



Center for Social Media



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**EXPANDING USER RIGHTS FOR DOCUMENTARY FILMMAKERS
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**RAPPORTEUR'S REPORT
BY NICK LEWIS**

EXECUTIVE SUMMARY

On Sep. 16, 2005, academics, representatives of legal clinics, documentary filmmakers, litigators, and leaders of non-profit entities met to discuss current activities to improve documentary filmmakers' ability to use copyright law. The event was co-hosted by the Washington College of Law's Program on Intellectual Property and the Public Interest and the Center for Social Media in the School of Communication, and funded by the Rockefeller Foundation and Grantmakers in Film and Electronic Media.

Several approaches emerged: research into abuse of copyright; education of creator groups and articulation of best practices; reducing complexity of licensing; providing direct legal services; legal policy intervention that indirectly affects filmmakers (and other creators); and market policy intervention that directly affects filmmakers. The convening revealed the importance of research on actual practice, the crafting of remedies appropriate to and with participation from creative communities, of developing and publicizing models for exercising user rights that other creative communities can apply *mutatis mutandis*; the crucial role for legal support for community practice; the potential of policy interventions; and the fruitfulness of communication and collaboration.

INTRODUCTION

Strict interpretation of copyright and extended copyright terms increasingly limit freedom of expression and creativity. However, creators themselves sometimes resist this argument; at least in part, this is because they understandably are invested in reward for their own work and

therefore identify with rights holders. Thus, they find themselves unable to address, much less resolve, their problems with copyright.

Documentary filmmakers are prime examples of this problem. Many groups concerned with IP issues have focused their concerns on the problems of documentary filmmakers because filmmakers are both copyright holders and copyright users. Their work routinely requires them to quote other work in the process of creating their own. Therefore their problems put into bold relief the creative consequences of current copyright policies and practices.

The problems that documentary filmmakers face in acquiring copyrighted material occur in the areas of:

- Filmmakers' ignorance or misunderstanding of current law
- Ignorance or misunderstanding of current law on the part of filmmakers' lawyers, insurers and broadcasters / cablecasters (a/k/a "gatekeepers")
- Orphan works
- Difficulty of tracking down even known copyright holders
- Arbitrary or extortionate terms set by copyright holders

Cf. Untold Stories report for a more extensive discussion of the above, available at <http://www.centerforsocialmedia.org/rock/finalreport.htm>.

APPROACHES

Investigation, documentation, & publication of bad practices or abuse of copyright

The Chilling Effect of Cease & Desist Letters -- Free Expressions Project [Marjorie Heins]:

The Free Expression Project recently conducted an empirical research project aimed at examining the balance between copyright controls and free expression safety valves. The project discovered a number of problems plaguing those desiring to use copyrighted works, including the prevalence of threatening cease & desist letters, as well as DMCA take down letters. They compiled a sample of cease & desist letters into a repository that they and others can evaluate in order to discern which letters stated valid claims and which ones did not. The project has also created a report ("Will Fair Use Survive?") outlining recommendations, including the need to talk to ISPs to determine how they respond to take down letters. For more information, see <http://www.fepproject.org>.

Education via Creative Multimedia --

Center for the Study of the Public Domain, Duke University [Jennifer Jenkins, Jamie Boyle]:

Duke University's Center for the Study of the Public Domain, through its Arts Project, analyzes the impact of IPRs on cultural production, specifically through the use of interdisciplinary or multimedia approaches. The Arts Project uses creative mediums of expression in order to educate the artistic community, having found artists to be far more receptive to creative

presentations than purely analytical or academic ones. For instance, the Arts Project is now working on a series of comic books that present information about IPRs and how they interact with artistic production. See <http://www.law.duke.edu/cspd/>.

**Use of Expression for Educational Purposes –
*Berkman Center, Harvard University [William McGeeveran]***

The Berkman Center is beginning an interdisciplinary study examining the use of content in the scholarship or educational context. The Center is talking to professors, filmmakers, activists, and anyone seeking to educate people in non-commercial ways. They hope to, through a legal lens, look at fair use, market and legal structures to determine how they limit or restrict expression for educational purposes. See <http://cyber.law.harvard.edu/home/>.

