

12-1-2009

Untold Stories in South Africa: Creative Consequences of the Rights-Clearing Culture for Documentary Filmmakers

Peter Jaszi

American University Washington College of Law, pjaszi@wcl.american.edu

Sean Flynn

American University Washington College of Law, sflynn@wcl.american.edu

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/research>

 Part of the [Intellectual Property Commons](#)

Recommended Citation

Jaszi, Peter and Sean Fiil-Flynn. Untold Stories in South Africa: Creative Consequences of the Rights-Clearing Culture for Documentary Filmmakers. PIJIP Research Paper no. 20. December 2009.

This Article is brought to you for free and open access by the Program on Information Justice and Intellectual Property at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in PIJIP Research Paper Series by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.



Program on Information Justice
and Intellectual Property



EO/AA University and Employer

American University
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8181

www.wcl.american.edu/pijip/

UNTOLD STORIES IN SOUTH AFRICA:

Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers

Sean Flynn and Peter Jaszi

A project of:

Black Filmmakers Network & Documentary Filmmakers'
Association, South Africa

Program on Information Justice and Intellectual Property &
Center for Social Media, American University

Funded by the Ford Foundation

PROJECT PARTICIPANTS

Principal Investigators:	Sean Flynn and Peter Jaszi Program on Information Justice and Intellectual Property, American University Washington College of Law
Interview Coordinators:	Ben Cashdan, Marc Schwinges, Siphon Singiswa, Natalie Stange
Interviewers:	Ben Cashdan, Siphon Singiswa, Marc Schwinges, Natalie Stange, Tula Diamini, Meril Rasmussen, Pascal Schmitz, Miki Redelinghuys
Project Advisor:	Patricia Aufderheide
Legal Advisors (SA):	Andrew Rens, Tobias Schonwetter
Video Production:	Tim Wege & Miki Redelinghuys
Research & Editing:	Matilda Bilstein, Jessica Cameron, Colleen O'Boyle, Hauwa Otori, Mike Palmedo, Ali Sternburg, Marynelle Wilson
Filmmaker Interviews:	Johann Abrahams, Gail Berman, Bronwyn Berry, Lucilla Blankenburg, Neil Brandt, Dorothy Brislin, Seipati Bulane-Hopa, Ben Cashdan, Indra Delanerolle, Rehad Desai, Tula Dlamini, Wynand Dreyer, Don Edkins, Sharon Farr, David Forbes, Harriet Gavshon, Odette Geldenhuys, Dan Jawitz, Michael Lee, Alethea Lindsay, Jane Lipman, Steven Markovitz, Tendeka Matatu, Vincent Moloi, Sechaba Morejele, Mthuthuzeli, Nicki Newman, Mandla Ngcongwane, Roli Nikiwe, Dingi Ntuli, Magantrie Pillay, Miki Redelinghuys, Pascal Schmitz, Marc Schwinges, Khalid Shamis, Siphon Singiswa, Guy Spiller, Helena Spring, Natalie Stange, Robbie Thorpe, Francois Verster
Funder:	Ford Foundation

CONTENTS

Executive Summary **1**

Research Design	1
Findings	1
Recommendations	2

Study Concept **3**

Research Design **5**

Background Research and Analysis of South African Law Partnerships with South African Filmmaker Organizations	5
Survey of Filmmaker Practices and Perceptions	6
Filmmaker Workshop & Consultation Meeting	8

Legal Review **10**

Limitations and Exceptions that Permit Use of Copyrighted Materials Without License	10
Limitations and Exceptions from Other Laws	14

Survey of Perceptions and Practices of Filmmakers **16**

Clearance Culture	16
Role of Gatekeepers	18

Copyright and Clearance	19
Costs and Complications of Clearance	21
Red Tape and Viewpoint Discrimination	22
Restrictions on Film Content and Distribution	22
Users' Rights in the Dark	23
Shared Views on a Fairer System	25
Need for Alternative Archival Access	26
Recommendations	27
<hr/>	
Short Term Goals	27
Longer Term Goals	29
Appendix: Excerpts From Responses To Questions	30
<hr/>	
Information About Respondents	30
Copyright Experience	30
Use of Archives	46
Asserting Your Own Copyright	49
Copyright Knowledge	56

EXECUTIVE SUMMARY

This report summarizes research on the perceptions of South African documentary filmmakers about copyright clearance requirements and the effect of such requirements on their work. This work was performed in the context of a larger project exploring how lessons learned from “best practices” projects with documentary filmmakers in the U.S. can help their counterparts in other countries identify and overcome barriers to effective filmmaking posed by escalating copyright clearance requirements.

