decade ago, James Thorpe investigated archival policies regarding the photocopying of manuscript material. He found a variety of procedures with the majority of institutions allowing copies to be made, but requiring them to be returned after use by the researcher.¹⁷ If personal experience may be taken as a guide, most researchers do not vehemently object to paying for copies which they must subsequently return. However, the process of obtaining return of photocopies is a tedious, time-consuming, and often thankless task. The researcher may have moved; he may claim to have lost or disposed of the copies; he may simply ignore the repeated requests, even though he has previously signed an undertaking to return them. Some institutions when obtaining this signed undertaking take the following additional precautions: obtaining the undertaking that "the reproduction will not itself be reproduced, and that it will not be examined by or transferred to any other person or institution," obtaining indemnification of the institution "against all claims resulting from my use of the material examined or reproduced made by any person asserting that he is the holder of the common law copyright or literary property," and copying the material on paper overprinted with the name and address of the institution and the statement that "no portion of this material may be quoted, copied or reproduced in any way or by any means without written permission."¹⁸

The use of overprinted paper is intended to prevent, or at least to discourage, copies being made from copies, in concordance with the Association of College and Research Libraries' stipulation that no copies be made for a third party by the owner of a reproduction without the written permission of the repository owning the

14 W. Kaye Lamb, "Liberalization of Restrictions on Access to Archives," *Archivum* 16 (1966), pp. 38-39.

15 S.N. Prasad, "The Liberalization of Access and Use," *Archivum* 26 (1979), p. 139.

16 Gina La Force, "Archives and Copyright in Canada: An Outsider's View," *Archivaria* 11 (Winter 1980-81), p. 46.

17 Thorpe, *The Use of Manuscripts*, p. 22 ff.

18 The wording is taken from McMaster University's application.

originals.¹⁹ However, despite such precautions, the stipulation is patently unenforceable. In our obsessive fear of running afoul of the law, and in our reluctance to allow free, unencumbered reproduction of manuscript material, are we not again assuming the postures of those forbidding and unapproachable custodians of the nineteenth-century stereotype?

The art and science of archival method depends upon balance. In copyright, it requires reconciling the interests of the author or literary property-right holder with those of the user of archival material. Archivists are burdened with the enforcement or at least with the observance of a law which has not been revised since its adoption in 1924,²⁰ which was itself modelled on a still earlier British act of 1911,²¹ and which has become less and less relevant, particularly given the advancement in the fields of photoduplication and information transfer. The Canadian, British, and American copyright legislation all make provision for "fair dealing." The laws of the three countries concur that the reproduction of portions of protected works for the purposes of "private study, research, criticism, review or newspaper summary"²² does not constitute copyright infringement. However, the archivist must resist the temptation to draw from these provisions the seemingly logical conclusion that such exceptions can be relied upon to justify the photocopying of unpublished material. In England, only unpublished archival material over one hundred years old may be subject to the "fair dealing" exemption.²³ In the United States, a 1983 report to Congress by the Register of Copyrights recommended that an amendment to the 1977 act be passed to make it clear that unpublished works are not affected by "fair use" provisions.²⁴

The making of individual copies of archival material in response to a user's request cannot in common sense be deemed to be publishing according to the accepted usage of that term, nor even as copyright or literary property-right infringement, for an author's profits are not being limited in any way by such an action.²⁵ However, the current Canadian Copyright Act gives the archivist no assistance. Keyes and Brunet are not helpful by recommending in their 1977 revision proposals that "the present law of fair dealing should be left unchanged and at the discretion of the

19 A.C.R.L., *Guidelines*, Statement on the Reproduction of Manuscripts and Archives, clause #5c.

20 *Revised Statutes of Canada*, 1921, c. 24. See also *R.S.C.* 1952, c. 55, and *R.S.C.* 1970, c. 30.

21 *Copyright Act*, 1 & 2 Geo. V, c. 37. Some revisions were made of the Act in 1956, 4 & 5 Eliz. II, c. 74.

22 *R.S.C.* 1970, c. 30, Section 17(2)(a).

23 Or where more than fifty years has elapsed since the death of the author, *Copyright Act*, 1956, 4 & 5 Eliz. II, c. 74, Section 7(6). On the British situation, see the useful article by D.S. Porter, "The Law of Copyright Relating to the Photocopying of Unpublished Manuscripts," *Journal of the Society of Archivists* 6, no. 8 (October 1981), pp. 493-97.

24 Society of American Archivists, *Newsletter*, March 1983, p. 2. See also the fuller account in the *Chronicle of Higher Education*, 12 January 1983, pp. 1, 26. However, the official statement on "Manuscript Copying and Permission to Quote" issued by the Manuscript Division of the Library of Congress continues to claim that "although the Act does not define the full limits or extent of fair use, it has been generally assumed that it permits the inclusion of brief quotations from unpublished manuscripts in scholarly and research publications."

