



Center for Social Media



May 31, 2006

Repurposing and Rights: A Non-Profit Summit

A Report by Patricia Aufderheide

Professor and Director, Center for Social Media

Leaders in nonprofit media organizations share problems about managing rights they own or acquire to audio-visual material. These rights problems are the largest obstacle to providing access to their materials on new digital platforms. In this meeting, leaders in public broadcasting, archiving, libraries and new media shared their problems with managing rights, and proposed next-steps recommendations in the following areas: rights management for users; third party rights; rights acquisition; and digital rights management.

The meeting, held on May 22, 2006 at American University, was convened by the Center for Social Media, in the School of Communication at American University, and the Program on Intellectual Property and the Public Interest in the Washington College of Law at American University. Professors Pat Aufderheide and Peter Jaszi led the meeting. The meeting was funded by the Ford Foundation.

THE PROBLEM

Many nonprofits in the cultural sector—public radio and TV entities, museums, and libraries among others--have over the years produced, commissioned, curated or otherwise acquired their own films, programs, exhibit videos, archives and other material. Nonprofit cultural organizations typically have a goal of broad dissemination of and wide access to materials. It is now possible to present material in a wide variety of formats, on a wide variety of platforms—each presently with its own micro-rights environment. As opportunities have grown, so have the challenges in negotiating rights issues around them.

RIGHTS MANAGEMENT FOR USER ACCESS

The group shared a common goal of making material easily accessible for end-users. Some, particularly public television executives, were concerned about the prospect of user repurposing. They cited their obligations to the subjects portrayed in the works, and expressed commercial, ethical and moral concerns about the possibility of making video of those subjects available for unauthorized re-use. “We’re very uncomfortable about this aspect,” said one public television executive. Some of the public television executives might prefer creating a hierarchy of uses (for instance, home/personal, classroom, commercial).

The group also noted that publicly-released research on user preferences is either scanty or not well-enough known. Public television entities have done extensive research, but not yet released findings to the general public. Some believed user expectations vary dramatically from rights holders’. Users believe, said one participant, that the ease of access connotes with the right to use the material in any way they see fit: “How do we avoid a war between owners and users?” Others believed that users have far too little knowledge of user rights under copyright.

Those who had holdings laden with rights complications—geographical, time and medium limitations, for instance, as well as union agreements—noted the enormous difficulties in releasing material on yet another platform. Those with public domain or wholly owned holdings, such as the Prelinger Archives and other participants in the Open Content Alliance, were able to release material on the Internet in the open. Some, such as Link TV, were willing to release material they wholly owned on the Internet in the open.

Many expressed frustration at the lack of a motivated, mobilized group that could take decisive action to make a radical break with legacy rights systems. Some expressed frustration as well at the lack of leadership in developing logical and elegant technical solutions for problems such as indexing and sorting. Legacy systems however continue fully in force, and are flouted at one’s peril.

Nonprofit leaders also noted the high cost of digitization and the lack of common indexing standards. Some were benefiting from Google Video’s appetite for material, and were able to pass along the costs of digitizing to Google. However, as Rick Prelinger noted, Google as a private enterprise has its own agenda and has no commitment to maintain its current relationships.

THIRD-PARTY RIGHTS

As already noted, third-party rights in existing material are an endemic problem in re-releasing material. User rights, including fair use, effectively relieve some of the pressure. However, participants noted, this has been a fear-ridden and “fact-free” zone in recent years, partly because of aggressive intimidation and pre-emptive misinformation by large copyright holders.

Several recent (or potential) initiatives may somewhat ease the problems:

Fair use asserted. Fair use, despite confusion and intimidation, continues to be a robust feature of copyright law, stoutly defended in the courts on the rare occasions in which lawsuits occur. Recent activities have reinforced its utility. These include the release of the Documentary Filmmakers' Statement of Best Practices in Fair Use (centerforsocialmedia.org/fairuse), which vastly reduces ambiguity and risk in application of fair use for that creator group. A recent lawsuit, *Bill Graham Archives v. Dorling Kindersley, Ltd.*, involving a book publisher who recontextualized copyrighted images without permission, was decided emphatically in favor of fair use.

Orphan works addressed. These are copyrighted works whose owner has gone missing. The Copyright Office, with broad public input, is developing a proposal for a remedy to the problem of orphan works, and legislation to deal with the issue just has been introduced in the House of Representatives. This remedy has the support of a broad range of stakeholders. The approach to remedies employed the orphan works proposal, including a cap on damages, might be usefully in situations where a cultural institution relied unsuccessfully on fair use.