Digital Sampling & Rights Clearance -- *Kembrew McLeod, University of Iowa*

Kembrew McLeod, a professor in the department of communication studies at the University of Iowa, has worked extensively with fair use, and has authored and / or produced a number of works discussing the intersection of intellectual property and the arts. He is currently at work on *Copyright Criminals: This is a Sampling Sport*, which examines the history of digital music sampling and collage. Amongst other issues, Professor McLeod examines the ways in which IPRs have made sonic collage all but impossible to create due to the difficulty of rights clearance. For more information, see <http://kembrew.com>.

**Barriers to Documentary Production –
*Untold Stories, American University [Pat Aufderheide, Peter Jaszi]***

American University's Center for Social Media, along with American University, Washington College of Law's Program on Intellectual Property and the Public Interest conducted qualitative research with veteran documentary filmmakers about the frustrations and creative opportunities forgone due to restrictive IPRs. As a result of their extended research, American University released a report entitled "Untold Stories," providing a detailed account of the problems faced by the filmmakers. For more information, see <http://www.centerforsocialmedia.org>.

Economic Inefficiencies in Rights Clearance -- *Future of Music Coalition [Peter Dicola]*

The Future of Music Coalition seeks to take an interdisciplinary approach to the problems associated with the clearance of digital music samples. Specifically focusing on the problem of economic inefficiencies, the project focuses on talking to musicians about their experiences trying to clear rights. The project has discovered that many musicians who want to know how much they have to pay rights holders are surprised to discover how difficult it is to even untangle who the right holder is. For more information, see <http://www.futureofmusic.org>.

Caption Project -- *College Art Association [Eve Sinaiko]*

The College Art Association is a professional organization representing artists and art educators. The CAA therefore represents both creators who have rights in their own works, as well as educators who cannot survive without the reproduction of the works of others. The CAA is currently very active in the Orphan Rights project, and is pushing for the Copyright Office to

find a solution to the increasing difficulty faced by users who cannot locate copyright owners. In addition, the CAA's caption project is advocating for the inclusion of more information within images. Their hope is for captions to be able to quickly inform potential secondary users of the extent to which the given image is protected (i.e., the photograph of an art working the public domain may be copyrighted, but it should be clear in the caption that the photograph, not the art work is what is protected.) For more information, see <http://www.collegeart.org>.

The Chilling Effect on Distribution -- *Electronic Frontier Foundation [Fred Von Lohmann]*

The Electronic Frontier Foundation is currently working on legal advice and defense. For instance, EFF has consulted with the filmmaker of a documentary film entitled *Raw Deal*, about a rape that had been videotaped at the University of Florida at Gainesville. Though the film is very compelling, the filmmaker's original distributor got cold feet when they could not clear the rights to a song playing in the background. The distributor, however, also refuses to release the rights to the film back to the filmmaker. EFF is working with the filmmaker to find a solution. For more on the EFF, see <http://www.eff.org>.

Investigation, documentation, synthesis, & articulation of good practices

Statement of Best Practices

American University's Untold Stories report recommended the creation of a Statement of Best Practices in order to present filmmakers' shared understandings about what is fair and reasonable in employing fair use. In response, AU has worked along with five documentary film groups to create this Statement (which will be released on November 18, 2005). In addition to the report and the Statement of Best Practices, American University has developed a short video on fair use for documentarians to serve as a teaser for the Statement of Best Practices. For more information, see <http://www.centerforsocialmedia.org>.

Asserting Fair Use More Publicly

In examining the practices of many educators, the *Free Expression Project* discovered how many feel that they must copy materials under the cover of night out of fear. Having encountered similar reactions, the *College Art Association* (CAA) is advocating their captions project as a possible solution. The CAA suggests a special caption for material reproduced by artists claiming fair use.

The History of Fair Use – *Michael Madison, University of Pittsburgh*

Professor Michael Madison recently performed an exhaustive study on the history of the fair use doctrine. Madison argues that, when considered from a sociological perspective, fair use makes more sense than perhaps commonly thought. Madison recommends that a record of fair use arguments be made. For more information, see <http://www.law.pitt.edu/madison/>.

Improving accessibility through easier licensing by copyright holders

Creative Commons

Creative Commons (CC) provides simple licenses, which specify conditions on how the work can be used. The overall goal is to clarify and expand the intellectual property commons, while lowering transaction costs. CC hopes to capitalize on the accretive nature of expression – when artists benefit from the greater amounts of material in the commons, they will be more inclined to share their works as well. See <http://creativecommons.org/>.

