

# **A Threat to the Public Domain? An Example of how Cost Recovery limits Access to Canadian Heritage**

*by Raymond Shirritt-Beaumont  
Researcher/Writer in Curriculum Development  
Frontier School Division*

## **History**

Frontier School Division, the largest division geographically in North America, has its central office in Winnipeg and serves thirty-five communities and forty-one schools in remote/northern Manitoba from Falcon Beach in the south to Churchill in the north. In September 2004, the division opened its new educational complex at Norway House, and marked the occasion by presenting the school with four reproductions of Paul Kane's paintings, the originals of which are housed at the Stark Museum in Orange, Texas.

Recognising the historical importance of Paul Kane's legacy to the people of Norway House, the museum had generously supplied the division with negatives for the reproductions and waived all fees in connection with the process. Indeed, its director was delighted that the paintings were "coming home" to a community in which they would be appreciated. And, indeed they are. One of the portraits, for example, is of *Ogemawwah Chack*, "The Spirit Chief," who is a direct ancestor of many local residents. It is the only likeness of this aboriginal elder in existence.

As a follow-up to the presentation, the Social Studies/Native Studies Department of Frontier School Division decided to create an explanatory text that would acquaint students and community members with the history and importance of Paul Kane's work. This text was to be mounted on a plaque that would go on display with the reproductions. In order to reinforce the text's meaning, it was to overlay an impressionistic image of Paul Kane, as he appeared when he made the tour of the Hudson Bay Company lands of British North America. This is where our trouble began.

In October 2004, Louise Marleau, research assistant, wrote the National Gallery of Canada for a copy of a photograph taken *circa* 1850 of a young Paul Kane wearing the buckskin jacket that he wore during his journey through the West. She explained that we wanted to use it as a background image for the explanatory text, one copy of which was to be kept on file, while the other was for the plaque that would hang in the new school at Norway House.

In November 2004, we received a reply from the Gallery. The image would cost us \$150.00 ["\$20 administration fee, \$50 image on CD, \$80 permission fee, to reproduce twice, display (non-profit rate)"]. We were shocked! Here are the reasons:

1. The National Gallery of Canada is a public institution that is mandated to preserve our Canadian heritage and make it available to the Canadian public. As Canadian

taxpayers, we do not expect to pay anything beyond the cost of reproduction for items in the public domain.

2. We have purchased hundreds of archival photographs, mainly from the National Archives and the Archives of Manitoba, during eighteen years of curriculum development in aboriginal studies. These photographic copies averaged between \$10.00 and \$13.50 each to a high of \$20.80, when a negative had to be produced.

3. We felt that the fee of \$50.00 for the image on a CD was exorbitant. The National Archives, also located in Ottawa, charges \$12.85 for a high quality image on a CD, a fee that is in keeping with the going rate.

4. We have never been charged a “permission” fee for copies of photographs in the public domain by either the Archives of Manitoba or the National Archives.

Louise Marleau immediately wrote the National Gallery to obtain a clarification, and Daniel Amadei, Director, Exhibitions and Installations, responded on 1 December 2004. He said that these were the reduced fees for non-profit organizations, and they were justified “to recover a portion of the cost.” He also added that, “We receive a great number of requests for reproductions and this high volume of service requires the use of staff and facilities that we could not support without some cost recovery.” He further stated that they would have to see and approve our final design proofs, in spite of the fact the Gallery does not have moral rights to the image. We were appalled to say the least.

The letter to the Gallery had been copied to the Ministry of Canadian Heritage, and in February, we received a letter from Luc Rouleau on behalf of the Minister. Abdicating any responsibility, he stated that, “the National Gallery of Canada is an autonomous Crown corporation that operates independently of the Government and is responsible for its own day-to-day operations, including those related to its fees.” By this time, we were incensed. If the Ministry of Canadian Heritage was not responsible, who was?

We began to investigate Canadian copyright law, and we determined that something was seriously wrong. On the basis of our understanding of the law, we challenged Daniel Amadei in a forthright letter on 28 February 2005. We asserted that the Paul Kane photograph was in the public domain, and the Gallery had no business charging anything beyond the basic costs of reproduction for a duplicate copy of it. It neither had the copyright nor the ethical authority to do so. We further asserted that we as the Canadian public already owned the picture, and for that reason a fee was outrageous. We challenged as hogwash his claim that it required “a high volume of service” from “staff and facilities” to produce a duplicate copy of a photograph. We showed by a comparison of the fees charged by the National Gallery with those charged by the Archives of Manitoba and the National Archives that his so-called “cost recovery” was in fact a gouge of the Canadian public.

