

CENSORSHIP BY COPYRIGHT:

REPORT

of the

DOC

COPYRIGHT SURVEY

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EXECUTIVE SUMMARY

The clear message from this survey is that copyright laws in Canada are a serious and growing problem for documentary filmmakers, especially because of increasing expense and limitations on the use of archival visual material and music. 85% of respondents said copyright is more harmful to them than beneficial.

The cost of copyright clearances is growing and now consumes up to 27% of the budget of many documentaries. Increasingly, documentaries on historical or arts subjects are not being made because the cost of archival footage or music is too expensive. This amounts to censorship by copyright.

While most respondents said they have not had to withdraw a film from distribution yet, they expected to do so in the near future. Independent documentary filmmakers are at an obvious disadvantage negotiating with commercial copyright sources, but even the National Film Board loses films every year because of copyright expense. So far in 2005, 9 films have been withdrawn for this reason. In some years, it is many more.

For example, archival footage licenses in the award-winning feature docudrama “The Kid Who Couldn’t Miss” were limited to 15 years from one source. The NFB decided that this film wouldn’t generate enough revenue at that point to pay for the renewal of this archival footage, and didn’t renew the copyright. As a result, the film was withdrawn from distribution in 1998.

The loss of this film because of copyright expense is particularly ironic. “The Kid Who Couldn’t Miss” was subject to complaints from the Canadian Legion and the Senate because it revealed controversial information about the career of Billy Bishop. The NFB continued to keep the film in distribution despite this controversy. In the end, the public lost access to this film not because of political censorship, but because of copyright censorship.

Although most of the respondents to this survey are “creators” or “authors” under copyright law, it is amazing that 68% said creators are overcompensated under current law. Many made the distinction between creators and commercial companies which collect copyrighted sources and exploit them.

In fact, 82% of respondents said that Canada’s copyright laws “discourage” the production of documentaries, and not one person said they “encourage” documentaries.

It is increasingly difficult to make documentaries under current copyright law because the expense of copyrighted material is out of proportion to the budgets of documentaries- and growing more so every year.

METHODOLOGY

This survey was designed by copyright lawyers David Fewer and Howard Knopf with input from DOC board member Kirwan Cox. It was emailed on October 9th to 607 members of the Documentary Organisation of Canada (DOC). Forty-five questionnaires were returned by October 14, 2005.

The overall reponse rate was 7.4%. The highest response came from Atlantic members (9.3%), followed by Ontario (9%), Quebec (5.5%) and BC (5%).

Kirwan Cox also conducted some follow-up interviews and prepared this report from the the surveys returned. The original questionnaire is appended.

SECTION I- RESPONSES TO QUESTIONS

This section includes only the percentage answers for each question. Excerpts of comments are included in Section II. The number of responses varies for each question and is noted (n=number).

A) Respondent Information

1. **Name:** 60% of respondents were male and 40% female (n=43). Only two respondents out of 45 questionnaires returned didn't provide their names so these percentages are calculated from a total of 43 respondents.
2. **Your email address:**
Only one respondent didn't provide their email address (n=44).
3. **Your city and province:**
62% of respondents were located in Ontario; 20% in BC; 9% in Quebec; and 9% in Altantic Canada (n=45).
4. **Job Description (e.g. producer, director, cameraperson, writer, etc. including multiple job titles):**
73% of respondents identified themselves as producers and directors (and/or writers as well); 13% as producers only; 4% as directors only; 4% as others (researchers and editors); one (or 4%) as a distributor or stock shot agency manager (n=45).
5. **Percentage of your production which is documentary (specific doc types or genres if you can):**
61% of respondents produce (or work on) 100% documentaries; 27% produce 75% or more documentaries; 9% produce 50% documentaries; and 2% produce 25% documentaries (n=44)

6. Do you wish your identity kept confidential? (yes or no):

62% said no and 38% said yes (n=45).

B) Copyright Experience

Please expand on your personal experiences if you wish.

See excerpts from comments in next section.

7. Has copyright ever prevented you from creating a film in the manner you planned, such as using archival material?

82% answered this question yes; 14% said no; and 4% said not applicable (n= 44)

8. As a documentary filmmaker, on balance do you feel that copyright laws are more beneficial to you as a creator, or more harmful to you in restricting your use of copyright material?