Center for the Public Domain [*Laurie Racine*]

Laurie Racine was absent, but her work was described by Gigi Sohn as searching for alternative commercial licensing models.

See <http://www.centerpd.org>.

Statutory Compulsory Licensing [*David Lange*]

David Lange, while absent, sent in a brief explanation of his project, explained by Peter Jaszi. He has proposed a statutory compulsory licensing scheme as a solution for documentary filmmakers. The proposal is one that would provide filmmakers in general with a broad compulsory license for incorporated, preexisting copyrighted materials. It would be a gratuitous license until the revenue from the project exceeded incidental costs. The gratuitous fee would then switch to a flat fee based upon the time of the clip. See <http://www.law.duke.edu/fac/lange/>.

Providing direct legal services

Electronic Frontier Foundation

The Electronic Frontier Foundation (EFF) features lawyers specializing in litigation. Strong advocates of fair use, they look for compelling cases that will directly raise these issues in court. Recently, they represented JibJab in response to a cease and desist letter for their 2004 election parody of “This Land is Your Land.” EFF prevailed easily as “This Land” had been in the public domain since 1973. EFF hopes that some of the exorbitant costs associated with rights clearance in the production of documentary movies will fall if more filmmakers begin to assert their fair use rights. For more information, see <http://www.eff.org>.

University of Southern California Law Intellectual Property Clinic [*Jennifer Urban*]

Students and practitioners in the USC Intellectual Property Clinic work on projects that aim to benefit the public interest in intellectual property law. Currently, the clinic is working with a coalition of filmmakers on the Orphan Works problem. In particular, the clinic is pushing for the Copyright Office to keep in mind that small filmmakers have limited resources, and that the Copyright Office should consider limiting liability when filmmakers demonstrate that they have made reasonable efforts to locate the original rights holders. See <http://lawweb.usc.edu/admissions/curriculum/pages/legalclinics.html>.

American University, Washington College of Law Intellectual Property Law Clinic

WCL’s intellectual property law clinic provides free legal representation to a wide range of creators and users of all types of intellectual property (copyright, patent, trademark, etc.). The clinic has represented individual creators, along with small businesses and communities of rights

holders, amongst other groups. For more information, see <http://www.wcl.american.edu/ipclinic/index1.cfm>.

Legal policy intervention that directly affects filmmakers

Orphan Works

A number of different groups are actively working on the problem of orphan works – that is, works where the original rights holder cannot be located. For instance, *USC's intellectual property law clinic* is pushing for the Copyright Office to consider limiting the liability faced by filmmakers who have exercised due diligence in searching for the rights holder. *Public Knowledge* (PK) has worked alongside *USC* and the *EFF* in these efforts as well. PK has also created a website for others to post comments to the Copyright Office. PK now hopes to bring groups of creators to Washington, DC to meet with members of the Copyright Office and members of Congress about why the problem of Orphan Works must be addressed – this will give the Copyright Office the opportunity to hear from individual artists, or the “little guys” that make up 85% of the market. The *College Art Association* and *National Video Resources* are also very active in the Orphan Rights Project. For more information on Public Knowledge, see <http://www.publicknowledge.org>; for NVR, see <http://www.nvr.org>; for USC, EFF, or CAA, see above.

Work for Hire – *Howie Besser, NYU*

Howard Besser, a Professor of Cinema Studies at NYU and Director of NYU's Moving Image Archiving & Preservation Program advocates for the elimination or modification of the contract provision of Work for Hire where creators have received public funding. Instead of the standard provision granting the rights to any works to the employer, Besser promotes the creation of some manner of co-ownership. Under this arrangement, the creator would retain the rights to the work, but material created with public funding would also flow into a creative commons. For more on Howard Besser, see <http://besser.tsoa.nyu.edu/howard/>.

Legal policy intervention that indirectly affects filmmakers (and other creators)

There is no legislation at the moment targeted at documentary filmmakers—indubitably a good thing—but many current communications policy issues indirectly affect them as they affect all creators. Examples include a rewrite of the Communications Act, setting of digital rights management standards by industry, law or treaty, reconsideration of the Digital Millennium Copyright Act, and the international broadcast treaty. Each poses opportunities to enhance the situation of documentary filmmakers and many other creator groups, although none of them seems likely to galvanize that particular constituency. The group considered the Broadcasting Treaty as an example. WIPO's adoption of the Broadcasting Treaty would create yet another layer of rights inhibiting the use of expressive materials. The Treaty would in effect grant rights to Broadcasters over all the content they broadcast, regardless of whether they hold the copyrights to the underlying expression, or even regardless of whether the creator desires the content to be freely available. Some groups are pushing for the Broadcast Treaty to cover webcasting as well.

