

Could it be a case of the emperor's new clothes?

Crown copyright and Canada's commitment to open government.

Amanda Wakaruk, Copyright Librarian
Government Information Day, Toronto
December 9, 2016

The Emperor's New Clothes

A story explained by pluralistic
ignorance exposed by an
innocent.

Image of Emperor Palpatine
removed due to lack of
permission for distribution on
the Internet. See
http://starwars.wikia.com/wiki/File:Emperor_Palpatine_TNsR.jpg

The Emperor's New Clothes

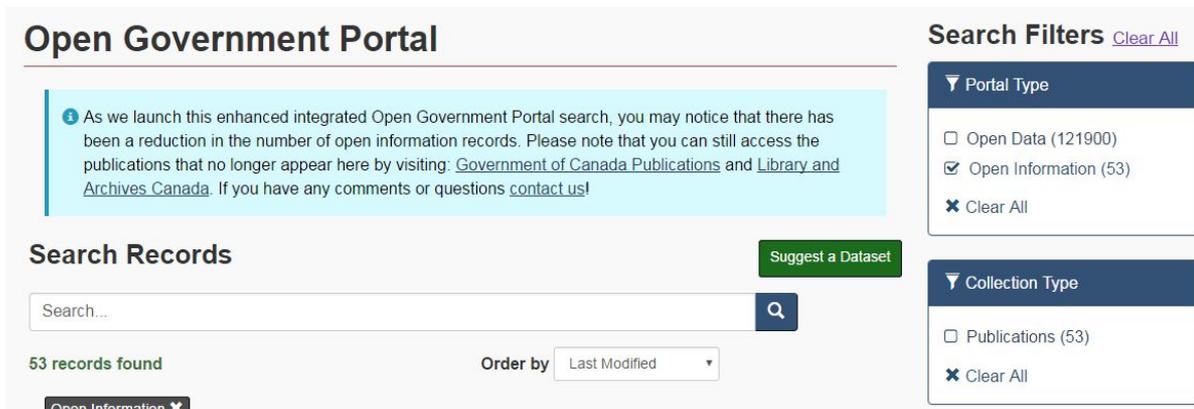
Hans Christian Anderson tale based on a German translation of a Spanish medieval story most likely inspired by a Persian folktale.

Image of Emperor Palpatine removed due to lack of permission for distribution on the Internet. See http://starwars.wikia.com/wiki/File:Emperor_Palpatine_TNsR.jpg

What is Open Government?



The screenshot shows the top navigation bar of the Government of Canada website. It includes the Canadian flag, the text "Government of Canada" and "Gouvernement du Canada", and a menu with "Jobs", "Immigration", "Travel", and "Business". Below this is a breadcrumb trail "Home → Open Government". The main heading is "Open Government", followed by a paragraph: "Welcome to Canada's new Open Government portal. Here you can explore how the Government of Canada is working with the national and international open government community to create greater transparency and accountability, increase citizen engagement, and drive innovation and economic opportunities through open data, open information, and open dialogue."



The screenshot shows the "Open Government Portal" search results page. At the top, there is a "Search Filters" section with a "Clear All" link. Below this are two filter categories: "Portal Type" with options "Open Data (121900)", "Open Information (53)", and "Clear All"; and "Collection Type" with options "Publications (53)" and "Clear All". The main content area features a "Search Records" section with a search input field, a "Suggest a Dataset" button, and a "Search" button. Below the search field, it displays "53 records found" and an "Order by" dropdown menu set to "Last Modified". A "Clear All" button is visible at the bottom of the search results area.

Librarian Questions (email correspondence with TBS Open Government Team, November 2016):

Q: What is covered under the Open Government licence?

A: The Open Government Licence covers everything that is published on open.canada.ca (datasets, open information, proactive disclosure, access to information requests).

Q: Does this include ALL information published and openly disseminated by the Government of Canada? That is, publications and documents regardless of format?

A: No, the Open Government Licence only applies to what is published on open.canada.ca (regardless of format).

What is Crown copyright?

Current s.12 of the *Copyright Act* <http://laws-lois.justice.gc.ca/eng/acts/c-42/>

Where copyright belongs to Her Majesty

12 Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

See also: *Reproduction of Federal Law Order*, Statutory Instrument/97-5,

<http://laws.justice.gc.ca/eng/regulations/SI-97-5/FullText.html>

Crown Copyright

Advantages

Government's perspective:

- Revenue generation: provides monopoly over the production, reproduction, performance, or publication of a work.
- Integrity, accuracy, authenticity of the work. (Official marks are a better mechanism than Crown copyright for these purposes.)

User's perspective:

- Can't think of any.

