

Rights laws dysfunctional in media Wild West

What happens when the copyright culture, based on restriction upon restriction, meets the Wild West of today's media market and an oncoming generation with little patience with those old ways?

For an update on 21st-century copyright licensing, here's a discussion adapted from Sheila Curran Bernard and Kenn Rabin's recent book Archival Storytelling: A Filmmaker's Guide to Finding, Using, and Licensing Third-Party Visuals and Music.

By Sheila Curran Bernard

In November 2005, a consortium of media and academic organizations led by the American University Center for Social Media issued the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. It had immediate and lasting impact, offering the industry a common framework for understanding the "fair use" exceptions to copyright law—situations where a documentary filmmaker has the free-speech right to use another creator's copyrighted work without paying for it.

But most uses of third-party materials in documentary films do *not* qualify as fair use; rights must be cleared if the films in which the materials appear are to be broadcast or otherwise distributed. The cost of clearing these rights, the intransigence of some rights holders, and the complexity of licenses that specify distribution technologies and geographic territories as separate "markets" and set limited time periods for use have dissuaded many filmmakers from drawing on materials that might otherwise enrich their films.

"This is [the] only kind of property we treat this way," says lawyer Anthony Falzone, director of the Fair Use Project at Stanford University's Center for Internet and Society. "When you go to buy a table, you don't have to tell the guy at the furniture store what room you want to put it in, whether it's going to be next to a white couch or a brown couch. And by the way, what if I want to put it in my cabin at Lake

Tahoe? Let's go ask the guy who made the legs, because we might not have the rights to use the legs in the cabin at Lake Tahoe."

To get a better sense of the licensing challenges facing documentary filmmakers, Kenn Rabin and I asked a panel of experts to convene at Stanford University in October 2007. Their conversation was edited for inclusion in *Archival Storytelling* and is further edited and excerpted here.

Kristine Samuelson, filmmaker (Arthur and Lillie), professor, and director of Stanford University's Film and Media Studies Program: I've had so many students who want to use archival footage. The timeline is a serious problem for students; they . . . don't have a lot of time to wait for archival footage to come in. The costs are daunting, and they seem to have gotten much higher. . . . I think it's very difficult to parse the idea of how many territories you're going to be buying for, because you're not quite sure where your film is going to go; and then how long you should arrange for your deal to last; and most of all, what is the Internet territory?

Now that we are really looking at a

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landscape where people will be offering their movies for download on the Internet, how does that factor in to some of . . . the contract negotiations that will take place with the people who own the archival footage?

Dale Ellen Nelson, v.p. and intellectual property counsel for Warner Bros. Entertainment Inc.: Warner Bros. is really on both sides of the issue here; we're in both businesses. We're in the business of licensing clips and stills and the protection of the assets that the studio has created and owns and that we've acquired. . . . But first and foremost, Warner Bros. studio is a filmmaker. . . . And as filmmakers, as content makers, we're subject to the many complex clearance issues, licensing issues, that you all face. And we're very much champions of the First Amendment, we're in the business of free speech.

I've been at the studio now for a number of years, and I've seen big changes with the introduction of the Internet. We have massive, increased expression now, by anybody and everybody. This is an era where there've been many attacks on traditional notions of copyright. We're in the era of file sharing, private copying, websites, user-generated content, mashups.

It's all kinds of new forms of expression that, as a content owner and a content maker, we have to evaluate. From an enforcement standpoint, protection of our rights creates a nightmare in this new era, but it also causes the content owner (like Warner Bros.) to step back and re-evaluate what harm is really being done when other people are using our material.

Anthony Falzone, lecturer in law at the Stanford Center for Internet and Society: . . . I'd like to talk briefly about what I would call alternatives to traditional licensing. Why do I suggest alternatives . . . ? It's not just because traditional licensing is often expensive. The problem with licensing is, licenses *always* have other restrictions. At the very least, they will almost certainly have a time restriction, which means the license you buy is going to expire someday. And once it expires, you no longer have the rights to the material that you licensed, and you may even see something in that license that says you agree not to use it at all unless you get another license. . . . Li-

censes may have media restrictions. Maybe it lets you [use the work for a project to be shown] in theaters and on DVD but not on the Internet, and maybe not on any other technology—who knows what?—that we haven't thought of yet.

Every time you sign a license, you're signing rights away. You're agreeing to restrictions on the way you use material. And for that reason, it behooves you to at least consider the possibility of whether you can use the material you want to use legally without entering into a license. So there's two things I want to talk about outside of traditional licensing. One, very briefly, is the Creative Commons. The Creative Commons license lets authors specify in advance the terms under which you get to use [their] content for free . . . [T]he second alternative to traditional licensing is fair use. . . . And it's a critically important part of copyright law. It balances the inherent tension in copyright law, which of course restricts speech, while the First Amendment is supposed to protect speech.

Sam Green, *filmmaker* (*The Weather Underground*) and *educator at the University of San Francisco and the San Francisco Art Institute*: Making archival films with very low budgets is hard, obviously. In making *The Weather Underground*, I knew I had to license a lot of material, but there was [also] a range of stuff that I thought I might be able to use under fair use. And so I started to ask around, to figure out what this "fair use" thing was and how it works, and I was amazed that very few people really had a clear sense of it. This was 2001 and 2002; since that time, I'm extremely happy to see that there is a lot more attention being paid to it. I also feel really strongly that there are political implications to this.