85% said that copyright laws were more harmful; 10% said more beneficial; and 5% said both (n=39).

9. Has copyright ever required you to re-cut or version a film prior to its release?

53% said no and 47% said yes (n=45).

10. Have you ever been forced, in order to clear material, to accept a license for a limited term that will prevent you from licensing your film at a future date?

52% said yes; 43% said no; and 5% said not applicable (n=44).

11. Has the assertion of copyright license renewals ever required you to withdraw one of your films from public circulation?

82% said no and 18% said yes (n=40). A number of those who said no also said this would happen to them in the near future.

12. Do you normally attempt to license existing music and recordings or do you commission your own music?

For financial reasons, 50% say they commission music; 42% both commission and license; and 8% license (n=38).

13. Have you had trouble finding affordable archival material?

88% said yes and 12% said no (n=42).

14. What percentage of your average budget goes to legal clearances and other copyright related issues?

Many said that the cost of legal clearances varied a great deal from film to film. However, the percentages ranged from 5% to 27% (n=33). It seemed that some respondents were unsure if they were being asked for legal fees only, or all copyright fees, so some of these percentages might be low.

15. Do you have trouble finding competent and independent legal counsel to advise on copyright issues?

68% said no; 30% said yes; and 2% said both (n=40).

16. Do you think that copyright, in its current form in Canada:

a. overcompensates creators,

68% said it overcompensates creators, but many distinguished between creators and corporations which own copyright such as stock shot libraries;

b. undercompensates creators, or

18% said undercompensates creators; and

c. appropriately compensates creators?

14% said it appropriately compensates them (n=28)

17. Do you find that Canada's current copyright laws:

a. encourage the creation of documentary films;

none said it encourages documentary films;

b. discourage the creation of documentary films; or

82% said is discourages documentary films; and

c. play no role in the creation of documentary films.

18% said it played no role (n=39).

C) Recommendations

18. Can you think of ways Canada's copyright laws might be improved to encourage the production of documentary films in Canada? If so, how?

There were 32 responses. See comments section.

19. Can you think of copyright laws in other countries which are more conducive to the work of documentary film-makers than are Canada's laws?

There were 24 responses to this question. See comments section.

20. Have you been consulted by the Canadian Government on copyright matters in the past, or given you opinion on copyright to the Government?

92% said no and 8% said yes (n=37)

D) Copyright Knowledge - OPTIONAL

This optional section is designed simply to assess the level of “copyright knowledge” among documentary filmmakers.

21. Are you forced to sign “most favoured nations” provisions that require you to pay all licensors at the highest rate for any of them?

47% said no; 40% said yes; and 13% didn’t know (n=30).

22. Do you believe that you understand the concept of “insubstantial copying” under the copyright law?

84% said no and 16% said yes (n=31)

23. Do you believe that you understand the concept of “fair dealing” under the Copyright Act?

55% said no; 42% said yes; and 3% didn’t know (n=31).

24. Has the lack of a “parody” defence under Canada’s concept of fair dealing interfered with your work?

45% said no; 17% said yes; and 38% didn’t know (n=29).

25. Are you aware of the “incidental use” provisions in the Copyright Act?

48% said no; 45% said yes; and 6% didn’t know (n=31).

26. Are you aware of the “unlocatable owner” provisions under the Copyright Act? If so, do they work well for you?

57% said yes; 33% said no; and 10% didn’t know (n=30).

27. Do you believe that you understand the concept of the “public domain” and its application to your work?

93% said yes and 7% said no (n=30), but many said that the rules were very unclear.

SECTION II- EXCERPTS FROM COMMENTS MADE BY RESPONDENTS

B) Copyright Experience

Please expand on your personal experiences if you wish.

Not all questions were answered by all respondents, and each writer is separated by a space. The answers from a distributor and a stock shot agent are noted as (DIST). All other answers are from producers and/or directors.