On the same day, we also challenged the Minister of Canadian Heritage directly. We accused her ministry of evading its responsibility by claiming that it did not interfere with

the day-to-day operations of the National Gallery, on the grounds that it was an autonomous crown corporation. We reminded her that it was the ministry's mandate to oversee our heritage and ensure that it was accessible to the Canadian public. To achieve that end, we told her she needed to intervene to bring the National Gallery administration fees in line with those charged by the National Archives and also end the practice of charging permission fees, which we asserted were in violation of copyright law.

In a letter dated 13 May 2005, Daniel Amadei responded to our letter of February 28. After reiterating the Gallery's fee schedule on the grounds that "photography of works of art can be complex," he backtracked on his position of December 1. He admitted that we had requested "an archival document that does not involve complex photography" and acknowledged as well that our "resources were very limited." On that basis, he said that they would reduce the fee to "\$70 and waive the Permission fee." He then added that the permission fee was not a copyright license, but simply permission to use a photographic reproduction and added that "The Gallery is entitled to levy a permission fee for the use of reproductions of originals for a third party." Needless to say, we did not accept his argument. First of all, he did not reduce the reproduction fee one iota. Also, we deny his right on legal, moral, and ethical grounds to levy a fee granting us permission to use a copy of a photograph in the public domain. We do not believe he can waive what he had no business charging in the first place.

As proof of the contradictory thinking surrounding this issue in Ottawa, we received a letter on 9 June 2005 from Luc Rouleau on behalf of the Minister of Canadian Heritage. He reiterated that ministry's position that it does not have any responsibility for the day-to-day operations of the National Gallery, seemingly oblivious to the fact that those "operations" contradict the mandate of both ministry and gallery to make Canada's heritage more accessible to the Canadian public.

What was more significant than Rouleau's evasion of responsibility was his assertion that "when a photograph of that public domain work is made, a new copyright – the copyright in the photograph – is created. The author of the photograph has the exclusive right to authorize most uses of that photograph, including reproduction. Before reproducing the work, permission from the copyright holder is required in the form [of] a licence [sic], for which fees may be requested."

Where are we now? Amadei tells us that, "the Permission fee is not a copyright license." On the other hand, Rouleau says that the Gallery copy of a photograph is copyright protected, for which a fee may be requested. From our perspective this is all illogical nonsense, and merely bureaucratic verbiage designed to wear down our resolve to challenge policies that we consider illegal as well as dangerous to the public good.

That is our account of the history of our struggle to June 2005. We will outline below why we feel that both the Ministry and the Gallery are out of line. We would appreciate your views on the matter, and how we might best proceed to challenge these retrogressive copyright innovations that violate the spirit of the copyright law and put into jeopardy the concept of public domain.

## **Our Argument**

1. The Ministry of Canadian Heritage has stated that its mandate is to “preserve the collective memory of the nation and enhance access, understanding, knowledge and appreciation of Canada.” However, it refuses to take any action whatsoever to curtail fees and licenses imposed by the National Gallery of Canada, even though such fees and licenses severely limit access to Canada’s heritage by the public at large. The Ministry’s excuse is that the National Gallery is “an autonomous Crown corporation that operates independently of the Government and is responsible for its own day-to-day operations, including those relating to its fees.”

We argue that its own documents make it clear that the Ministry of Canadian Heritage must assume responsibility for the conduct of the National Gallery, especially when the latter’s policies violate the spirit of the Ministry’s mandate, and indeed the mandate of the Gallery itself. It is beyond belief that the government would give control of our heritage to the National Gallery and allow it to do as it likes with it. If the Gallery can charge fees and licenses at whim, what is to prevent it from selling our heritage or destroying it altogether? If the Gallery answers to no one, then access to our heritage is in jeopardy. We argue that no responsible elected government would violate the public trust to such a degree, and therefore it follows that the Ministry of Canadian Heritage *is* responsible and needs to act to curtail Gallery policies that severely restrict Canadian access to its heritage.

2. The National Gallery claims it has the right to levy a permission fee for the use of reproductions of originals for a third party, but in any of the correspondence we have received from the Gallery, it cites no law giving it that authority. This is curious, because our letter strongly challenged the legality of the so-called permission fee, something we would have though merited a strong comeback from the Gallery based on law. Instead, we receive a statement, “The Gallery is entitled...” That is not good enough for us. We have found nothing during our investigation that authorises the National Gallery, or any other institution for that matter, to charge a permission fee for something in the public domain. We think the Gallery has simply assumed entitlement with no legal basis whatsoever.