Exemptions, compulsory licenses, and collective administration extended. Opportunities may also exist in the possibility of expanding or building upon current successful practices in managing third-party rights obligations. For instance, one could extend existing exemptions, such as those for charitable purposes, libraries and educational venues. One could learn from compulsory licensing both in the U.S. and internationally, and from the collective administration of rights by organizations such as ASCAP and BMI. To date, however, it has been difficult to get agreements for the use of music on new platforms such as podcasting. And collective administration of image rights is virtually non-existent. The group discussed whether, if statutory exemptions and compulsory licenses for public broadcasters are extent, it would be practical to ask an all-rights-all-media blanket permission.

The issue of exemptions also comes up in what is, strictly speaking, a non-copyright context -- that of the so-called "broadcast flag" model that appears to be making headway among legislators and regulators. The group had several opinions regarding the desirability of pushing to exempt educational or newsworthy programming from the broadcast flag. In particular, some participants wondered whether that might leave educational broadcasters vulnerable to unfair copying.

Asking forgiveness instead of permission. Currently some online video aggregators such as Open Media Network are simply posting material that creators claim is rights-cleared, and taking it down—or even letting someone else take it down themselves—upon complaint. While this permits content to surface without much fuss, it also allows it to disappear without a fuss as well. The utility of this model remains untested on a larger scale.

GOING FORWARD: RIGHTS ACQUISITION MODELS

How do nonprofit organizations structure agreements with producers, in order to ease public access to new material and ensure long-term uses with as-yet-unimagined new platforms? Public broadcasters need long-term and flexible contracts in order to take advantage of new platforms, but producers fear getting locked into arrangements that hurt their chance of making money in the long run, or at the “back end.” Libraries often are given materials under limited conditions of use.

Automate. Automated intake systems that permit producers to grant wide-ranging rights have worked well for PRX, which offers independent radio programs to stations. Producers are highly motivated to get their work out widely, and therefore regularly opt for the most expansive rights.

Communicate. Better communication between nonprofits and producers is necessary, said some public television executives, as is shared information about the emerging marketplace. Inflated expectations of new media platforms have poisoned some discussions. The Center for Social Media study, *The New Deal*, explores this issue.

Experiment. Experimental contracts are working, and could be more widely shared. For instance, NPR’s producers’ contract gives NPR a nonexclusive, all-rights-all-media for all time right, with first airing through NPR. This allows NPR flexibility while allowing producers a chance to independently exploit their work.

MANAGING RIGHTS DIGITALLY

The discussion of digital rights management divided into two areas: coercive DRM and enabling DRM.

Public media DRM? Current DRM models have been primarily designed for and promoted by commercial interests. Its values include a bias toward owner control, one-way communication, and a narrow construction of use. Public media values for DRM articulated by Prof. Dierdre Mulligan, and widely shared in the group, included: Non-restrictive, conducive to making associations, friendly to user rights, facilitating re-use, facilitating the seeking of permissions, low transaction costs, permanent forward accessibility, respecting privacy. In some cases, DRM even could provide another way for owners to offer to put their material into the public domain.

Better DRM? Prof. Grace Agnew noted that today’s DRM is unnecessarily controlling and restrictive, inhibiting not only users today but new uses of tomorrow. If DRM were properly designed, it could instead serve as an enabler of a multitude of new uses, by allowing identification of the object, owner, the current rights situation (and provide the ability to revisit the rights arrangement), and ensure privacy of the user. Coercive DRM should be at the highest level as an exception, and conform to a three step test: Is it an exceptional case? Is it necessary? Is it as limited as possible? Coercive DRM should not be built into the core of material as if its conditions were or should be timeless.

De-facto registries. The group noted the need for better information retrieval generally of rights information, especially with the abolishing in 1978 of many of the incentives to participate in the Library of Congress’ national registry of copyrighted materials. DRM could assist in this need as well, if embedded identifiers were easily retrievable and relative uniform in content. The problem with any database information, however, is the quality of input. In the case of public broadcasting programs, often information is provided by producers, who are today the least invested in properly labeling their content.

Some in the group also hope that DRM makes possible revenue models, such as pay-per sales or subscriptions, which can substitute for declining models such as taxpayer support and member contributions. Others reject DRM because of user expectation; users expect nonprofit material to be easily accessible. Still others believe that DRM-free material will create new productions and business models.

LESSONS

Experimentation is good, and the results of experiments need to be better known. NPR has been able to get experimental licenses for its podcasts, for example. The “sandbox” approach used by WGBH—developing zones for media that can be released digitally and often in the open—is another example of experimenting.

Terminology in new media rights is not standardized yet, and provides many opportunities for confusion.

Ethical issues often become entangled with the law and rights issues. How much is ok to borrow? When can a subject’s remarks or likeness be repurposed? Legal approaches may not be the most effective on ethical concerns.