7. Has copyright ever prevented you from creating a film in the manner you planned, such as using archival material?

”In filming a performing arts documentary (dance) - not a performance program but a doc, I wanted to film full company rehearsal (25 dancers) over several days from which I would cull perhaps 5-10 minutes of footage. Although I was concentrating only on two principal dancers, I would have to have paid the following fees because of the company’s agreement with Actor’s Equity and the AFof M agreements:

For rehearsal: 2 weeks salary for every dancer: plus 2 weeks salary for the production manager. Cost: approx \$38,000 . For performance: 2 weeks salary for the dancers, the production manager, plus AFof M rates for every orchestra member and the conductor. Not to mention the choreographer and composer (or arranger) fees. Cost: approx \$70-\$80,000.

I stood by while a local CBC crew came in and filmed without having to pay anything at all, because their 22-min documentary was being broadcast as “news” rather than a documentary.

Needless to say, this is why performing arts docs are not made very often - the only thing I could do was to film other performances outside of the company and the unions’ jurisdictions, and purchase 2-3 minutes of the CBC footage, paying the third party clearances for those actually in the footage.”

“Yes. In order to make a carefully layered and comprehensive doc on any subject that delves into history, even if it is only a personal history, the prices for archival material are so prohibitive that one has to often curtail the amount of archival material which would enrich the film. Third party rights, particularly for performing arts material are so complex, time-consuming and expensive that this is one of the main reasons that the arts are not seen very often on Canadian television.”

“All the time. If it’s not the high price of the material that prevents use, it’s an inability to use the footage because the owner of the copyright can’t be found to sign off for E&O insurance, rendering the footage unusable because the broadcaster won’t show the program without E&O.”

“Yes – and increasingly so. The cost of archive material is now getting to high that doing dramatic recreations is less costly !”

“Yes, every documentary film I have ever been involved with has had certain copyright issues that have impacted on the final product. Usually the high cost of stock footage relegates you to telling a story differently than you would if cost were not an issue. There have also been instances where a copyright holder would not release their footage unless we altered our narrative. As a result we did not have access to this footage.”

“Yes. Sensitivity of a political theme/subject makes a barrier. The other problem is high price of the footage of general interest that should be in a public domain.”

Yes. The costs of the NFB & CBC are expensive for publicly funded institutions.

We regularly get films in the door where the archival material has not been cleared. I think more education in film school on this subject is required. Often it is simply a question of not even seeking permission, not necessarily having to pay for the footage. (DIST)

It has prevented us from licensing to clients who due to budget/timeline constraints could not seek third-party clearances and permissions, and therefore could not even consider using certain clips or images (DIST)

Yes. Both with music and with archival footage. In both cases music and archival footage had to be pulled from a film to meet budgets because the archive turned out to be insanely priced (126/sec for some critical shots).

8. As a documentary filmmaker, on balance do you feel that copyright laws are more beneficial to you as a creator, or more harmful to you in restricting your use of copyright material?

“Having been a performer, I can see the argument from both sides. However, I feel, and have always felt that the laws are very restrictive. As a performer I preferred a full rights buyout at the time rather than the possibility of receiving a minor cheque a few years later.”

“Laws which protect true intellectual property (including, of course, one’s own films) are a good thing. Laws which restrict the representation of reality in factual films (shooting in public places, incidental use of signs, logos, etc. Are regressive.”

“It’s a Catch 22. You want strong copyright laws to protect your rights to license films, but you want to balance it with access to affordable archival material. That balance is hard to achieve in a market driven industry such as film and TV.”

“The worst experience we had was that on older films, no one at the appropriate locations seemed to know about copyright and people you try to contact want to avoid dealing with the searches. Our trails went ‘cold’. Access to certain materials became questionable – too risky – by insurance standards – another scam and equally onerous to the copyright issue.”

“As a documentary filmmaker, on balance, I feel copyright laws restrict my ability to make the films I would like to make more than they benefit me. However, I believe the opposite is true as a dramatic filmmaker.”

Copyright is beneficial to all creators. Filmmakers are creators and benefit from the protection of their work, allowing them to grant licences for use/sale and make profits. The only way this works is if there is a system protecting these rights and allowing those paying to do the distribution to sue for unauthorized use. (DIST)

Copyright laws relating to archival material are in no way beneficial to me as a filmmaker. They are harmful and restrictive.

