

# **Copyright, Trademark, Digital Rights Management, and Info-commons: Intellectual Property Issues for the Social-Issue Documentary Filmmaker**

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March, 2003

## **Introduction**

The laws and practices dealing with intellectual property both inhibit and protect artists. Copyright laws and other intellectual property protections shield the artist from having her work appropriated for uses, either commercial or otherwise, without compensation and acknowledgement. IP also inhibits artists by limiting access to materials, also protected by copyright law, which could be used in the creation of new work.

Social-issue documentary makers, too, are subject to these same protections and limitations in the creation of their works. Documentarians have often relied on the umbrella protection of journalists whose reports are protected by “fair use” exceptions to copyright laws. The public’s right to know has often trumped the copyright holder’s legal right to compensation. However, fair use does not cover every situation and legal action challenging a documentary maker’s claim to fair use, even though eventually upheld, can often cripple a producer’s ability to distribute the work. In addition, the conglomeration of media outlets under corporate ownership have increased the legal threat to independent makers who lack the resources, including legal staff, even to fight a copyright infringement challenge.

## **The Costs of Using Copyright Protected Material**

Most documentary makers, as artists themselves, recognize the need to credit the creators of original works of art, but can often not afford to pay rates the rates required either by archives for footage or for the incidental inclusion of a trademarked building in a city’s skyline or of a painting hanging in some interview subject’s living room. For example, use of the Zapruder footage of the Kennedy assassination can cost up to \$15,000. Music for films also can be prohibitively expensive or altogether disallowed, such as in the case of Nick Broomfield’s high-profile exposé “Kurt and Courtney,” for which rights holder and Cobain widow Courtney Love denied Broomfield the use of Nirvana songs just before the film was scheduled to premiere at the Sundance Film Festival.

Adapting historical written materials for documentaries can also be prevented, if not rendered prohibitively expensive, as in the case of a Dutch filmmaker whose attempts to make a documentary based on Anne Frank’s diaries were, temporarily at least, thwarted by the copyright holder, Anne Frank Funds.

Social-issue documentary makers are not often engaged in such high-profile work and usually are able to remain below the radar of legal action. However, keeping a low profile frequently means reaching a limited audience. Makers incorporating footage of copyright protected or trademark materials can be prevented from having any audience at all. In 2001, ITVS commissioned several independent filmmakers to create interstitials about 9/11 in an effort to balance the popular news media’s one-sided view of the attacks and their aftermath. Ellen Spiro created four such interstitials, one of which, “Dog Bless America,” was a humorous and critical look at the unquestioning patriotism that swelled just after the attacks. Because rights to the original song, “God Bless America,” were not cleared, Spiro’s piece was neither broadcast

nor streamed on the ITVS Web site. Although a copyright infringement challenge could have been aptly met with an argument for parody under fair use exceptions to copyright laws, the threat alone of such a challenge was enough to suppress the piece. Now, although ITVS aired Spiro's three other interstitials, "Dog Bless America" will likely never be seen.

Copyright also protects the filmmaker against misuse or misrepresentation of works. During the brouhaha over Marlon Riggs's documentary about African American homosexuals, "Tongues Untied," presidential candidate Pat Buchanan used portions of the documentary in television ads railing against government funding and public television broadcasts of such work. His use of the clips violated copyright laws and he was warned against using them.

### **Trademark Protection Becomes Censorship**

Copyright infringement can also be wielded as a tool of corporate censorship. A corporate interest, though not threatened financially by nonpayment of licensing fees, can invoke infringement and hinder investigations into its corporate practices, which affect public interest.

It may seem minor at first glance, but filmmaker Micha X. Peled's decision to obscure any reference to Wal-Mart in the publicity posters for his documentary "Store Wars: When Wal-Mart Comes to Town," has far-reaching implications for issues of censorship. To make the ITVS-funded documentary about what happens when public space becomes privatized, Peled negotiated with Wal-Mart to gain access to film in its stores and to interview employees, to use footage of founder Sam Walton and shareholders' meetings, and to use other types of corporate-owned footage. At no time in the negotiations was payment for use of any footage discussed. The negotiations centered on Wal-Mart's attempts to assert editorial control over the final documentary.

Peled and producers at ITVS were ultimately successful at getting the necessary footage and at acquiring the access needed while maintaining editorial control. Luckily for Peled, he had the support of ITVS and the imprimatur of PBS, on his side. Plus, the costs (including time spent) of meeting each challenge were not prohibitive. In the end, Peled was able to make the film he wanted. However, fear of lawsuits led to an increase in the cost of Errors and Omissions Insurance by about 40 percent.

As for the poster—an important marketing tool that could have capitalized on the Wal-Mart trademark to attract viewers to the broadcast—it originally included a photo of a Wal-Mart storefront in colors associated with Wal-Mart's own marketing campaigns. For fear of being sued for trademark violations, Peled requested changes to the poster to obscure the Wal-Mart storefront and opted for a different color scheme.

Peled explains the implications: "It's the threat of suits rather than actual action that causes costs to rise and leads to self-censorship. During the Vietnam War, protesters burned the flag; there's no copyright for flags. Now, to protest the actions of corporations, the most powerful entities today, what you are going to do, shred their logo on camera? That logo is copyright protected."