Copies of this report and other materials created for this project are available at <http://www.wcl.american.edu/pijip/go/internationalfilm>.

Research Design

The project conducted a legal review of South African and other commonwealth laws. This review included commissioned scholarly reports on copyright law and documentary filmmaking in commonwealth countries from the developed and developing world. Using this research as background and context, the principal investigators undertook a detailed examination of the users' rights available to filmmakers in the South African Copyright Act.

The project also included research into South African documentary filmmaker perceptions and practices with regard to use of copyrighted material in their films. This work included a survey of 41 South African filmmakers conducted by members of the Documentary Filmmakers' Association (“DFA”) and the Black Filmmakers' Network (“BFN”).

Following these two research exercises, a two-day workshop was held with filmmakers at which the research findings were presented and discussed. The workshop included segments training filmmakers on their users' rights under existing law as well as opportunities to change the law through an ongoing reform process.

Findings

South Africa's copyright law contains important limitations and exceptions that permit for the fair quotation of copyrighted work without license from the right holder, but these aspects of South Africa's law are not well known among filmmakers.

Gatekeepers, such as broadcasters, researchers and international distributors, often enforce rigid rights clearance requirements which are producing a “clearance culture” in which filmmakers believe that they must obtain clearance for every use of copyrighted material in their films.

The clearance process is complex, time-consuming, expensive and frequently frustrating. These hardships lead to many instances when filmmakers alter their work to avoid the use of copyrighted material or limit the circulation of their films to avoid clearance requirements.

When South African filmmakers exercise their rights to use copyrighted material without license, they most frequently do so quietly, reluctantly and under an assumption that their actions are illegal.

Despite the low level of copyright literacy, filmmakers share many common conceptions about what are fair and just uses of copyrighted material in their films. Thus, collective action to improve their position under current law is a real possibility.

In addition, South Africa's copyright law is undergoing a process of revision. There are important limitations and flexibilities in other countries' laws that South Africa does not utilize. Filmmakers in South Africa have an opportunity to study the best models of copyright limitations and exceptions from other countries and advocate for improving the legal enabling environment for documentary film in South Africa.

Recommendations

Following the two-day workshop, DFA and BFN resolved to work with American University Washington College of Law and the Center for Social Media to:

- ✘ Develop a consensus “best practices” document explicating copyright users' rights in documentary filmmaking.
- ✘ Develop standards for the ethical use of historical documents and footage; art, music and stories that are traditional to indigenous groups; and the personal narratives of individuals.
- ✘ Develop a legal advice network for documentary filmmakers on user rights in copyright.

- ✘ Develop a list of pressing copyright policy proposals for pending revision of the South African copyright law.

In the longer term, over the next two to four years as the South African copyright law is being revised, the organizations resolved to:

- ✘ Articulate additional law reform goals, such as positions on copyright term extension.
- ✘ Research law reform strategies, including research into constitutional free-expression grounds for user rights in copyright.
- ✘ Recommend ways in which documentary filmmakers can create or contribute to projects in South Africa to audit archival and documentary footage (publicly and privately held), and to create “open” archives through which material would be more widely available to filmmakers and others.
- ✘ Develop model transfer agreements for footage from filmmakers' personal archives to open archive projects.
- ✘ Investigate the utility of international best practices statements that attempt to harmonize users' rights across borders.

STUDY CONCEPT

Copyright laws and free expression principles are at once interdependent and in potential conflict. Copyright laws help promote free expression by providing incentives for the production of new creative works through an exclusive right of reproduction. But taken to the extreme, exclusive rights could inhibit the production of new expressive works that depend on the incorporation and transformation of prior expression. Thus, copyright laws normally contain what the U.S. Supreme Court has referred to as “built-in [free expression] accommodations” in the form of limitations and exceptions to the original creator's exclusive rights.¹ These limitations and exceptions, which allow quotation of copyrighted material without permission of the copyright owner in certain circumstances, may be broadly referred to as “users' rights.”

