

Appropriation Art and Copyright Law: Searching for Common Ground

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A response to a master class at Centre des arts actuels Skol, "Does Copyright Serve or Fail the Canadian Artist? Modernizing Copyright in a Post-Modern World," led by artist, designer and art advocate Gordon Duggan, founder of the Appropriation Art Coalition

Copyright issues have recently taken centre stage in Canada, and have been debated by a wide audience. This is largely because on June 18, 2012, the federal government passed Bill C-11 in order to "modernize" the Copyright Act, after many years of proposing to do so, and after many months of public debate and discussion.ⁱ Response to the bill has been mixed. Some critics argue that it will enhance freedom of expression, while others view it as restrictive and punitive.ⁱⁱ These issues are of central importance for Gordon Duggan, co-founder of the Appropriation Art Coalition. Duggan shared his concerns with participants in a master class at Skol in May 2012. The event was an opportunity to discuss the practice of appropriation in art, and how it has been differently framed within art and legal discourse. There were nearly thirty participants in the class, including artists, writers, curators, administrators, students and lawyers. Debates about art and copyright have a tendency to become quickly polarized, and the discussion at Skol was no exception. It was clear that there were conflicting opinions on copyright law and appropriation art, and that these opinions were representative of larger debates taking place across the country. Can these divides be reconciled in a productive way? Or do they signify an impasse in how creativity, originality, and artistic labour are understood and valued in our society?

This essay is a response to the discussion that took place during the master class. I address the key ideas brought up by Duggan and the participants, and focus on three connected issues that came up in the group discussion: the meaning and evolution of appropriation in art; the relationship between appropriation and artistic labour; and the way that the internet and social media have shaped appropriation art practices. My aim is to place the discussion at Skol in context with current debates occurring across the country, which revolve around copyright law and the creation and consumption of culture. These are questions that need to be debated further by artists, whose practices will be affected by new legislation. However, the discussion should not be limited to artists and arts professionals. We all use, make, create, subvert and comment upon culture to some degree in our daily lives, and we are all affected by laws that limit the ability to engage in these activities.

The Appropriation Art Coalition

The master class began with a presentation by Duggan. His talk revolved around two major points. First, he aimed to examine whether or not copyright was useful to artists working today. Second, he wanted to expose the disconnection in thinking about appropriation that exists between art and legal discourse.

Duggan formed the Appropriation Art Coalition in 2005 in response to these issues. He had just returned to Canada after spending more than a decade working in art galleries in the UK, and he was interested in putting together an exhibition of work that appropriated footage from Hollywood cinema. This turned into a project that would take place simultaneously at fourteen galleries across the city of Calgary. At the time, Bill C-61 was about to be passed by parliament. It would have had serious ramifications for artists working with appropriation, since it placed restrictions on using content protected by digital locks (which are anti-piracy measures that restrict a user's ability to access, change or copy material found on a wide range of media including CDs, DVDs and software) even for the purposes of fair dealing—which in Canada, refers to the practice of appropriating content from another source for the purposes of research, private study, criticism, review, or news reporting.ⁱⁱⁱ

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Duggan was concerned with how the bill would affect his exhibition, and subsequent exhibitions and artworks dealing with appropriation, so he wrote a letter and sent it to other artists. Within three weeks, there were over 600 signatures, and the Appropriation Art Coalition was launched. The signatories included artists, educators, filmmakers, galleries, collectives, directors and curators, all of whom were concerned with the restrictions that the bill would place upon creativity and freedom of expression. In a letter sent to the Canadian Ministers of Heritage and Industry, the group emphasized three principles necessary for making appropriation art: First, the ability to fairly access the works of others; second, certainty of access, which involves the protection and expansion of fair dealing; and third, creative access, which acknowledges the many forms of media that artists use. In relation to the third principle, the group states that “artists who use appropriation work with a contemporary palette, using new technology. They work from within popular culture, using material from movies and popular music. The law must not outlaw otherwise legal dealings with copyrighted works merely because a digital lock has been inserted.”^{iv}

In the end, Bill C-61 was not passed because an election was called, but it led to the current Bill C-11. Since the details of Bill C-11 were made public in autumn 2011, thousands of Canadians have voiced their concerns. To understand these concerns, and those of the hundreds of artists and cultural workers who added their names to the Appropriation Art Coalition, it is worth reflecting more deeply on the meaning and history of appropriation in art.

Appropriation as a postmodern strategy

As Duggan made clear in his presentation, artists have always used the creations of others to make their work. However, there is a difference between the modernist notion of carrying on a tradition, and the copy-and-paste approach associated with appropriation art. Modernism is defined by a sense of originality and progress—the idea that culture is continuously moving forward and improving upon itself. In art, these ideas are exemplified by Clement Greenberg’s analysis of flatness in painting, which he outlined in a 1961 essay titled “Modernist Painting.”^v Greenberg drew from Kant’s theories on genius and authenticity to trace a history of modern art from Manet to Pollock, arguing that painting had progressed because it had become increasingly self-reflexive. Progressive flattening in painting was not considered to be appropriation, however. While it involved artists building upon past works, it also required a crucial injection of originality.