From the outside perspective of a supplier, it seems that the laws restrict doc producers’ use of material more than they benefit them. (DIST)

More harmful: It limits creative choices as stops people from using copyright materials for critique or in more critical work. I often have to explain to people what really constitutes copyright and have to suggest ways to get around it. Copyright is also often used as a weapon to stop people from being critical of the works used or subject matter raised in the materials.

Harmful. British filmmakers have, I understand, the ability to use up to 30 seconds of music under a fair-dealing type clause without paying.

9. Has copyright ever required you to re-cut or version a film prior to its release?

“No – but we know we’re cutting with the e&o lawyer in mind”

Not for now, since I started my productions recently, but I expect that to happen in the near future, almost certainly.

We regularly have to ask filmmakers to re-cut a film to remove unlicensed content. (DIST)

10. Have you ever been forced, in order to clear material, to accept a license for a limited term that will prevent you from licensing your film at a future date?

“Yes - we used to be able to license material for all territories, all media in perpetuity. Very few archives or stock providers now do this, and to try to pay for these rights are prohibitive - doc budgets as they are now cannot support the current trend towards splitting territories and spans and charging an arm and a leg for them. *e.g* - 1) a license for footage in one of our films may prohibit it from being distributed in the future. The cost of renewal will outweigh potential sales. 2) The limited terms for WGC rights is a problem. Many docs tend to sell in video form for 10-15 years from the date of their production. 3) For docs which go theatrical, there is also a large problem with WGC - the difference between television and theatrical rights for the writer is astonishing, and most producers cannot afford the extra \$30K or more it costs to make the leap.”

“ I have had to limit the length of license to a distributor because by the time I’d collected all my music clearances on a “favoured nations” basis I had less than 5 yrs left on the first clearance.”

We are always very disappointed when filmmakers have only acquired limited licences for example “a festival licence” for use of copyrighted music in their film. We can’t sell their film worldwide in this case, and they then discover that getting a full exploitation right is too expensive, and we have to pass on distributing their film (if they won’t or can’t recut it with other properly licensed music, for example). Sometimes they think a song is critical to the work, but then it sits on a shelf, so it’s an artistic trade-off. There are lots of great composers out there looking for film work. (DIST)

The temptation is there to agree to less expensive limited terms, but so far i have avoided it and in one case was forced to seek alternatives (ie: public domain material which is not as creatively effective). The rates for perpetuity rights are astronomical but i refuse to end up with films where the distribution is in any way restricted by the licensing agreements.

Yes. Prevention usually happens when a disproportionately high prices are demanded for the copyright license

Absolutely – both with music and with archival footage. In most cases budgets cannot handle the cost of clearing either music or archival footage for more than Canadian usage for 7-10 years.

11. Has the assertion of copyright license renewals ever required you to withdraw one of your films from public circulation?

So far we have caught these situations before putting them up for global sales, but it is possible that there will be a situation where a filmmaker has supplied incorrect information and we have to pull the film down, upon receipt of a complaint by a copyright owner/collective. Our licence agreement contemplates these circumstances. (DIST)

I will. My first film will be out of commission in 2008 because of music copyright.

12. Do you normally attempt to license existing music and recordings or do you commission your own music?

“Usually commission - the charges for recorded music are too high, even if you use “sound-alike” sources. AFof M rights for live orchestral recording are ridiculous. To film a 1-minute excerpt of a ballet performance or even dress rehearsal could cost half a production budget for the entire doc.”

“Usually commission music but issues arise when documentary subject(s) involves music that can be heard in the background.”

It is certainly much easier to clear the film for our purposes, when the producer owns the rights to the music, by having commissioned the work – whether music, graphics, special effects etc. (DIST)

Attempt to license existing music alongside with commission. Usually go with commission if license fees too high or too limited

13. Have you had trouble finding affordable archival material?

“Yes. I usually end up trying to make deals with private or foreign archives or go to public domain sources. Price determines what the final quality of the doc will be.”

“Yes. And I do not believe that publicly funded bodies such as CBC and NFB should be making profit from the use of their archive material by Canadian documentary makers.”

Our clients do run into this problem – we try to work around this with doc producers, in any way that we can...(DIST)

Absolutely. The cost of archival footage has gone through the roof. Even getting basic Canadian images from the CBC costs \$33/sec.