¹ *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (referring to the fair use doctrine's “built-in First Amendment accommodations”).

It is not enough that users' rights exist on the books. To accomplish the balance between copyright owners and users that free expression requires, users of copyrighted material must know about their rights and have the practical means to take advantage of them. In recent years, however, there has been a global trend toward rigorous enforcement of copyright's exclusivity by owners that often neglect users' rights, and thereby harm free expression principles. The Fair Use and Public Media Project of American University's Program on Information Justice and Intellectual Property (PIJIP) and Center for Social Media (CSM) seeks to restore balance to copyright systems by working with documentary filmmakers and other media makers to understand, utilize and advocate for the protection and expansion of users' rights in copyright law.

In 2004, PIJIP and CSM published their first Untold Stories report. That report examined the experiences of documentary filmmakers in the U.S. with copyright clearance demands and the effect of those demands on the production of this important form of public media. The report summarized filmmakers' perceptions that rigid rights clearance demands were increasing, especially by "gatekeepers" such as distributors, broadcasters and insurers, and that such demands were restricting the utility of "fair use" rights that protect free expression. Following the report, filmmakers worked with PIJIP and CSM to craft educational and policy tools to promote understanding and utilization of fair use rights, including a widely circulated and influential Documentary Filmmakers' Statement of Best Practices in Fair Use.

One of the aims of the Statement was to affect the way users' rights were interpreted on the ground and in the courts by establishing broadly shared standards for what unlicensed uses of copyrighted material are considered "fair" in the industry. Because courts in the U.S. look to industry practice to determine the fairness and legality of a given use of copyrighted material, the Statement served as a way to affect the law through a focus on practice.

The Statement and other efforts by filmmakers to articulate and promote their rights as users proved extremely effective. The efforts led to changes by major distributors and broadcasters to permit films with fair use material to be shown to millions and to all four of the national errors and omissions insurers to begin issuing fair use coverage on a routine basis. Films were made in reliance on the Statement that would not have been possible to imagine producing before the document was released.

This report arises out of an effort of PIJIP's Fair Use and Public Media Project to explore the extent to which lessons and strategies from

the U.S. Best Practices project could be of use to filmmakers in the Commonwealth of Nations, composed primarily of the United Kingdom and its former colonies. Broadly speaking, the national copyright laws of the world can be divided into two groups: those influenced primarily by continental European legal thought and those that reflect the model of British legislation. Although copyright doctrine in the U.S. has diverged significantly from that of the United Kingdom and the other countries that make up the Commonwealth, U.S. law does have many structural and philosophical connections with the laws of other Commonwealth states. It was therefore hoped that lessons from the U.S. experience might be relevant in this new context.

South Africa was selected as the first site of study for this project because the country has a fairly typical Commonwealth copyright law heavily influenced by British legal tradition, is a thought leader among emerging nations, and is home to a large and active community of documentary filmmakers. The country is also embarking on a project to study and reform its copyright law, thus providing opportunities for filmmakers to investigate opportunities to change, as well as use, the existing law.

RESEARCH DESIGN

Background Research and Analysis of South African Law

At the initiation of the project-planning period, expert reports were commissioned from leading academics who were asked to summarize the current state and potential future development of users' rights in their countries, especially in documentary films. The reports were submitted by Emily Hudson (Australia), Jeremy de Beer (Canada), Lawrence Liang (India), Ayodele Kusamotu (Nigeria), Tobias Schonwetter (South Africa) and Jeroline Akubu (Uganda). Each of the reports is available at <http://wcl.american.edu/pijip/go/internationalfilm>.

Using the information gathered on comparative copyright laws from the expert reports, combined with their own knowledge of the topic, the principle investigators analyzed the South African Copyright Act to determine what appear to be the most helpful users' rights for documentary filmmakers. The results of that analysis are summarized in the section on the "Legal Review," below.