Disadvantages

Government's perspective:

- Administration: Have to staff positions to answer permission requests, questions.

User's perspective:

- Barrier to re-use (limited distribution/access, fees, etc.).
- Bolsters democratic deficit, especially given that aims are at odds with Open Government principles.

DRAFT e-petition on Crown Copyright

Canadians have a right to use and re-use works produced by their government. Unfortunately, because of our outdated system of Crown copyright, such uses are unduly restricted. See s.12 of the *Copyright Act*

<http://laws-lois.justice.gc.ca/eng/acts/c-42/> (also on the following page).

Given that:

- access to government information and the ability to distribute and encourage its re-use is of fundamental importance to a democratic society, as noted in the *Reproduction of Federal Law Order*, SI/97-5
<http://laws.justice.gc.ca/eng/regulations/SI-97-5/FullText.html>)
- the Government of Canada is committed to open government principles
(<http://open.canada.ca/>)

Reproduction of Federal Law Order

SI/97-5

Registration 1997-01-08

Reproduction of Federal Law Order

P.C. 1996-1995 1996-12-19

Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law;

And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission;

Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*.

Reproduction of Federal Law Order



Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

SI/98-113(F).

Date modified: 2016-12-02

<http://laws.justice.gc.ca/eng/regulations/SI-97-5/FullText.html>

Given that:

- the Government of Canada believes that (commercial) exploitation of IP contributes to economic growth and job creation, and that such exploitation is best achieved outside of government (as noted in TBS Policy <http://www.ic.gc.ca/eic/site/068.nsf/eng/00005.html>)
- academic library projects to preserve and provide access to government works have been delayed or prevented due to confusion over Crown copyright (e.g., Canadian government publications restricted in HathiTrust, hundreds of hours spent to obtain permissions, etc.)

DRAFT e-petition on Crown Copyright

Given that:

- current interpretations of existing government terms of use and government licences by government employees are inconsistent and confusing, especially since the closure of the Crown Copyright Licensing program in 2013 (<http://publications.gc.ca/site/eng/ccl/index.html>, see also <http://www.michaelgeist.ca/2013/11/crown-copyright-change/>)

DRAFT e-petition on Crown Copyright

Federal government correspondence

Asked permission to web archive site (2012):

Unfortunately we are not in a position to help advise you on how to resolve your technical difficulties in archiving GoC website content.*

My more immediate concern is ensuring you are provided proper guidance and information regarding Crown Copyright and Licensing and what this means when reproducing (via an archive) GoC website information on your institutions website. To this end, I've sent an email to the Crown Copyright and Licensing and Library of Canada seeking their advice and input on this matter.

Where is such guidance and why is it necessary if noncommercial use is ok?

*not wanting to circumvent a robot.txt file

Asked permission to web archive site (2013):

I apologize for the delay in getting back to you. Unfortunately, we decline your request to allow your user agent archive.org_bot to crawl the website. To respect the recommendation of the Office of the Privacy Commissioner of Canada that xxxx protect personal information on their websites by using web robot exclusion protocols, the xxxx implements the robots.txt protocol to prevent search engines such as Google from crawling certain areas of our website that include personal information about individuals who participate in xxxx processes and displaying these search results.

Why is restricted personal information openly available on a govt web site in the first place?

Federal government correspondence

Asked permission to make a copy for a library collection (2015):

Usually, when a publication is not on the website anymore, it means it is no longer available to the public and the government of Canada is not allowed to give you permission to use it, even for a non-commercial purpose. But looking at the publication title, that content looks to be owned by xxxx. Here is a link that may help you in your research:

<http://www.DEPARTMENT.gc.ca/home-accueil/important-eng.php>

New restrictions for new formats? Were print publications ever withdrawn from depository libraries? (Link provided was to department's terms of use statement.)

My requests for information about OGL and/or Crown copyright from federal agencies/depts:

June 2011: CCL provided email confirmation that terms of use applied across formats.

January 2015 - December 2016: Open Government Canada (TBS)

- OGL only applies to 53 publications on open.canada.ca (as of December 2016)

November 30, 2016: [post-conference updates]

- Canadian Heritage noted that a briefing file exists for Crown copyright, encouraged public input.
- Innovation, Science, and Economic Development Canada encouraged use of public input.