25 A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, (Ottawa, 1977). It stresses that the emphasis of Canadian law, based as it is on British common law, is upon the pecuniary protection it affords rather than upon the safeguarding of the "personal rights" of the authors (pp. 2, 5).

courts,"²⁶ and also that photocopying of copyright material in libraries and archives should be permitted only for the purpose of preserving deteriorating or damaged material.²⁷

While archivists cannot be expected to subscribe to the school of thought which would appear to rank the right to photocopy as second only to divine right of kings, clearly access to photocopying is a convenience which is fast becoming a necessity. Why should scholars with unlimited travel funds be able to pursue their literary quarry over no matter what distances while those in less fortunate circumstances be effectively prohibited from using the same materials? In discussing exceptions to the law applicable to archival activities, Keyes and Brunet suggest that "libraries and institutions should be relying primarily on contract [that is, upon the terms of their agreement with the copyright or literary property-right owner] rather than statutory exemptions."²⁸ Herein we must find a working solution. Archivists may sometimes have to accept the decision of an author to refuse to allow any photocopying at all.²⁹ Much of the manuscript of Margaret Laurence's *The Diviners* is subject to just such a restriction. Where such a stipulation is not explicitly made the terms of agreement with the archives, the donor/seller should include permission to duplicate individual copies of unpublished material in response to users' requests. Before providing such copies, the archivist must obtain from the user a signed acknowledgement that the institution neither holds nor can transfer any authority to publish. Having made the copy, the archivist must ensure that the name and address of the owner of the copyright or literary property right or his agent (wherever they are known) is clearly marked on the copy.

The policy of the Library of Congress is particularly enlightened regarding reproduction of manuscript material. Other than bound or fragile manuscripts, those where contractual agreements specifically prohibit copying, or those works which have been formally registered for copyright, the Library allows researchers to make their own photocopies on provided machines. According to the Chief of the Manuscripts Division, James Hutson, "in the case of copies being made by our readers on the coin-operated machines in the Manuscript Reading Room, it is the readers' responsibility to observe the law — and statements to this effect are required by the law to be posted in plain view of the machines' users. In general, the law is interpreted as permitting single copies to be made in lieu of note taking."³⁰

Once the copy has been made, whether by the researcher or by the archivist, why should the researcher not be allowed to dispose of it as she sees fit? Could the archivist not even recommend that it be deposited in another archives or library when it has served its purpose? The archivist is unlikely to encounter serious opposition as long as the owners of literary property rights to existing collections are informed of this policy and the practice is provided for in the contractual agreements accompanying new acquisitions. However, while they claim to be defending the

26 *Ibid.*, p. 149.

27 *Ibid.*, pp. 174-75.

28 *Ibid.*, p. 174.

29 According to the Ilsley Report, "the right of an author to prevent publication of a work of his is an important and fundamental one." Royal Commission on Patents, Copyright, Trade Marks and Industrial Design, *Report on Copyright* (Ottawa, 1957), p. 33.

30 From a letter of 7 April 1983 by James Hutson to the writer.

rights of authors and their heirs in restricting the free circulation of photographic copies, many institutions are also protecting their own self-interest whether they admit it to themselves or not. In these days of economic restraint, the purchase of a literary collection often represents a substantial investment of resources. With that investment sometimes comes a certain possessiveness which engenders unwillingness to see photocopies spread freely through academe. Howard Peckham makes an equally blunt defence of a community's right to enjoy the unique possession of material that its institution has spent considerable sums to acquire: "This pride of possession may not be the highest public virtue but neither is it reprehensible. It encourages support of the library and of the university by the people and frankly that is more important in the long run than any scholar's inconvenience."³¹

While they may not express their feelings quite as uncompromisingly as Peckham, some archivists may fear that the easy availability of copies elsewhere will eventually reduce funding or even threaten the very survival of their own institution, where funding is based directly or indirectly upon the number of users an institution attracts. Such fears are ill founded. As bulk copying is still, and seems likely to remain, an expensive proposition, even researchers endowed with generous grants usually obtain copies of only fragments of a literary archive: a few letters, a portion of a diary, a sample few pages of a book manuscript. The presence of such fragments in photocopy form in another repository is more likely to encourage others to consult the original collection *in toto* than it is to threaten the economic well-being of the institution wherein the collection is housed.

Archivists must gently but firmly extricate themselves from the quasi-legal activities of limiting access to their collections and restricting their reproductions. While the physical security of archival material is of utmost importance, the weighing of academic credentials should not be a primary concern. Since "the Canadian Copyright Act has long been regarded as vague, inadequate and incomprehensible to all but a few lawyers,"³² the responsibility for unravelling its complexities should rest where it rightly belongs, on the shoulders of the authors and researchers whose activities it was designed to regulate.

31 Peckham, "Aiding the Scholar," pp. 226-27.

32 Jean E. Dryden, "Copyright in Manuscript Sources," *Archivaria* 1 (Winter 1975-76), p. 39.