Partnerships with South African Filmmaker Organizations

Using contacts developed through its work on other projects in South Africa and with filmmakers around the world, PIJIP identified two filmmaker organizations that predominantly represent documentary filmmakers – the Documentary Filmmakers' Association (“DFA”) and the Black Filmmakers' Network (“BFN”). DFA was established “to create a unified voice for documentary filmmakers” and “address the specific needs of documentary filmmakers and network with related industry bodies.”² BFN was formed to represent the particular interests of black filmmakers in South Africa. The majority of BFN's members are documentary filmmakers.

Both DFA and BFN have been active in recent policy debates regarding the ownership interests of filmmakers in films commissioned by the nation's public broadcaster. Currently, the South African Broadcasting Corporation (“SABC”) claims all ownership in all materials (including footage not used) created in furtherance of a film commissioned for broadcast. The South African Copyright Act gives broadcasters this right as a default, and filmmakers have been advocating for, among other positions, a change in the default rule of law.³

At the initiation of this project, DFA and BFN leadership knew of each other's advocacy work, particularly on the issue of creator rights in films commissioned by SABC, but had not worked closely together. To ensure that PIJIP's project would reach the broadest possible spectrum of filmmakers, PIJIP sought to establish relationships with both organizations and engage them in a collaborative project.

Survey of Filmmaker Practices and Perceptions

PIJIP worked with a South African documentary filmmaker consultant, Ben Cashdan, to design a survey of filmmaker

² <http://www.docfilmsa.com/about.html>.

³ Other filmmaking organizations in South Africa represent different or broader segments of the community and are also engaged in the ownership debate. At the time of this project, for example, DFA (but not BFN) was a member of the South African Screen Federation, an umbrella organization across the TV/film/fiction/documentary industries with a mission of “representing the interest of most film and television industry organisations as a collective federation.” The Independent Producers' Organisation of South Africa (IPO) represents the interests of all independent producers, including documentary filmmakers as well as fiction producers. But most of IPO's members are in fiction rather than documentary production.

perceptions and practices with regard to the use of copyrighted material in their films. The survey was designed to elicit both qualitative and quantitative information, with each survey competed in an interview context in which follow-up questions could be asked.⁴

In a test run with a small group of interviewees, several were highly reluctant to share their experiences using unlicensed content in films for fear that they could be sanctioned for such conduct by content owners or the SABC. Accordingly, interviewees were told that they could maintain the confidentiality of their responses and for this publication all identifying information for specific responses to questions has been removed.

All interviews were conducted by South African filmmakers who were members of the DFA or BFN. In total, over 40 filmmakers from Cape Town and Johannesburg (South Africa's two centers of documentary production) were interviewed between October 2008 and February 2009.

All of the interviewees are full-time filmmakers who earn their livelihood in the industry, primarily from the production of documentary films. These filmmakers have a wealth of experience in the industry and, on average, more than ten documentaries to their credit. The budgets for these films vary from less than R 100,000 to more than R 1 million, with almost as many films being made on budgets of R 0-300,000 as films made with budgets of R 1 million or more.

The respondents reflected the diversity of South Africa's population. They included black and white respondents from the full range of language groupings in South Africa (English, Afrikaans, Indian and Nguni and Sotho based African languages). About half the respondents were women. Some had also been engaged in various degrees of opposition to apartheid, and some had working lives that began under the democratic constitutional dispensation.

The subject matter of their films is no less varied, including films on architecture, gay rights, politics in Zimbabwe, the environment, modernization and development, HIV/AIDS, the

⁴ The survey instrument is available at www.vukani.net/survey/copyright_survey.php, and was based on similar questionnaires used for interviews of filmmakers in Canada and the U.S. See Kirwan Cox, *Censorship by Copyright: Report of the DOC Copyright Survey* (November 15, 2005); Patricia Aufderheide and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (Nov. 2004), available at <http://www.centerforsocialmedia.org/rock/index.htm>.