Postmodernism, on the other hand, involves deconstructing originality, authorship and progress, the same values that allowed modern artists to be held up as geniuses. Critic Jan Verwoert views appropriation artists as performing a “gradual re-shuffling of a basic set of cultural terms through their strategic re-use and eventual transformation.”^{vi} Artists including Sherrie Levine, Cindy Sherman, Richard Prince, Damien Hirst and Jeff Koons have created work that critiques modernist notions of progress and originality, expressing the idea that, as art historian Douglas Crimp once wrote, “underneath each picture there is always another picture.”^{vii} Since the 1980s, appropriation has been widely practiced by contemporary artists. Postmodern strategies such as deconstruction, critiques of authorship, and semiotic free-play have become so commonplace in the art world that they are barely even subversive anymore. However, these concepts have not managed to influence legal discourse surrounding intellectual property, which has remained centred around modernist notions of authorship and authenticity. Appropriation art still exists in a legal grey area. As I will discuss below, many contemporary artists who appropriate images and media have faced threats, lawsuits and takedown

notices, which can lead to financial problems, loss of confidence, and above all, self-censorship. This atmosphere of uncertainty and fear is hardly conducive to a democratic society in which freedom of expression and participation in culture are valued.

Copyright and intellectual property

As well as examining the postmodern critique of originality in art, it is worth considering how money and ownership affect appropriation. As Duggan pointed out, it is in the interest of large corporations like Disney and Sony to protect their intellectual property by rigorously pursuing legal action against infringement. These companies, and their affiliated associations (the Motion Picture Association of America, the Recording Industry Association of America and many others), argue that they are protecting the artists they (claim to) represent, and without strict copyright laws, there would be no incentive to create. These groups have been successful in lobbying the American government to extend copyright terms. To illustrate this, Duggan pointed out that each time Mickey Mouse has been about to enter the public domain, the term of copyright has been extended in the United States.^{viii} As an instantly recognizable icon, Mickey is part of a shared visual culture, but he is also a valuable commodity—too valuable for Disney to give up.

Duggan concluded his talk by pointing out that Canadian copyright law has the potential to be progressive, but that it has been tainted by too much lobbying from American corporations. The power that corporate lobby groups have to dictate the terms of copyright law was one of his biggest concerns. He argued that the government must listen to all groups that represent artists, including those that are similar to the Appropriation Art Coalition and do not have ties to large corporations.

Appropriation and artistic labour

Participants in the master class were eager to jump in after Duggan finished speaking. Several individuals felt that he had not said enough about the benefits of copyright, and that he had unfairly conflated corporations who sue appropriation artists with artists who do the same. One participant, a photographer, puts his work online to sell to graphic designers. He felt that if artists were able to use his images for free, he would have no way of making a living. While Duggan did not have a solution to this problem, he responded by bringing up the 2009 Shepard Fairey lawsuit in the United States. Fairey appropriated an Associated Press photograph of Obama taken by Mannie Garcia, and used it to create the iconic “HOPE” poster. He was threatened with legal action by the photo agency for stealing their image. More recently, Richard Prince was sued by photographer Patrick Cariou for using his images of Rasta men. In both cases, the courts argued that the appropriation artists did not do enough to transform the original work. While the specific criteria of American copyright law are different (it involves “transformation,” while Canadian law focuses on “skill” and “judgment”), these cases are extremely troubling for artists everywhere, because they demonstrate the power of the law to define the parameters of artistic practice.

Montreal artist Thomas Kneubühler had another perspective on the issue of photography and appropriation, which relates to the postmodern critique of originality. He argued that photographers like Garcia and Cariou do not create anything original, but are themselves engaged in appropriating images from the world around them—politicians in the case of Garcia, and Rastas in the case of Cariou. How else would Fairey have been able to make a poster of Obama, if not for photography?

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Representatives from RAAV (Le Regroupement des artistes en arts visuels du Québec) held an opposing viewpoint. During the discussion, they defended copyright, describing it as an essential part of an artist's livelihood. But how much of a role does copyright actually play in the lives of artists? A 2009 study by the Art Gallery of York University reports that on average, artists from Québec made 12% of their annual income (\$1,988) from artist fees.^{ix} This is no small sum, but neither is it an amount that makes it substantially easier to live and practice as an artist. Copyright scholar Laura J. Murray has pointed out that contemporary artists make much more money from sales, grants and academic salaries. She also notes that copyright fees tend to be distributed among established artists already making decent income from other sources. Murray interviewed dozens of contemporary artists in Canada, and found that most were cynical about copyright law, which they considered to be detrimental to user's rights.^x With this in mind, how might a balance be found, which allows artists to be compensated for their work but does not restrict their ability to make art? Duggan addressed this point by calling for organizations like RAAV to update their attitudes towards appropriation, and to recognize the importance of user's rights and fair dealing for artists.