As a corollary to its permission fee, the Gallery claims that “any changes, overprinting, cropping etc., to the artwork in reproduction” will require its approval. However, we have checked the Copyright Act, and it states clearly that moral rights to an item in the public domain die with copyright. The Paul Kane photograph was taken in about 1850, so copyright has long since lapsed. I doubt that Marcel Duchamp asked for or needed the permission of the Louvre to paint a goatee and a moustache on the Mona Lisa! We wish to use the Paul Kane image as a backdrop to an explanatory text concerning his art. We do not think the Gallery has any right to approve or disapprove, since it does not have the moral right to do so.

3. The Gallery has not claimed copyright directly (although its assumption of moral rights is suggestive); instead, it argues that the high costs of reproduction necessitate some cost recovery and that its fee schedule “compares well with other North American institutions.” We have shown that its fee schedule is out of line by comparing it to those levied by the National Archives and the Archives of Manitoba *for exactly the same kind of reproduction*. Moreover, we question the concept of cost recovery in this instance. Since it is the Canadian Public that owns the National Gallery’s holdings, it should not have to pay any more than the cost of reproduction for copies of its heritage. If the National Gallery needs additional funding, it should seek it from the Government of Canada, rather than imposing fees that effectively bar a good percentage of Canadians from access to their own history.

4. The Ministry of Canadian Heritage is much more forthright than the National Gallery’s concerning copyright. It makes the utterly ludicrous claim that a new copyright is created as soon as the Gallery makes a photograph of a work in the public domain (see full text of the Ministry’s argument above)! By this reasoning, we could purchase the photograph of Paul Kane in question, make another copy of it, and claim copyright on the copy! As ridiculous as this may appear, something close to this happened when the Western Canada Pictorial Index, based here in Winnipeg, began to charge permission fees as large as those of the National Gallery on copies of photographs it had obtained from other archives. If such thinking and the corresponding policies that flow from it are allowed to go unchallenged, copyright will be meaningless, our heritage out of bounds to all but the rich, and artistic creativity stifled.

5. This brings us to the argument of creativity. Regardless of the complexity of the photographic procedure, a copy of a photograph is a copy. There isn’t a spark of creativity in it. When we obtained negatives of four of Paul Kane’s paintings from the Stark Museum, we took them to a photographer who was able to make reproductions that were as close to the original as his technological skill allowed. Only an expert with a trained eye would have noticed any discrepancies. Nevertheless, the reproduction was still a copy, and the photographer knew it. The argument of the spokesman for the Ministry would allow that photographer to claim copyright and effectively destroy the concept of public domain.

It may be that the Ministry was befuddled by a misreading of Bills C-16, C-20, and C-9, all of which have been attempts to reform sections of the Copyright Act, so that copyright would be in the hands of the initial photographer and not the person/institution that commissioned him, as is the case now. However, that issue has nothing at all to do with photographs in the public domain, whose creators died more than fifty years ago.

We have been involved in curriculum development at Frontier School Division for nearly two decades now, and have purchased hundreds of copies of archival photographs and paintings over the years at nothing more than the cost of reproduction. These copies have been used in our educational publications, which are expensive enough to create, without the additional costs that institutions like the National Gallery would like to charge us. These charges are not isolated to the Gallery either, for we have recently faced the same

problem with the Archives of British Columbia and the Glenbow Museum. Therefore, it is crucial that this trend be halted, or it will spread like a cancer and eventually make everything inaccessible to us.

It needs to be stopped for another reason as well. The fees and licenses for images in the public domain could very well have an impact on the use of the Internet for educational purposes. This is particularly worrisome, because we are about to launch a website on which we plan to display archival photographs to enhance educational activities of a historical nature. Already there are signs that institutions see this as a cash cow, too. We need to oppose them vigorously. In our view, the confused and contradictory arguments put forward by the Gallery and Ministry are no justification for what we consider a violation of copyright law as well as the public trust they are mandated to uphold. Their intransigence has delayed one of our projects for nearly a year, and denied a community and its students an opportunity to learn about Art (*and creativity!*) through Paul Kane, the artist who opened up windows into the world of their ancestors more than a hundred years ago.

Would you please provide us with your view on our case? Is our argument sound? Is there anything we have missed? Where do we go from here?