South African judiciary and personal memoirs. These films have been distributed nationally and internationally and include prestigious award winners.⁵

Filmmaker Workshop & Consultation Meeting

After all the surveys were completed and the results initially analyzed, the partner organizations sponsored a two-day workshop and consultation with the interviewees and other filmmakers.⁶ Over 40 documentary filmmakers, about half of whom had taken the survey in the first phase of the project, attended the meeting March 18-19, 2009, in Cape Town. The purposes of the meeting included presenting the survey results for discussion, providing a chance for filmmakers to learn about South African and foreign copyright laws, and soliciting their input on the project's draft findings and recommendations.

The first day of the meeting was primarily devoted to educating filmmakers about current users' rights under South African and foreign copyright laws. Presentations included sections on Constitutional Free Expression Rights and Copyright, Copyright Limits and Exceptions for Documentary Film, Comparative Perspectives on Copyright Users' Rights, and Mobilizations to Change South African Copyright Law.

Participants learned about a five-year study process of the copyright act recently announced by the government. Against the background of comparative analysis of flexibilities in the copyright laws of other countries, the discussion highlighted that documentary filmmakers are key stakeholders in the copyright reform process. As noted in the legal analysis below, there are many ways in which the current users' rights in the law would benefit from adoption of norms that exist in other countries. But the participation of filmmakers may need to be defensive as well as offensive. There are parts of South African law that are far more liberal than international norms, an aspect that filmmakers may want to maintain.

The second day of the meeting was devoted to deliberations about how filmmakers can potentially take action to expand the utility of existing and potential future copyright flexibilities

- 5 Notably, however, a number of filmmakers indicated that problems of copyright clearance were a substantial obstacle to achieving broader foreign distribution for their work.
- 6 Prior to the workshop, PIJIP hosted a leadership and planning retreat with representatives from BFN and DFA. This retreat was the first opportunity for all three organizations to work together face to face and provided an important opportunity to plan the workshop together and build trust and a working relationship between the organizations.

for their work. The participants discussed the survey results and presented the draft findings and recommendations for discussion and input. There was also a panel with presentations consisting of projects that are seeking to create open archives of audio and visual material in South Africa. This panel on Future Visions for Historical Archives was attended by representatives of the Visual History Archive at the University of Cape Town, South Africa History Archives (SAHA) and iHeritage.

One key issue raised during the open archives discussion was how the intellectual property rights in materials donated to open archive projects should be managed. Specifically, the group discussed whether material could be made available to archive projects using Creative Commons "Share Alike" or other licensing terms that would ensure downstream access to the material by others.

Another issue that arose at the workshop was the proprietary relationship of individuals in their personal stories (and records relating to them), and of communities in their traditional stories and other cultural productions. Participants discussed whether members of a community should have greater rights to access and use footage documenting the history of that community; whether the history of the anti-apartheid struggle should be more accessible to black filmmakers or to individuals who were participants in the struggle; what ethical obligations filmmakers (and others) have to attribute traditional cultural expressions; and how such concerns relate to the narrower legal question of whether a given use of copyrighted material is "fair." As discussed below, the partner organizations agreed to include research of these questions in later stages of the project.⁷

At the end of the meeting, the group deliberated over a set of recommendations that were later adopted by the partner organizations and are reflected in the recommendations section of this report.

⁷ One key copyright issue of concern to filmmakers was not selected for incorporation into this project. As noted above, filmmakers have been organizing for several years for reform of a section of the current copyright law that gives the default ownership of all copyrights in a commissioned production to the commissioning broadcaster. South African filmmakers are passionate about this issue and there were many requests to include it within the research scope of this project. In the final analysis, however, it was decided that incorporation of this issue would detract from this project's focus on users' rights.

LEGAL REVIEW

There is a key difference between the situation in other countries and that in the U.S., which long has been nearly alone in having a “fair use” doctrine in its national copyright law. Other national copyright laws provide for other kinds of users’ rights with regard to copyrighted material, but these rights are often seen as more limited in scope and less flexible in application than the U.S. standard.⁸

South Africa’s law follows the general Commonwealth model of providing for a series of specific limitations and exceptions to the general right of a copyright holder to exclude uses by others, supplemented by so-called “fair dealing” provisions. In important respects, users’ rights in South Africa’s law are broader in some respects than those provided for in some comparable national laws. In other ways, South Africa’s law appears to lack key flexibilities found elsewhere.