14. What percentage of your average budget goes to legal clearances and other copyright related issues?

“Depends entirely on the film. And if you are including E&O insurance and all the (often unpaid) time which is required for releases in this cost, it is higher. For a history/science doc, approx 12%. For an arts doc, about 22-25% (which is ridiculous).”

A lot of our time is consumed by clearance issues. Again, some of it is educating the film owner to their obligations in this regard. It would really help if there were more producers with a clear understanding of their rights obligations and privileges. (DIST)

15. Do you have trouble finding competent and independent legal counsel to advise on copyright issues?

“We were searching copyright in England, India, USA and Canada. Every country and copyright holder had a different opinion. No two opinions matched. Our Canadian counsel advised us in relationship to the demands of the Cdn broadcasters but couldn’t speak for USA”.

16. Do you think that copyright, in its current form in Canada:

a. overcompensates creators,

“In the case of the large media conglomerates, yes”

“ no, as the owners of the copyright are often not the creators”

“I think this is likely the case – and especially since Canada lacks the “fair use” allowances that are available in the USA.”

b. undercompensates creators, or

undercompensates creators, & overcompensates businesspersons

c. appropriately compensates creators?

“Probably undercompensates them but overcompensates the corps they’re signed with.”

“D. None of the above. I think the current form overcompensates the gatekeepers. More often than not, the agencies who are current right holders charge tremendous administration and licensing fees and only provide a flimsy legal agreement that still leaves the filmmaker liable. Events that have historical significance are valued in retrospect. I doubt the creator sees much of that money.”

“This depends on how famous the creators are. Top-of-the market creators and their managers are often overcompensated. At the low end of the market creators are often undercompensated. This is not always true. I am not in much of a position to generalize.”

In terms of archival material, it's not necessarily the creators who are being compensated. It's institutions such as cbc and nfb who are attempting to generate revenue through the sale archival material that should be public domain. They are absolutely overcompensating themselves.

Overcompensates the owner of the copyright - Yes, but perhaps does not always overcompensate the creator, if they are not one and the same...(DIST)

Its too market driven, creators especially big music labels pretty much name whatever price they feel like and we have to either take it or leave it. Most of the time, it is a purely commercial decision for big-name rights holders.

Its not flexible to different cases and there is no provision for documentaries

17. Do you find that Canada's current copyright laws:

a. encourage the creation of documentary films;

b. discourage the creation of documentary films; or

“Discourage. I don't think our current copyright laws recognise sufficiently the difference between the public and private sphere. Much media material, once out there belongs in the public sphere. As do corporate logos. They put them out there. Documentarians try to document our lives. If our lives are saturated with media, images, songs, sound bites and corporate images then that is what we must document. But if we have to pay for the use of every instance and negotiate terms of use then of course the law is stacked against the documentary maker.”

“They do, especially when dealing with historical issues; or popular culture.”

“it's not so much Canada's copyright laws – but American companies that hold the rights to archives that make it prohibitive to use some archival material – they end up owning history”

DISCOURAGE – Content creators and funders often have second thoughts about access to materials if they attempt to make a film that relies heavily on copyrighted materials

c. play no role in the creation of documentary films.

C) Recommendations

18. Can you think of ways Canada's copyright laws might be improved to encourage the production of documentary films in Canada? If so, how?

“For one thing, harmonization of the major archives, such as the CBC and the National Film Board would be good, with substantial discounts for independent doc producers. Deals with the major unions as a group (WGC, AfofM, ACTRA, Equity) would be very useful for doc makers. Purchase prices should include third party rights. Licensing should be for all territories, all media and in perpetuity.”

“(1)If the clip is used in an informational piece, it shouldn't have to be cleared. Much like journalists don't have to clear everything. Context is clear and in a factual program, why are filmmakers subject to more restrictive standards than journalists?(2)Make the insurance companies follow the laws first. They often go above and beyond binding the documentary filmmaker and limiting what they can do.”

“In cases where no copyright holder can be found, allow the producer to indemnify the footage and still get E&O.
I don't know if this can be regulated, other than lowering the paranoia regarding such issue.”

