Canadian copyright legislation and the documentary context

Marielle Nitoslawska

This paper explores the implications of copyright legislation on the specific context of Canadian documentary production and examines some of the aesthetic, historical and legal intersections between them [1]. In the present climate of shifting technologies, media conglomeration and increased corporate influence on the public sphere, the recent debates on copyright issues gain particular significance, and have special bearing on the reform of Canada's copyright law.

Documentary filmmaking provides one of the most interesting platforms for fundamental discussions about copyright policy, which legislates the balance between the rights of owners and that of users. By definition, documentaries are made with what exists already. Since 'visible evidence' is always gleaned either from contemporary life or from archival materials, the question of who owns the images and sounds of the past, the present and the future is an essential one to the very existence of the genre.

As documentary makers, we wish our status as rights-owners to be protected. However, as we use more and more images and sounds previously made by others to comment upon the world (which can no longer be imagined without its media representations), we also desire to safeguard our access as rights-users. This position on the seesaw of copyright protection legislation may prove to be a tenuous one for Canadian documentarians. We are at a critical stage in the development of Canada's copyright law, which is currently under revision, and the views at both ends of the seesaw are increasingly seen to represent contradictory interests.

In 2001, following the signing of the international World Intellectual Property Organization (WIPO) Copyright Treaty, the Canadian government initiated a Copyright Reform process to replace Bill C-42, the Copyright Act in place since 1985, which did not yet address the effects of new technologies that enable massive downloading and reproduction of cultural products. Numerous arts organizations formulated submissions to Heritage Canada towards policy reform, calling for an increase of holders' rights at the expense of users' rights, based on the understanding that the economic status of Canadian artists would improve with added protection of their

intellectual property [2]. In June 2005, the government introduced its long-awaited Bill C-60 to amend the Copyright Act. It featured, amongst other changes, anti-circumvention rights, DRM anti-tampering rights, and generally manifested a strong bias towards the rights–holder side of the copyright balance.

Meanwhile, critics argued that the proposed Bill C-60 does not represent the best interests of creators nor of Canadian culture as a whole. Laura J. Murray, from Queen's University, provides an enlightening analysis in her paper "Protecting Ourselves to Death: Canada, Copyright and the Internet," [3] in which she maintains that protectionist policies, which have traditionally provided the rationale for Canada's heavily state-funded culture, have deviated from their original intent of protecting artists. She argues that protectionism has become a rhetoric that serves the economic interests of corporate entities, which have progressively been fused with those of the government's. She concludes that the new copyright proposals represent a departure from what was previously *only one* aspect of cultural policy: the market as cultural policy tool.

Several encouraging developments in the copyright revision dossier have occurred in recent months. The Liberal minority government thankfully did not have time to pass Bill C-60 before it was defeated last November. In January 2006, just days prior to the federal election, Sarmite Bulte, the two-term Liberal MP from Toronto's Parkdale-High Park riding, and parliamentary secretary to the minister of Canadian heritage, held a 250$ a plate fundraising dinner, which made national news as bloggers posted an unofficial campaign to have her defeated [4]. Bulte, who had been the driving force behind Bill C-60, was considered to be in the running for minister of Heritage Canada. Scrutiny of election contributions identified the constituency of her entertainment-industry backers, confirming what critics of Bill C-60 had said all along, that the Bill was a one-sided corporate prescription for copyright, not in the best interests of a vibrant Canadian culture.

Whereas market driven policies easily conjure the music or entertainment industries that lobbied for the proposed copyright amendments, the positioning of documentary within this configuration is far from clear. Documentary films generally don't make money; the buyers' market is small, paid prices are low, and the supply outweighs the demand. Moreover, recent studies have shown that even though the volume of Canadian documentary production has gown significantly in recent years, the creators themselves have not gained proportional benefits from this growth [5]. Why then, have the discussions in documentary milieus during the copyright reform

process focused almost entirely on “authors rights” issues, since there is little financial gain at stake?

The preoccupation with author’s rights, referred to as holders’ rights in legislation, understandably arises from the legitimate need of improving the economic situation of documentary creators. Following the American model, the rights-holders of Canadian documentaries are normally the producers, and rarely the directors, unless they are self-produced. Even though some headway could be made if creators were to follow the progress of their European counterparts who have secured more favorable creators’ rights agreements with broadcasters, it would not change the line of reasoning in the copyright debate, since no profitable market is at stake. A prominent commissioner from the BBC was recently quoted as saying “People pay money for the pleasure of escaping from reality, not for the privilege of confronting it” [6]. Documentary filmmaking remains an act of faith and a labor of love.

Shifting the attention from issues of owners’ rights to users’ rights may be an alternative and effective way of improving the working conditions of Canadian documentary filmmakers. Artistic freedom and creativity could be greatly enhanced by securing easier access to the materials previously shot by others. Furthermore, by allowing easier access to their own work, documentary creators could reach wider audiences and counter the frustrating obscurity that befalls documentaries after first runs. Finally, rallying on the side of Canadian users’ rights groups would situate documentary filmmakers on the more progressive side of the copyright debate, and promote the issue of media democracy.