Limitations and Exceptions that Permit Use of Copyrighted Materials Without License

Fair Quotation

12(3) The copyright . . . shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

The broadest, most flexible and potentially most useful exception to copyrights for filmmakers may be found in the fair quotation provision of the Copyright Act. Although the application of section 12(3) was originally limited to quotation of a “literary or musical work,” later amendments to the Act added sections 16-18 permitting the fair quotation of cinematographic films, sound recordings and broadcasts. Thus, filmmakers are permitted under the section to quote nearly any form of copyrighted audio

⁸ For more on different national approaches, see Jaszi, “Public Interest Exceptions in Copyright: a Comparative and International Perspective.” Available at http://correctingcourse.columbia.edu/paper_jaszi.pdf.

or visual work provided the quotation is “compatible with fair practice,” the amount of material quoted does not “exceed the extent justified by the purpose” of the quotation, and the source of the quotation is mentioned.⁹

Potentially, much of what filmmakers commonly use copyrighted material for could fall within this exception. Importantly, and in distinction from the fair dealing exception (discussed below) or in the quotation exceptions of some other laws, there is no restriction relating to the purpose for which the quotation is made.¹⁰ Quotation is permitted for any purpose so long as the quotation itself meets the various elements of fairness.

One key feature of the provision is the duty to conform the quotation to “fair practice.” “Fair practice” is not defined in the Act, nor is there judicial authority interpreting the fairness concept in the South African copyright context.¹¹ One way to approach the issue, which would conform to practice under the fair use clause in the U.S., would be to assess fairness in reference to the accepted standards of practice in the relevant use community, e.g., among documentary filmmakers. Thus, a best practices statement by filmmakers could help shape the application of the clause.¹²

⁹ There do not appear to be any particular forms required for attribution. It apparently is assumed that a filmmaker could adequately meet the duty by mentioning the author of the quote in the credits at the end of the film.

¹⁰ Some quotation exceptions from other countries restrict its application to quoting for a short list of acceptable purposes, e.g., for scholarly work, noncommercial or education purposes, or for criticism or review.

¹¹ Some Fair Dealing jurisdictions articulate a statutory fairness test that resembles the U.S. fair use clause. For example, Uganda’s relatively modern law states that a permitted use is to be determined “fair” based on the following factors: (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes; (b) the nature of the protected work; (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and (d) the effect of use upon the potential market for or value of the protected work. Uganda Copyright Act (2006). This formulation is identical to the four-factor test for fair use in 17 U.S.C. § 107.

¹² This was the case in the U.S. where the *Filmmaker’s Statement of Best Practices* sought to enhance filmmakers’ ability to rely on users’ rights by providing “evidence of commonly held understandings in documentary practice and help[ing] to demonstrate the reasonableness of uses that fall within its principles.” Association of Independent Video and Filmmakers et al., *Documentary Filmmakers’ Statement of Best Practices in Fair Use 2* (Issued November 18, 2005) available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

Fair dealing

12.- (1) Copyright shall not be infringed by any fair dealing with a literary or musical work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.

Another important and potentially flexible users' right in South African law is the standard of "fair dealing." Under fair dealing, the unlicensed use of the copyrighted work must satisfy two criteria:

- ✘ First, the use must fall into one of several enumerated categories of permitted use;
- ✘ Second, the use must be "fair."

Unlike the fair quotation norm, the fair dealing standard applies only to a limited range of specified purposes.¹³ However, the "criticism or review" purpose is potentially quite broad. A very large percentage of the kinds of uses of copyrighted material mentioned by filmmakers in interviews and in the meeting could be interpreted as "criticism or review of the work that is being used, or of another work." Most filmmakers choose a particular piece of footage or music to quote in order to not only tell a story about the facts being portrayed in the work, but also to make a comment about the material or its relation to other works. When historical footage of an anti-apartheid demonstration is used,

¹³ Section 12(1) is extended to films and sound recordings by sections 16 and 17, but only for the purposes listed in (b) and (c), i.e. "criticism or review" or "reporting current events." The extension of the provision to broadcasts in section 18, however, applies the entire fair dealing clause, including for the purposes of "research or private study" in 12(1)(a).

for example, the clip not only tells the audience that the event happened, but may also be reviewing how the broadcast news of the time covered that event.