“As long as the fees required for copyrighted material are reflective of the budget and/or returns for the film. In many cases, I have gone to alternatives or shot my own material to avoid over zealous copyright owner demands. But this problem exists in drama as well. For example, I wanted to acquire the rights to a book that was a collection of short stories based on true stories. The stories were in the public domain. A fair price to the author would be about 2,000 dollars per story or about 20,000 for the book. After all, the stories could have been taken from the public domain by me and used. But I thought it would be good to use the author's title and we could both benefit from the cross promotion. Clearly, if the show was a hit, book sales would have been renewed. Unfortunately, the author's publisher owned the film rights and they had sold another book for far more to a US studio. In the end, I abandoned the project since it appeared there was too much greed up front and I knew they would be trouble later. I think generally the problem has more to do with individual greed than copyright laws. Of course, some will price their content off the map if they are trying to prevent a story from being told. In one case, a key player was willing to be interviewed for free, but would not admit to having or would even show me any of the material he had on the story. Others involved have told me he has a tremendous collection of visuals. But there was no way to access it. So, when it comes to private material, there is really nothing that can be done. In terms of material that is controlled by Canadian Broadcasters, perhaps a system can be put into place that will set a more reasonable standard for independent doc's. I think this might be one way Canadian Broadcasters can put back into the system since they benefit largely from government funds by opening their stock libraries to the independent film community. This, however is a separate issue to copyright. Relinquishing copyright

or restricting it is a double edge sword. I think the issue is about fees structures and increasing access.”

“Have caps on ceilings on rates charged, establish broader public domain protocols, encourage affordable and reasonable rights buyout protocols between creators/owners and producers”

“But more control back in the hands of the Indie producers because they are the ones who create the ideas,”

“Creative commons licenses”

“Greater latitude in fair use and fair comment provisions; inclusion of parody or artistic license usage”

“Revisit statute of limitations on archival materials.

Establish standard pricing strategy for copyright materials that are in Grey zone’.

Perhaps concept of ‘favoured nations’ approach – e.g. standardized rates for certain kinds of productions, need to register archival materials with governing body that arbitrates pricing of materials?”

“The meaning of the word “criticism” is not adequately defined in the Fair Dealing clause. The E&O lawyers prefer to play it safe and interpret it as within a review. It should be made explicit to include commentary on the impact and implications of a copyrighted work.”

“Allow “fair use”; make synchronization rights more like mechanical rights – ie a pre-determined fee.”

- “Find a way to make compensation fair across the board
- Make it easier to licence music quickly”

“No copyright coverage of material used on the Internet-Make it public domaine. Reduce the number of years that copyright remains in force.”

“There could be a limit placed on how much you are allowed to charge for footage you own the copyright on.”

“By giving special rates and exclusions for productions that can be proven to be documentary film and with budgets lower than a certain \$\$ amount.”

Canadian Copyright law should make a distinction between the Canadian independent documentary producers and the Canadian, American and/or International and Multinational companies making documentaries in Canada. Independent producers should be given much more easier access to archives of all kinds (private and public).

More negotiated financial leeway for independent Canadian documentary productions to access publicly funded institutions like the NFB and CBC archives.

We need a central clearinghouse for acquiring GLOBAL music rights to be able to sell films through various worldwide distribution channels – including the Internet, cell phones, eCinemas etc. Right now SOCAN and CMRRA can only grant Canadian rights, forcing the filmmaker to go to the source (recording company and music publisher) and these companies are not equipped to handle the volume of film inquiries that come through. The filmmaker doesn't get an answer, let alone a global licence. The companies can also charge whatever they like, so discourage the use of their works by independent filmmakers in this way. It is simply cost and time prohibitive for filmmakers to go this route. If a piece of music is critical to the film (in that it was playing while they were shooting live footage for example) the filmmaker is forced to use music clearance services (legal offices and other such operators), which can also be very expensive. The answer is for SOCAN and CMRRA to negotiate with their sister societies to be able to grant a global licence from Canada. In the case of sales on CineClix, we can track global sales, and report to them with full transparency for each copy sold in each territory, so there can be flow-through compensation through our sales reports. (DIST)

Broader definition of “fair use,” and legal precedents that reflect this..(DIST)

Adopting other forms of copyright as in creative content laws. Creative Content by Arthur Lessig, USA.