The importance of documentary cinema as conservation of historical memory, and the danger of its potential loss, has been identified since its inception, as early as in 1898 [7]. Today, the issues of censorship, history and memory, resurface as a result of tightening copyright regulations. Recent debates in Canada and the US, sparked by several controversial cases of documentaries that could either not be made or shown, demonstrate how the rights clearance process and legislation could have a direct impact on documentary filmmaking, and by extension, upon the larger issue of corporate influence of media and censorship. In 2005, *Eyes on the Prize*, widely considered the most important documentary about Martin Luther King and the American civil-rights movement, which had previously been regularly shown on TV, could no longer be broadcast or sold anywhere, because of copyright constraints [8]. The rights for the archival footage of key events had expired, and the $300,000 needed to clear the copyrights involved proved too expensive. The question of why no major US broadcaster was willing to cover these costs,

given the documentary's historical importance, is a relevant one at a time of ongoing media conglomeration. Seen from the Canadian perspective, such privatization of collective memory is a frightening prospect.

However, the resistance to the control by corporate interests on copyright has intensified in the US over the past several years, as evidenced by independent initiatives emerging from several American universities and collectives. The Center for Social Media at the American University in Washington, D.C., has contributed extensive research specifically related to documentary filmmakers as rights' users, and has been responsible for bringing clearance issues to the attention of the public [9]. Other initiatives include the Free Expression Policy Project at NYU, the Berkman Center for Internet & Society at Harvard Law School, and the Center for Public Domain at Stanford Law School initiated by Laurence Lessig, which has supported numerous projects such as the international Creative Commons Project and the Free Culture student movement.

While the specific case of documentary filmmakers *as rights-users* was not formulated as such during the Copyright Reform Process initiated by the Liberals, the movement resisting industry control of copyright has been slowly taking root in Canada. Several Internet forums have been created to allow for a public response to the copyright revision process, such as Digital Copyright Canada or the Canadian Forum on Privatization and the Public Domain. The Canadian chapter of Creative Commons was launched in 2005 under the auspices of CIPPI [10] — the unique *Canadian Internet Policy and Public Interest Clinic* at the University of Ottawa's Faculty of Law, initiated in 2003 by Michael Geist, the most prominent Canadian scholar regularly articulating public interest concerns about copyright policy in the mainstream media.

The very definition of the term 'user' is the heart of the argument that aims to loosen the grip of rights' owners thereby increasing the access for rights' users. The case has been made that not all *users* are simply consumers of cultural artifacts. In the sphere of cultural production, when creators reach to the past to build upon it by 'remixing' and reinterpreting it, they are in effect participating in a dynamic process of culture, essential for its vitality. The idea that *participation* is central in the exchange of ideas is at the core of the Open Source movement. During the Canadian copyright reform process, the academic milieu was the only major sector to convincingly defend the participatory subtext of the term "user", contending that the activity of learning does not equal consuming, and that facilitating access to materials protected by copyright fosters the development of society as a whole.

In Canada, as opposed to the US, the distinguishing factor in the copyright debate as it relates to the cultural sector is the extensive public funding system, which is driven by the legitimate need to protect our distinct cultural identity from excessive influences south of the border. Indeed, Canadian documentary production is widely state-funded, which is as true today as it was in the past. Public funds are available at both the provincial and federal levels, extending from the Arts Council's funding of independent auteur documentaries to cultural industry funding for broadcast productions. Additionally, state subsidized public broadcasters provide the main showcase for Canadian documentaries. In this publicly funded environment, the question of users' rights raises distinct concerns, as compared to those relevant within a privately driven market economy.

The bulk of historical Canadian documentary archives are housed at the National Film Board and the CBC, which held a virtual monopoly on the production of documentaries until the 1970s. Access by independent filmmakers to this extraordinary national heritage is increasingly becoming difficult because of rising costs. During the last 20 years, as most documentaries have been produced outside these public institutions by independently owned production houses, the question of access to recent Canadian film and video archives is worrisome. While these independent productions have benefited from numerous forms of public financing, documentary materials are increasingly held by private rights' holders. Hence future conservation and access become problematic. Clear mandates and adequate funding of our national archives could potentially offset the consequences of what is in effect a privatization of our heritage.

In his essay "Ephemeral for no good reason: the waste of documentary and independent films," [11] Rick Prelinger, founder of the eminent Prelinger Archives, states from experience that only a small proportion of documentary materials have any mass-market potential after their usual monopoly windows of TV and theatrical release have expired. The remaining mass of produced materials retains the interest of a select group of scholars, teachers, independent filmmakers and the general public.