The second stage of the test is to determine whether the dealing with the work is "fair." As with the fair quotation exception, there is no statutory definition of fairness.

Incidental capture of 'artistic works'

15.- (1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

Many copyright laws provide exceptions to copyrights that permit material to be used when it is incidentally captured in the background of a film sequence. It is common, for example, to capture copyrighted music or television playing in the background of a live shoot. Indeed, as described below, such an exception is one of the most commonly identified by filmmakers as one they "know" and that is useful to their profession. However, the South Africa incidental use exception does not extend to the most frequently captured copyrighted content in films.

The incidental use right in South African law is limited to the capture of "an artistic work," which is narrowly defined to exclude music, film or broadcast footage, as well as literary texts. Specifically, the South African Copyright Act defines an artistic work as limited to:

- (a) paintings, sculptures, drawings, engravings and photographs;
- (b) works of architecture, being either buildings or models of buildings; or
- (c) [other] works of craftsmanship

Thus, the incidental use right would apply to permit the filming of building or sculpture in the background of a scene, but not the capture of music playing on a radio or a program playing on a television set. To use the latter material in a film under existing law in South Africa, the filmmaker would have to make use of another exception in the law.

Illustration for teaching

12(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

Section 12(4) provides for an exception for use of copyrighted work “by way of illustration . . . for teaching.” This exception seems relatively narrow. The primary purpose of the provision appears to be to allow teachers to use copyrighted material without license in their classroom or in ways otherwise linked to their teaching. It may be possible to interpret the exception to apply to use of copyrighted work in a film which is intended to be used primarily or exclusively for teaching. But it does not appear to give anything like a broad exception for all educational films.

Limitations and Exceptions from Other Laws

There are some significant user rights in the copyright laws of other countries that are not explicitly addressed in the South African law. At best, only partial equivalents of some of these exceptions could be found to exist by liberally interpreting some of South Africa’s broader exceptions, such as instances when a quotation is deemed “consistent with fair practice” under section 12(3), or is a fair dealing under section 12(1).

Incidental capture of video, music, TV and text

The exclusion of video, music and text from the incidental capture exemption is a key omission. Filmmakers commonly capture footage of music or television playing in the background of the scene, and many copyright laws exempt such capture from licensing requirements.¹⁴ As discussed above, there is currently no explicit exception for the capture of such work in the South African law.

¹⁴ *E.g.*, Canada’s Copyright Act, R.S.C. 1985, c. C-42 at s. 30.7:

It is not an infringement of copyright to incidentally and not deliberately

(a) include a work or other subject-matter in another work or other subject-matter; or

(b) do any act in relation to a work or other subject matter that is incidentally and not deliberately included in another work or other subject matter.

Parody

Some fair dealing laws, and the U.S. fair use doctrine as it has been interpreted in the courts, allow use of copyrighted material for the purpose of parody.¹⁵ The South African law does not contain this exception, although such use could be interpreted as an instance of “fair dealing” exception for “criticism.” In addition, the Constitutional Court’s ruling in *Laugh It Off*¹⁶ permitting a parody of a trademark indicates that there may be opportunity to recognize a constitutional basis for a parody exception in copyright and trademark cases.

Illustration

Some copyright laws provide for exceptions for the use of copyrighted material to illustrate a point or argument. Switzerland’s law, for example, provides an exception for the use of copyrighted material “if the quotation serves as an explanation, a reference or illustration.”¹⁷ South African law does not explicitly provide such an exemption, although such use of copyrighted material might be construed to be a fair quotation in section 12(3) or a fair dealing for criticism or review in section 12(1).

Transformative use

At the center of modern fair use doctrine in the U.S. is the question of whether the filmmaker (or other author) has transformed the use sufficiently from its original purpose so as to make it a new work.¹⁸ On this basis, for example, documentary filmmakers in the U.S. can claim fair use for the appropriate use of copyrighted material for illustration or in situations where footage is excerpted to depict a historical event or to provide context for a historical narrative.¹⁹

¹⁵ *E.g.*, Australia’s Copyright Act 1968 (Cth) at s. 41A:

A fair dealing with a literary, dramatic, musical, or artistic work, or with an adaptation of a literary, dramatic, or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

¹⁶ *Laugh It Off Promotions CC v. South African Breweries International (Finance) BV t/a Sabmark International and Another* (2006) (1) SA 144 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2004/76.html>.