- The journalistic / critique exemption under copyright laws should extend to long-form and experimental documentary films. Substantial copying requirement for copyright infringement should be more clearly defined. At the end of the day, copyright laws should be used to prevent people from copying materials for commercial exploitation without putting in extra work to justify the copying. It should never be used to stifle creative expressions. At the end of the day, culture does not happen in a vacuum and any cultural evolution must be built on what's gone before. If copying for the purpose of art/expression is stifled for commercial or proprietary reasons, that is protecting short-term commercial interest at the expense of long-term cultural development.
- Having a centralised copyright license agency/regime rather than having a number of different collecting societies working in parallel alongside with big labels dealing with the licensing regime itself. And this agency will also have a sliding scale of license fees depending on the use of the copyright materials.

I believe that licensing fees should be linked to the size of the budget. If there was a set amount which a producer could factor in from the beginning, it would make the act of creation much easier.

We need separate criteria for Documentaries. We don't make tons of money and are governed by the same laws as feature productions

Make process straight forward and less legal

For music, institute a law similar to one in Britain that allows documentary filmmakers access to short portions of songs without having to pay to use that portion. With archive... don't know.

Some historical footage should be held in the public trust with easy access - not with private, entrepreneurial companies.

19. Can you think of copyright laws in other countries which are more conducive to the work of documentary film-makers than are Canada's laws?

“The 14-year term of the original 18th century British and American copyright laws, renewable once, might be a good place to start. The flood of free content on the internet – a good thing in my opinion – has shown that most creators do not need incentives that stretch across generations. Remember copyright was a temporary government-supported monopoly on copying a work, not a property right. Its sole purpose was to encourage the circulation of ideas by giving creators and publishers a short-term incentive to disseminate their work. And by their nature documentaries don't even fall under this strict definition anyway. Everything that is recorded live in a documentary, i.e., music, etc., should be in the “public domain” and things that are added after-the-fact should be held under the definition proposed above. (Sensible people will recognize that music recorded in a rehearsal hall is not the same thing as what comes out as a finished product of a recording studio. People will still want the more polished final product. In fact the law of unintended consequences arises because the documentary provides free advertising and marketing on a myriad subjects.)”

“Germany. Even USA has the legal concept of fair dealings that would allow more freedom for the documentary filmmaker.”

“No. Just don't do/license anything in China. They will rip you off in a blink of an eye.”

“Fair comment is much easier to claim in the US – not only the copyright laws are a problem but defamation laws are a problem in Canada as well – onus is on defendant to prove he didn't defame plaintiff”

“The American documentary filmmakers have it a little better with the Fair Use laws. See the well informed report at <http://www.centerforsocialmedia.org/rock/finalreport.htm> And [Michael Geist](#)’s column [Appeared in the Toronto Star, June 27, 2005](#) where he states “Canada would also do well to move away from the confining “fair dealing” approach that limits uses to prescribed categories such as research or private study, and instead adopt the more flexible fair use model found in the United States that is not so limited. While the Canadian Supreme Court has emphasized the importance of a broad and liberal interpretation to fair dealing, the approach still suffers from a relatively rigid categorization of exceptions. The United States does not feature such limitations in its copyright law, thereby encouraging innovative, fair uses of existing work. Canada recognized the benefits of a fair use system in a landmark policy paper in the 1980s, yet failed to introduce legislation to implement the recommendation. That failure may leave Canada behind once again, since countries such as [Australia](#) are currently contemplating reforms to their fair dealing provisions.”

“Only limited knowledge; but “fair use” in the US makes possible such programs as “OutFoxed” – which would likely be impossible to make in Canada”

Although the country in the so-called ‘Transition period’, the independent documentary filmmakers in Serbia&Montenegro have much easier access to the archival material of all sorts, than in Canada. I was able to get the archives there more efficiently and with much less expense than here.

Copyright law is pretty harmonized, and the laws are not the problem. It is the administration of them. To date collective administration has been on a territorial basis and this doesn’t work in a border-less world. We want to pay the copyright royalties, but these organizations have to get their act together to make it commercially feasible to do so.(DIST)

No. Under the TRIPS agreement, copyright is seen as any other proprietary right and priority is given to the commercial rights holders (not necessary the creators). This is just a way to privatise intellectual property and take materials out of the public domain (not in the legal sense). As Bertrand Russell has pointed out, creative impulse is what drives civilisation forward because unlike possessive impulse, creative impulse is not a zero sum game and what is created can be shared and disseminated. The copyright regime as it stands now only encourages the possession of copyrights and discourages open sharing and stops the evolution of cultural expression.