Based on his experience, Prelinger believes that easy availability creates publicity, making business viable, promoting *both* creativity *and* the market. Having sold stock footage for 20 years before making it widely accessible on the Internet in 2001, his sales have gone up, despite the several million downloads of his 1,600 titles. Prelinger's Archive relies on a two-tier system: those who wish a written license agreement or access to a physical videotape element have to pay, while others who are willing to accept more basic

access do so for free. Furthermore, Prelinger sustains the radical view that all publicly funded media work should be publicly accessible, after the usual monopoly windows have expired, as "people will respond to what they can see, not what they cannot. Films that are cleared for mass distribution and easily available will work their way to viewers, and become key cultural reference points." [12].

In step with Prelinger's convictions, the BBC has recently announced the creation of its Creative Archive conceived in the spirit of the Creative Commons, making much of its owned content available online for free downloading and reuse for non commercial purposes. The NFB and CBC are beginning to display some of their archives online. Until further progress is made on the copyright clearance front for Canadian public archival materials, a rarely emphasized provision within Canadian copyright legislation could enhance selected forms of creative activity: 'fair dealing', which permits Canadians limited users' rights for the purposes of research, private study, news reporting, commentary, and criticism.

In comparison with the explicit US legislation defining 'fair use', the Canadian provisions for 'fair dealing' in the Copyright Act are ambiguous and do not lead to clear interpretation. Consequently, the Courts in Canada have been the principal defenders of users' rights, establishing the legal precedents on which subsequent cases are defended. In 2004, the Supreme Court handed down a leading case on fair dealing. Its significance consisted in laying clear ground for Canadian users' rights in legislation. The *CCH Canadian Ltd. v. Law Society of Upper Canada* case established that "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator..." (10) And that "...The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively..."(48). Most importantly, the Supreme Court's decision mapped out a structure for fair dealing assessment: "... the following factors will be considered in assessing whether a dealing was fair: 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. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases..."(53) [13].

While this Supreme Court decision marks a victory for Canadian users' rights groups, deep pockets for legal fees will most likely be

required to defend these rights, as they are not guaranteed by legislation, as they are in the USA. Add legal fees to rising costs and increased limitations on archival materials, and the independent documentary maker, who wishes to work with what was once referred to as 'found footage', may soon be an endangered species. Could films such as Arthur Lipsett's *Trip Down Memory Lane* (1965), or Esther Shub's famous compilation films still be made today?

Within the complex web of network relationships between public funding and private initiative in the Canadian cultural landscape, the proposed copyright amendments will not benefit creators nor, by extension, our culture as a whole. While digital technologies potentially represent enormous commercial gains, ambitious documentary media hold no such promise. The policy of promoting market development does not always serve culture. However, facilitating access to public archives is one of the ways of enhancing production conditions and creativity within the documentary genre. Another is the open exchange of ideas and information to promote a better understanding of both the users' and owners' side of the copyright balance.

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[Marielle Nitoslawska is Professor in Film Production at the Mel Hoppenheim School of Cinema at Concordia University. Many of her documentaries are concerned with issues of memory and its loss.]

Notes

[1] First presented at Visible Evidence XII as *The Privatization of Collective Memory*.

[2] Heritage Canada, July 2005
<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html>

[3] Laura Murray, "Protecting Ourselves to Death: Canada, copyright and the Internet," July 2005
<http://www.firstmonday.org/issues/issue9_10/murray/index.html>

[4] Brandon Sun, January 2006
<http://www.brandonsun.com/story.php?story_id=16660>

[5] Michel Houle, “La production documentaire au Québec et au Canada, Phase 1” (2000), July 2005 <http://www.ridm.qc.ca/observatoire/eridm-1/base.f/>,

[6] Lewis H. Lapham, “Notebook: Eyes Wide Shut,” *Harper’s*, 312 no. 1869 (2006): 7-8.

[7] Jan Uhde, “100 Years of Cinema: Remembering Bronislaw Matuszewski,” August 2005 <http://www.kinema.uwaterloo.ca/100yr951.htm>

[8] Guy Dixon, “How Copyrighting could be killing culture,” July 2005 <http://www.theglobeandmail.com/servlet/Page/document/v4/sub/MarketingPage?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FRTGAM.20050117.gtdocs17%2FBNStory%2FTechnology%2F&ord=1144417945017&brand=theglobeandmail&force_login=true>

[9] The Center for Social Media, School of Communication, American University, July 2005 <http://centerforsocialmedia.org/res_csmreports.html>

[10] Canadian Internet Policy and Public Interest Clinic, University of Ottawa, August 2005 <http://www.cippic.ca>

[11] Rick Prelinger, “Ephemeral for no good reason: the waste of documentary and independant film,” July 2005 <http://72.14.207.104/search?q=cache:lEeq_4sTk3QJ:www.centerforsocialmedia.org/documents/prelinger.pdf+Prelinger+Ephemeral+for+No+Good+Reason&hl=en&gl=ca&ct=clnk&cd=1&client=firefox-a>

[12] Ibid.

[13] CCH v. Law Society of Upper Canada et al., (2004) 1 R.S.C. 339