Given that:

- objectives of copyright law do not apply to publicly disseminated government works given that such works are created by public organizations for the benefit of the public (as per the Supreme Court of Canada in *Théberge v. Galerie d'Art du Petit Champlain* and *CCH v. LSUC*, which state that the objective of the law is to balance the incentivization and rewarding of creators with the encouragement of disseminating works in order to benefit society)

DRAFT e-petition on Crown Copyright

Given that:

- the Government of Canada almost never pursues Crown copyright infringement claims (e.g., see Sessional paper 8555-412-57, tabled December 4, 2013, House of Commons)

DRAFT e-petition on Crown Copyright

[Home](#) / [News](#)

CBC threatens podcast app developer for using publicly available content, suggests 'license fee model'

[Facebook](#) | [Twitter](#) | [Google+](#) | [Email](#)

Sean Craig
Tuesday, Nov. 8, 2016

In a move that could impact your morning commute, the Canadian Broadcasting Corp. has sent a legal threat to the developers of a podcast app, claiming that accessing the public broadcaster's publicly available RSS feed without paying a licensing fee constitutes "commercial use" and is a violation of its copyright.

A spokesperson for the CBC said that while the broadcaster offers its podcasts for free on most third party apps and services, those third parties are "not permitted to sell ads on CBC content without our consent. To that end, we have sent a letter reminding them of this policy."



THE CANADIAN PRESS/Nathan Denette

One of Canada's leading experts on digital and intellectual property law was left baffled by the CBC's message.

"I don't get the claim," said Michael Geist, the Canada Research Chair in Internet and E-Commerce Law at the University of Ottawa. "An app that simply brings in a publicly available feed that you have made public is not something I'm convinced is a commercial use."

Geist added that CBC News articles have terms and conditions associated with them, as does the broadcaster's website. "If I read a news article through a browser or any other reader, which are applications that access publicly available content, that's not a commercial misuse."

"This all leaves beside the broader issue of why the CBC would want to limit the access the public has to content and information they paid for," he said.

<http://www.financialpost.com/m/wp/news/blog.html?b=business.financialpost.com%2Fnews%2Fcbc-threatens-podcast-app-developer-for-using-publicly-available-content-suggests-license-fee-model>

Given that:

- not all government works are intended for broad dissemination
- some works published by government agencies are authored or prepared by third parties
- the *Reproduction of Federal Law Order* is limited to federally-constituted courts and administrative tribunals

DRAFT e-petition on Crown Copyright

The undersigned request that Section 12.1 be added to the *Copyright Act*:

12.1 Works noted in section 12 are no longer protected by copyright upon being made available to the public.

DRAFT e-petition on Crown Copyright:

https://docs.google.com/document/d/188L4az5n9r2S4NxwCPU_hrbkqSKjbjTd3hKHUPzVsyk/edit?usp=sharing

Wittem Group's European Copyright Code:

Art. 1.2 – Excluded works

The following works are not protected by copyright:

- a. Official texts of a legislative, administrative and judicial nature, including international treaties, as well as official translations of such texts;
- b. Official documents published [13] by the public authorities [14].

<http://www.copyrightcode.eu/>

[13] The term 'published' does not imply that a work must formally have been published in an Official Journal or equivalent. However, secret or confidential information can not be considered as 'published'.

[14] As to 'official' works by private authors, these will be protected until they become 'official'. Also, questions of moral rights could still arise despite the exclusion.

Resources

Freund, Luanne and Elissa How. Quagmire of Crown Copyright: Implications for reuse of government information. Canadian Law Library Review. 40.4 (2015). https://issuu.com/callacbd/docs/cllr_40_4_final.1

Judge, Elizabeth F. "Copyright, Access, and Integrity of Public Information." Journal of Parliamentary and Political Law. March, 2008.

Elizabeth F. Judge, "Crown Copyright and Copyright Reform in Canada," In the Public Interest, ed. Michael Geist (Irwin Law, 2005), 550–96, www.irwinlaw.com/pages/content-commons/crown-copyright-and-copyright-reform-in-canada---elizabeth-fjudge

Judge, Elizabeth F. "Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information." in Geist, Michael. From Radical Extremism to Balanced Copyright: Canadian Copyright and the Digital Agenda. Toronto [Ont.]: Irwin Law, 2010.

Wakaruk, Amanda. Canadian Crown Copyright Conundrum. Fair Dealing Week 2016 blog post. (February 2016). <https://era.library.ualberta.ca/files/b2b88qc23g#.VtYEdlSrJaQ>

Mireille van Eechoud and Lucie Guibault, "International Copyright Reform in Support of Open Legal Information." Open Data Research Symposium. Madrid, 2016 <https://drive.google.com/file/d/0B4TpC6ecmrM7NmZhZkFkZWtjVWM/view>

Questions?

Amanda Wakaruk, MLIS, MES

<https://sites.google.com/a/ualberta.ca/wakaruk/>

amanda.wakaruk@ualberta.ca

@awakaruk (personal)