Sharing images and ideas online

As well as the issue of artistic labour and remuneration, an interesting theme that came up during the discussion revolved around copyright, the internet and social media. One participant reflected on the ability of sites such as Tumblr and Pinterest to break down categories of creator, artist and viewer. Another participant, artist Ed Janzen, has appropriated clips from Hollywood movies to make his work, and has received takedown notices from YouTube. Artists Charles-Antoine Blais Métivier and Serge-Olivier Rondeau shared their thoughts on their upcoming project at Skol, titled "After Facebook," which examines the democratization of photography through social media. They plan to comb online profiles in much the same manner as street photographers, in an attempt to explore the limits of virtual public space. They ask, is this an intrusion into the private lives of individuals, or an appropriation of what has already been made public? Artist Vincent Chevalier commented on these ideas as well, noting a tension in the way that culture has traditionally been produced and consumed, and the tendency within social media to "share" images and information freely.

These points led to a discussion of remix culture. French curator and critic Nicolas Bourriaud has written about this concept, describing the DJ as the poster-child for contemporary art. In tracing the way that appropriation art has evolved, he argues that "the ecstatic consumer of the eighties is fading out in favour of an intelligent and potentially subversive consumer: the user of forms."^{xi} This description fits artist Christian Marclay well. His montage installation, *The Clock*, was referred to by critic Roberta Smith as "the ultimate work of appropriation art." The piece consists of thousands of appropriated film clips which reference time and unfold in real time. In an article in *The New Yorker*, critic Daniel Zalewski writes that "to keep advancing as an artist, Marclay needed not just his mischievous imagination; he needed material to manipulate."^{xii} Marclay's approach highlights the falsity of creating divisions between creators and users, when clearly, artists are users too. Similarly, as many participants in the master class argued, appropriation is not stealing, but instead, using references that are a familiar part of public memory and culture.

Conclusion (still searching for common ground)

What did not come up nearly enough during this discussion was how artists could resist some of the more restrictive elements in Bill C-11. Digital lock provisions will prevent artists who use a "contemporary palette" from appropriating certain forms of media, which means that pieces like *The*

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Clock will be virtually impossible to make in Canada. So how do we go about finding solutions? Thousands of Canadians have already spoken out against Bill C-11 through public forums, petitions, Facebook, and discussions similar to the one that took place at Skol. These conversations need to keep occurring across the country, and more questions need to be raised about creativity, ownership and property. However, in terms of finding common ground when it comes to thinking about the function of art in society, it may be wishful thinking to assume that the two sides might be reconciled—or that there even are two sides.

During his talk, Duggan was pessimistic about the future of copyright law in Canada. However, he suggested that a major court case involving appropriation could make things more clear. There are few Canadian artists who come close to rivaling the wealth and celebrity of Richard Prince, so it might be the case that self-censorship will prevail when it comes to appropriation. It may take a few brave artists—perhaps those who make up the Appropriation Art Coalition—to test the waters.

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For more information about Skol's programming, please visit www.skol.ca

Notes:

ⁱ Bill C-11 was passed by the House of Commons on June 18, 2012. At the time this essay was written, Senate approval was pending, but is only a formality.

ⁱⁱ University of Ottawa law professor Michael Geist has covered these issues extensively on his blog, www.michaelgeist.ca.

ⁱⁱⁱ Bill C-11 will expand fair dealing by adding education, parody and satire as exceptions, meaning that artists who appropriate content for these purposes will be protected. These uses were previously unprotected, which resulted in a legal grey zone around appropriation. See Laura J. Murray and Craig Berggold, "See You in Court: Can Canadians Practice Parody?" *Fuse* 32.2 (2009): 12-17.

^{iv} Appropriation Art Coalition, www.appropriationart.ca.

^v Clement Greenberg, "Modernist Painting," (1961) in Gregory Battcock, *The New Art: A Critical Anthology* (New York: E. P. Dutton & Co., 1966): 100-110.

^{vi} Jan Verwoert, "Apropos Appropriation: Why Stealing Images Today Feels Different," in Beatrix Ruf (ed.), *Tate Triennial 2006: New British Art* (London: Tate Publishing, 2006): 14-21.

^{vii} Douglas Crimp, "Pictures," *October*, 8 (Spring 1979): 75-7; 87-8.

^{viii} In the United States, copyright terms have been extended from 28 years (1831), to life of the author plus 50 years (1976), to life of the author plus 70 years (1998).

^{ix} Michael Maranda, "Waging Culture: A Report on the Socio-Economic Status of Canadian Visual Artists," published by the Art Gallery of York University, 2009.

^x Laura J. Murray, "Copyright," In Marc Raboy (ed.), *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press, 2010): 196-215.

^{xi} Nicolas Bourriaud, "Deejaying and Contemporary Art," in *Postproduction/Culture as Screenplay: How Art Programs the World* (New York: Lukas & Sternberg, 2002): 39-45.

^{xii} Daniel Zalewski, "The Hours: How Christian Marclay Created the Ultimate Digital Mosaic," *The New Yorker*, March 12, 2012.