Jamie Boyle argues that the Treaty should be attacked in three stages. First, he argues that the Treaty should not be agreed to at all. Failing that, he suggests that webcasting be excepted entirely. At the minimum, however, the Treaty must contain a section of limitations and exceptions. *Peter Jaszi* suggested that one very specific intervention that should be made would be to carve out appropriate language in the limitations and exceptions, which would incorporate the fair use defense into the Treaty, as there is currently no such provision. *EFF* is also actively campaigning against adoption of the Broadcasting Treaty. See http://www.eff.org/IP/WIPO/broadcasting_treaty/.

Market policy intervention that directly affects filmmakers

Standard Educational Rate – *Orlando Bagwell, Ford Foundation*

Orlando Bagwell, a documentary filmmaker and now an officer for the Ford Foundation, has seen first hand the difficulties and incredible expenses associated with trying to clear rights prior to widespread distribution of a documentary film. The Ford Foundation hopes to create a space for common materials for non-commercial or educational projects. Bagwell argues that if the project is primarily non-commercial or educational, then there should be a standard licensing fee and that licenses granted should be granted in perpetuity.

PROPOSALS FOR FUTURE WORK

During the afternoon discussion, the participants considered a number of different projects and initiatives that could be undertaken in the future. The group created an impressive list, including educational tools and materials, proposals for the creation or enhancement of institutions, possible legal reforms, increased attention to changing international treaties, and greater research into the policies and practice of errors & omissions insurers.

Education

Best Practices Statement:

American University plans to unveil its Statement of Best Practices on November 18, 2005. AU worked with five documentary film groups to come up with a statement reflecting what documentary filmmakers consider valid fair use. AU hopes that the Statement will help educate filmmakers and the greater public about fair use, and that it will lead to a greater assertion of fair use rights. This, in turn, should reduce clearance costs.

Friendly Gatekeepers:

Friendly gatekeepers should be identified and further educated on the merits of fair use. Certain distributors, producers, and insurers have shown a greater willingness to work with filmmakers and other artists. Artists and other creators should promote these groups to others in the community. Further, friendly gatekeepers should be ever more willing to work with artists once they have learned even more about fair use.

Using Art to Educate Artists:

Similar to Duke University's current projects, which use short films and comic strips to educate artists about intellectual property laws, participants mentioned a number of ideas that would use

multimedia as an educational tool. One participant suggested that a documentary filmmaker could make a documentary about the problems associated with rights clearance. Others suggested that a short, publicly sharable trailer discussing intellectual property rights could be added to the beginning of documentaries – explaining, for example, that parts of the film appear via fair use. Or alternatively, the trailer could show how much the film cost to make and then how much it cost to clear the underlying rights.

Greater Education about Creative Commons:

By advertising the idea of the creative commons, more artists will consider placing their works within the commons for all to share. Creators will also see a direct benefit by finding more in the commons that they too can use.

Educating Those Who Need to Know:

Greater efforts should be made to educate various groups of people who regularly encounter intellectual property issues. First, filmmakers themselves are often unaware of many of the rights they have available to them. Similarly, film school faculty would greatly benefit from education about copyright law. Participants suggested that the Statement of Best Practices could serve as a beneficial teaching tool for film schools, while others suggested a need to come up with one key source (a book or guide) for educating filmmakers, faculty members, and others.

Beyond artists and educators, the group emphasized the need to better educate lawyers (both specialists and non-specialists) and judges about relevant laws. Participants had been greatly surprised to find that many judges (particularly at the district court level, where most cases are resolved) were ignorant about intricacies of intellectual property laws. Finally, much attention was paid to the education of errors & omissions insurers. For more, see below.