### **Broadcast Flags and Digital Rights Management**

The implications of digital rights management and the use of digital technologies to limit access to intellectual property have not yet been fully experienced by social-issue documentary makers. Broadcast flags, which are designed to prevent unlawful copying of works aired, have so far had little effect on such projects. Most social-issue doc makers enter a contract with PBS or other broadcasters knowing their films will have a life outside its television broadcast, often editing

one version for television and one for educational or even theatrical release. PBS, or even HBO, has the rights to broadcast for a limited time and are generally most interested in generating publicity for and limiting exposure to the work for the premiere only. Most filmmakers insert special clauses into their contracts thereby ensuring that their films can still be used for educational benefit.

Judith Helfand and Dan Gold's "Blue Vinyl," for instance, was picked by HBO, but the producers were careful that the Web site developed for the film and any outreach screenings planned for their documentary about the deleterious effects of vinyl and its manufacture would not be interfered with.

Some filmmakers, such as Arthur Dong who turned down \$250,000 from ITVS for "Family Fundamentals," prefer to remain completely independent unless he can maintain the right to self-distribute his own works. By maintaining complete control, he can use his projects as he sees fits, offering them for benefit screenings or even handing out free copies if he feels it will help him achieve his goals.

Broadcast flags and any encryption coding designed to prevent copying of social-issue docs can benefit the filmmaker by protecting her works from piracy. Most doc makers are trying to earn a living, too. However, the uninhibited copying of some works can be more important to some makers who, for what ever reason, can afford to be less interested in royalties lost and more interested in spreading the information or message in their documentaries. Ilisa Barbash and Lucien Taylor happily acknowledge that their documentary "In and Out of Africa" is being illegally copied throughout Africa. More people can see the film, which is more important to them than collecting payment for each copy made or collecting royalties for each screening. Such pirated tapes also can help build an interest in their work, facilitating distribution on a next project. In any case, documentarians prefer to have the decision left in their hands rather than in the hands of the broadcaster or Web-caster (as the reality of broadband approaches).

Threats to social-issue documentarians take more menacing forms. Attempts to restrict access to government information—the USA Patriot Act and the current debate over the Office of Management and Budget's ruling that the GPO now must be opened up to competition—as well as the ability provided by the Digital Millennium Copyright Act for intellectual property holders to take away fair use access to materials by writing restrictive codes into the software offer many challenges to the social-issue documentary maker—the effects of which may not be felt or assessed until some point in the future.

### **Copyright Commons**

An informal network of experimental and documentary filmmakers who share copyrighted materials and knowledge about dealing with copyrighted footage already exists. Also, filmmakers can sometimes save money by trading footage from their own projects in exchange for use of archival materials or other footage. Arthur Dong made own such trade for his film "Family Fundamentals": footage from one of his previous films in exchange for clips from Fox news broadcast.

The rise of formal "commons," such as the Stanford-based Creative Commons, although well intentioned, will have to meet a heavy burden of quantity and diversity of materials to benefit social-issue documentary filmmakers. Since its creation, Creative Commons has attracted some musicians, photographers, authors, and filmmakers to exchange copyrighted materials or to offer their works to the public domain. However, a large enough pool of resources has not yet been developed to benefit those requiring use of archival footage, access to copyrighted music, and

other materials necessary to social-issue documentarians. Indeed, most social-issue documentaries have other copyrighted materials embedded within them that cannot be made available for free exchange to another member of the commons.

It remains to be seen if commons licensing can become a major factor in loosening the restrictions on intellectual property uses. The recent Supreme Court ruling against the Eldred challenge to the Copyright Extension Act, by upholding the right of Congress to create such legislation, makes the urgency of commons licensing more apparent than ever.

### **The Subjects of Documentary Films: What Protects Their Intellectual Property Rights?**

Concern about the appropriation of cultures, stories, and knowledge in documentary films has been a concern since the silent era and continues to mark the current climate surrounding Intellectual Property Rights. Although few documentaries break even and still fewer make a profit, makers still feel the need to provide some sort of compensation to their subjects. This compensation can take the form of cash or gifts, given in ways and at times designed to have the least impact on the behavior of the subjects on camera. In their book, “Cross Cultural Filmmaking,” Ilisa Barbash and Lucien Taylor describe some filmmakers, including Sarah Elder and Leonard Kamerling of the Alaska Native Heritage Film Project, who go further by sharing copyright with the subjects of their documentaries.

Filmmaker Maja Tillman Salas, who produced a five-part video project for China’s Center for Biodiversity and Indigenous Knowledge, feels that the knowledge shared by her film subjects belongs to them. The filmmaker agreed to teach filmmaking to her subjects in exchange for sharing their knowledge about indigenous cultural practices, but she felt that wasn’t enough. Tillman Salas also shared filmmaking credit with all her subjects, whose knowledge of papermaking and the manufacture of cloth from hemp plants she considers to be their intellectual property. However, given the nature of her films, it is unlikely that any financial profit will ever have to be divided among them.