Britain.

20. Have you been consulted by the Canadian Government on copyright matters in the past, or given you opinion on copyright to the Government?

No, but soon will!

Yes, on behalf of the Recording Industry from 1990-1992 and for Internet Providers, from 1996 to 2002.(DIST)

I have international expertise in copyright law, but I am constantly faced with a complete lack of understanding on the part of filmmakers on these fundamentals below. I think we should be doing more to educate filmmakers – maybe we could create a tutorial on the DOCS site? (DIST)

-30-

Appendix A

October 9, 2005

DOC Survey on Copyright

Note to DOC Survey Respondents:

The Federal Government is revising the copyright law (Bill C-60) and DOC wishes to submit a brief to add the voice of documentary filmmakers to this complicated debate.

This survey will help us better understand your concerns and experiences dealing with copyright in the production and distribution of your films.

Please fill in as much of this questionnaire as you can. Please feel free to add comments. We encourage you to include personal experiences. You may wish to provide information on a “generic” basis without actual names to maintain your confidentiality. We will not reveal your identity unless you expressly allow us to do so.

Unfortunately, we do not have much time. Our deadline to write this brief is October 17th. **You must return this Word document to DOC as soon as possible to alessandra@docorg.ca. The survey deadline is Thursday, October 14, 2005.**

A) Respondent Information

1. Your name (optional):
2. Your email address:
3. Your city and province:
4. Job Description (e.g. producer, director, cameraperson, writer, etc. including multiple job titles):
5. Percentage of your production which is documentary (specific doc types or genres if you can):
6. Do you wish your identity kept confidential? (yes or no)

B) Copyright Experience

Please expand on your personal experiences if you wish.

7. Has copyright ever prevented you from creating a film in the manner you planned, such as using archival material?
8. As a documentary filmmaker, on balance do you feel that copyright laws are more beneficial to you as a creator, or more harmful to you in restricting your use of copyright material?

9. Has copyright ever required you to re-cut or version a film prior to its release?
10. Have you ever been forced, in order to clear material, to accept a license for a limited term that will prevent you from licensing your film at a future date?
11. Has the assertion of copyright license renewals ever required you to withdraw one of your films from public circulation?
12. Do you normally attempt to license existing music and recordings or do you commission your own music?
13. Have you had trouble finding affordable archival material?
14. What percentage of your average budget goes to legal clearances and other copyright related issues?
15. Do you have trouble finding competent and independent legal counsel to advise on copyright issues?
16. Do you think that copyright, in its current form in Canada:
 - a. overcompensates creators,
 - b. undercompensates creators, or
 - c. appropriately compensates creators?
17. Do you find that Canada's current copyright laws:
 - a. encourage the creation of documentary films;
 - b. discourage the creation of documentary films; or
 - c. play no role in the creation of documentary films.

C) Recommendations

18. Can you think of ways Canada's copyright laws might be improved to encourage the production of documentary films in Canada? If so, how?
19. Can you think of copyright laws in other countries which are more conducive to the work of documentary film-makers than are Canada's laws?

20. Have you been consulted by the Canadian Government on copyright matters in the past, or given you opinion on copyright to the Government?

D) Copyright Knowledge - OPTIONAL

This optional section is designed simply to assess the level of “copyright knowledge” among documentary filmmakers.

21. Are you forced to sign “most favoured nations” provisions that require you to pay all licensors at the highest rate for any of them?
22. Do you believe that you understand the concept of “insubstantial copying” under the copyright law?
23. Do you believe that you understand the concept of “fair dealing” under the Copyright Act?
24. Has the lack of a “parody” defence under Canada’s concept of fair dealing interfered with your work?
25. Are you aware of the “incidental use” provisions in the Copyright Act?
26. Are you aware of the “unlocatable owner” provisions under the Copyright Act? If so, do they work well for you?
27. Do you believe that you understand the concept of the “public domain” and its application to your work?

Thank you for completing and sending this survey back to us at alessandra@docorg.ca by Thursday, October 13th.