Institution Building – Creating Resources for Defense of Documentary Filmmakers:

Clinic Networks

Law school legal clinics can serve as great resources and litigation support for clients, particularly individuals or small, independent groups. Further, clinics feature fewer ideological or personal conflicts than larger law firms. Currently, independent filmmakers with little in the way of resources have few options outside of legal clinics and EFF. Participants expressed interest in capitalizing on the clinical model by showing filmmakers that they can gain a one-stop shop for legal advice on rights clearance. One participant noted that clinics could perhaps educate film school faculty and students at their respective, or even other, universities.

Pro Bono Lawyers – A Documentary Defense Fund?

Beyond law school legal clinics, other participants advocated for the creation of a free-standing, independent organization of pro bono attorneys who could provide assistance to filmmakers and other artists -- one participant threw out the name “The Documentary Defense Fund” as a possibility. The establishment of a blue ribbon commission of notable scholars in the field could legitimize the organization. Similarly, the organization could create a pool of expert witnesses to be used in litigation. This group could also provide opinion letters, as well as work collaboratively with smaller groups across the country.

Legal Reforms:

Damage Reform

The United States' system of copyright infringement damages is unparalleled elsewhere, as Peter Jaszi noted. It is not related to real harm to the holder, and there are huge penalties for small violations. This is impossible in most of the rest of the world – elsewhere, it is based on substituted license fees related to actual harm. Thus, the risk of guessing wrong in other countries is not nearly as severe as in the US. Therefore, the participants suggested that copyright damage reforms be stressed in the future.

Orphan Works

As noted above, a number of the groups participating in the discussion are actively attempting to solve the Orphan Works problem. Their efforts demonstrate a collaborative approach that should continue in the future.

Errors & Omissions Insurance:

The Need to Include E&O Insurance in the Analysis

Throughout the conversation, participants continued to bring up the role of errors & omissions insurers. Currently E&O insurers simply do not want to bear the risk that they perceive as coming with the assertion of a fair use right. The insurers likely interpret fair use purely as a defense, meaning that it only arises after an admission of infringement – a risk that insurers are unlikely to take. Therefore, the group realized the necessity of including E&O insurers within the larger conversation about how best to resolve problems facing documentary filmmakers. By including and educating insurers, advocates of fair use can hope to lower transaction costs facing filmmakers. In terms of learning more about insurers, there is an annual conference in Kansas City called the *Media and the Law Seminar*. See <http://www.kuce.org/programs/ml/>. Participants suggested going to the conference and beginning to engage the insurers in the pursuit of solutions.

Research Current Practices

Group members emphasized the need for a study of E&O concentration in general -- that is, a mapping of who E&O gets their advice from, as there could be potential antitrust issues. Overall, the participants want to know who is writing what policies. If insurers are getting all of their information from content industries or large companies, they may well have a skewed understanding of fair use rights. For instance, do insurers view fair use as willful infringement? What claims history are they relying on? Generally speaking, what do insurers even know about fair use?

Insurer of Last Resort

A number of participants also suggested that, along with a pro bono network of lawyers, there could be an E&O insurer of last resort. There could be a pooling of resources to create an insurance fund for filmmakers who have valid fair use arguments, yet who cannot convince other

insurers to insure their projects. The combination of an insurer of last resort with a network of pro bono lawyers could work together to specifically address the problem of the unreasonably denied license. Lawyers could draft opinion letters, and be willing to defend artists, while the insurer would agree to cover the work, so that it could be distributed.

Topics for General Research:

The group also identified a number of areas that still need further research, including the following:

- A study on abuse of copyright notices, including a determination of how many actually state valid claims.
- Research what other nations have in their copyright laws that resembles fair use.
- Talk to ISPs, and give them sample counter take down notices
- Collect data on the exact costs of clearance in order to help filmmakers create sound budgets
- Research market based strategies to lowering clearance costs, including but not limited to the increased assertion of fair use
- Research whether lawyers are willing to draft opinion letters, and determine how often such letters have been beneficial

CONCLUSIONS

Several themes emerged, including:

- The importance of focusing on disciplinary practice and the potential for improvement of the situation from within those disciplines ;
- The value of learning from and education of creator communities (i.e. do ethnographic research; address problematic or self-defeating behavior, e.g. clearance culture);
- Importance of specificity in problem solving (no global solutions);
- Value of extending models from specific problem solving to more general cases;
- Importance of a diversity of complementary strategies (e.g. legal defense; education; research, documentation) in order to build upon each other's efforts;
- Need for communication and cooperation.

PARTICIPANTS

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