As the archival landscape gets more and more commercialized and corporatized and legalized, I think it's extremely problematic. I really struggled with this stuff with *The Weather Underground* because as a filmmaker—and especially a filmmaker with not a lot of money—it feels like the deck is stacked against you.

Rick Prelinger, *founder of the Prelinger Archives, co-founder of the Prelinger Library, and filmmaker* (*Panorama Ephemera, Our Secret Century*): I've collected film since

the 1980s, and I've sold stock footage on and off for quite some time. My archive is now represented by Getty Images, but we're still very actively involved in bringing material in and helping make sense out of it. What I'm going to talk about briefly are some new ideas that have come into this field that complicate things a little bit, but in some ways maybe also point towards a future where things are a little more open.

As I said, I sold stock footage for many years, and we were always incredibly restrictive about what we did. . . . We never let

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anybody see anything without a superimposed time code blotting out the image. Since most of what we had was public-domain material, we were very, very controlling about our physical materials.

And then I moved to the Bay Area and hooked up with the Internet Archive and agreed to put almost 2,000 of our films online for free, under a Creative Commons license with no restrictions on reuse. At the same time, we were selling the same material that we were giving away.

And we ended up with a two-tiered system in which, if you were willing to download material under a Creative Commons license, you had the right to reuse this public-domain material without any additional restrictions.

But if you wanted a written agreement with your name on the top, if you wanted physical materials, if you needed any sort of enhanced research services, you had to pay. So we made a firm line between what you get for free and what you have to pay for. And in almost seven years, we've had about 20 million [copies of] extremely obscure films downloaded, and (we think)

about 20,000 derivative works have been made using our material, mostly independent, student, community work that wouldn't really have been made otherwise.

This was a life-changing experience for us, because we realized that the gift economy can work. It's possible to give things away and also get paid at the same time. In fact, our sales more than doubled (not completely because of giving things away, but there's a strong correlation). We also feel that we've increased the visibility of our collection and increased the fan culture that's grown up around it. . . . But more than that, we've entered into kind of a semi-collaborative relationship with hundreds of thousands of people.

Jan Krawitz, *filmmaker* (*Little People, Drive-In Blues*), *professor, and director of Stanford University's MFA Program in Documentary Film and Video*: . . . Today I've chosen to speak to the issue of archival footage from the perspective of a documentary filmmaker who has film material to license, as presumably we all do. . . . What business and legal acumen do we need to properly protect our archival assets and/or share them freely through the Internet and other means? . . . [W]hat about a scenario in which footage is appropriated from an independent documentary film, like ours, and used without permission or attribution, in something other than a fair use context? What recourse do we, as documentary filmmakers, have when broadcasters and other deep-pocket entities use our work without a licensing agreement or an *a priori* negotiated payment? In two situations, footage from my films was used by broadcasters in direct violation of the copyright law. . . .

Documentary filmmakers may feel thwarted by the Copyright [Term] Extension Act [a 1998 law that added two decades to the copyright period] and the onerous fees associated with licensing archival material. But when the shoe is on the other foot, and outside parties want to license our images, we stand to benefit.

We are currently producing films in a Wild West arena of media dissemination. The proliferation of distribution channels, including the Internet and cell phones, coupled with the ease of duplication afforded by digital technology, will make it

increasingly difficult to retain control of our footage. We need to remain responsible about using the images of others and licensing them when appropriate. In turn, we should expect the same consideration as the proprietors of archival footage.

Rick Prelinger: Some people in the Open Content movement say, “Don’t ask permission, ask forgiveness.” . . . Permission-based media is where every little piece of content that you have in your work, every creative element, every piece of footage, every piece of music has a license, or [the user conceives] an opinion letter and a fair-use rationale.

Forgiveness-based media is where you put in what you want and then you deal with the consequences. Forgiveness-based media has far outpaced the older media because most people don’t ask permission, and most media have a very low profile. . . . There’s a fairly well-informed estimate that there are 77 million videos just on YouTube. . . .

Of the stuff that’s original creative activity, a tremendous amount of it uses copyrighted music, copyrighted images, trademarked content, copyrighted buildings, dance steps that belong to somebody else. In other words, it has no legal standing, but in terms of the total amount of production, that kind of production is beginning to outpace legal production. Now, it’s low-level and it’s not mainstream, but the point is that there are now mainstream outlets for it. . . . I think we have a new generation of especially younger media authors arising who have no sense that intellectual property laws exist, or that content is property and that they should really even deal with that.

Anthony Falzone: And I think a big part of the reason people are ignoring the system is because it’s so crazy. If you create a system that’s workable and practical and reasonable, people will use it. I think people in general want to do things the right way. They would rather license it. They would

rather do it on the up and up. But when it just gets so darn ridiculously complicated, they’re going to say, “The heck with it,” and they’re going to do it their own way. ■

Adapted from Archival Storytelling, copyright 2008 by Sheila Curran Bernard and Kenn Rabin (Focal Press). Bernard is an Emmy- and Peabody Award-winning filmmaker and consultant. She holds a joint appointment at the University at Albany’s Documentary Studies Program and the New York State Writers Institute. Rabin is an internationally recognized expert on the use of archival materials in film storytelling. His credits include the dramatic features Milk and Good Night, and Good Luck and the PBS series Vietnam: A Television History and Eyes on the Prize, for which he was nominated for an Emmy.