RECOMMENDATIONS

The group developed a set of proposals for interim action in the following areas:

RESEARCH/KNOWLEDGE BUILDING

Research, and publicity around existing research, on consumer preferences, both on current habits and on expectations

A simple text, a “*Copyright and Clearance for Dummies,*” pitched at the emerging creators in participatory media

Practice-grounded economic data that can be used to develop economic models demonstrating the costs to innovation of today’s IP regimes (including: data on costs of obtaining clearances, cost of managing rights, of tracking down copyright holders and of re-clearing for each new platform)

Practice-grounded data documenting emerging models, e.g. a survey of the kinds of materials available through Creative Commons; analysis of Prelinger Archives and Open Media Alliance; analysis of Vanderbilt TV Archives post-Google indexing

Data to counter the “fear-based, fact-free” atmosphere around fair use (e.g. a review of legal cases and their costs)

Media education that puts an emphasis on balance in copyright and users’ rights

Education on users’ rights aimed at university counsels and other legal gatekeepers

Town meetings on openness in content while respecting rights of producers

A legislative summit, e g., on expanding compulsory licensing

Nonprofit information-sharing (libraries, museums, historical societies, public broadcasting) to promote common goals about

- Economic experiments

- Content experiments

- Experimental legal contracts

BUILDING OF STANDARDS/BEST PRACTICES

Extending the best practices model to more user and creator groups

Developing ethical standards statements

Developing standards for DRM uses appropriate to public media communities, perhaps through library bodies

Standardizing new media terms, perhaps through a glossary synthesizing the current terminologies of leading practitioners

Work with OCLC to provide a database for broadcast media

MARKET PRACTICES

New approaches to licensing, e.g.

- ACSIL-based collective licensing scheme for archival material

- DRM-enabled point-to-point licenses

Develop risk management software

- Develop substitutes or voluntary registries for official copyright registration, perhaps a cooperative; or a trusted nonprofit model, controlled by creators not distributors; or take advantage of existing projects

Develop insurance fund to protect people on fair use, or work with insurers to develop an instrument accommodating fair use and other “risky” practices

Support already-existing digital-distribution consortium in public broadcasting (Open Media Network)

LEGISLATION/POLICY/POLITICS

Extend compulsory licensing to new media

Support orphan works remedies

Apply orphan works limitations to fair use, e.g. limit remedies against cultural institutions invoking fair use in good faith.

Push for consumer protection from coercive DRM and privacy invasion

Find and be clients for legal clinics’ amicus briefs, especially around fair use

Insure metadata standards are open and governed democratically

Create tax incentives for donating rights

###

For copies of the report, go to centerforsocialmedia.org or to futureofpublicmedia.wikispaces.com. For comments and questions, please write socialmedia@american.ed

ATTENDEES

Ruta Abolins, Director

Walter J. Brown Media Archives & Peabody Awards Collection
University of Georgia

Barbara Abrash, Director

Public Programs, Center for Media, History and Culture, New York University

Grace Agnew, Associate University Librarian for Digital Library Systems

Rutgers, The State University of New Jersey

Pat Aufderheide, Professor and Director

Center for Social Media, School of Communication
American University

Orlando Bagwell, Program Officer

Ford Foundation

Jonathan Band, Counsel

Library Copyright Alliance

Andrew Cotlar, Associate General Counsel

APTS

Vera L. Davis, Director

Black Metropolis Research Consortium

Jessica Duda, Associate Director

Center for Social Media, School of Communication at American University

Jay Fialkov, Deputy General Counsel

WGBH

Jeanne Fink

National Geographic Society

Paul Gherman, University Librarian

Vanderbilt University

Tamara Gould, Director of Distribution

ITVS

Paul Greco, VP & Deputy General Counsel

PBS

Dennis Haarsager, General Manager
KWSU

Wendy Hanamura, Station Manager
Link TV
Link Media

Peter Jaszi, Professor
American University, Washington College of Law

Sue Kantrowitz, General Counsel
WGBH

Denise Leary, Deputy General Counsel for Programming and Senior Legal Counsel
NPR

Jack Lerner, Samuelson Clinic
University of California Berkeley

Bill McGeeveran, Resident Research Fellow
Berkman Center

Deirdre Mulligan, Professor
University of California, Berkeley - Boalt Hall

Rick Prelinger
Prelinger Archives, Open Content Alliance

Andy Russell, Senior Vice President for Media Strategies
CPB

Joshua Sarnoff, Assistant Director
Glushko-Samuelson Intellectual Property Law Clinic
American University, Washington College of Law

Jake Shapiro, Executive Director
PRX

Judith Thomas, Director
Robertson Media Center
University of Virginia, Robertson Media Center

Jeff Ubois, Staff Research Associate

School of Information Management and Systems
University of California, Berkeley

Frederick Weingarten, Director
Office for Information Technology Policy
American Library Association