¹⁷ Switzerland Federal Law on Copyright and Neighbouring Rights, SR 231.1 art. 25(1) (1992).

¹⁸ This sort of exception is present in Germany’s Law of Copyright and Neighbouring Rights (*Urheberrechtsgesetz*), 1965 at s. 24(1), which codifies the doctrine of “free utilization”: “An independent work created by the free use of the work of another person may be published and exploited without the consent of the author of the used work.”

¹⁹ On historical sequence as a fair use in the U.S., see American University Center for Social Media, *Documentary Filmmakers’ Statement of Best Practices in Fair Use 5* (Nov. 18, 2005), available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

In some commonwealth jurisdictions, there have been proposals to add a separate “transformative work” category to the list of permitted purposes in the statute.²⁰ This exception can be particularly beneficial to documentary filmmakers, who are commonly transforming copyrighted material into a different context and using the material for a different purpose than the original.

Orphan works

Some copyright laws have specific provisions for the use and reproduction of orphan works – works for which it is difficult or impossible to locate or contact the right holder, e.g., because the rights holder is not identified or not known, the author is not alive and it is not possible to determine who inherited the copyright, etc.²¹ Many of the interviewees identified instances where it was not possible to find or contact a rights holder for audio visual material and that would have benefited from an orphan works provision. South Africa does not have specific orphan works provisions, a point made in the recent Open Review of South Africa’s copyright law facilitated by the Shuttleworth Foundation.²²

SURVEY OF PERCEPTIONS AND PRACTICES OF FILMMAKERS

Clearance Culture

The first *Untold Stories* report concluded that filmmakers in the U.S. were operating within the confines of a “clearance culture” — a “shared set of expectations that all rights must always be cleared” which was “both imposed upon filmmakers and imposed by them

20 See *Gowers Review of Intellectual Property at 66-68* (November 2006), available at http://ec.europa.eu/internal_market/copyright/docs/links/gowers_report_en.pdf.

21 E.g., Canada’s Copyright Act, R.S.C. 1985, c. C-42 at s. 77(1):

Where, on application to the Board by a person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performer’s performance,
- (c) a published sound recording, or
- (d) a fixation of a communication signal

in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

22 Shuttleworth Foundation, *Open Review of the South African Copyright Act*, available at <http://www.shuttleworthfoundation.org/our-work/intellectual-property-rights/projects/open-review-sa-copyright-act> (last visited July 20, 2009).

on themselves and colleagues.” Our research finds a similar, and perhaps even more rigid and confining, clearance culture in operation in South Africa.

In the words of one filmmaker interviewed for this project, the clearance culture is produced by “a common law on the ground that everyone thinks is the law” requiring that every use of copyrighted material in a film be cleared.²³ When asked if there were any instances when South African law permitted the use of copyrighted material without clearing rights from the copyright owner, 68 percent of filmmakers stated that there were no such instances. Filmmakers explained their view that “there was no law” allowing unlicensed use of copyrighted material,²⁴ and explained that they were “not aware of any circumstances when you can use clips deliberately without permission.”²⁵ The general rule that operates in the mind of most filmmakers was that you must “always seek clearance for everything.”²⁶

Of those who claimed to know of exceptions, many were misinformed as to the actual doctrines. For example, many interviewees stated that they knew of an exception that permits the use of “location music”²⁷ or “something on a TV set”²⁸ in the background of a scene if they are “incidental”²⁹ to the scene, or “you capture [it] in ambience.”³⁰ But, as has been described above, the specific exception for the incidental capture of copyrighted works in a film is limited to “artistic works,” which do not include music or broadcast videos.

Other filmmakers claimed to know of exceptions for the “public interest,”³¹ for “the general benefit of the community,”³² “when it’s in the interest of the public to hear a story,”³³ or “for non-commercial purposes.”³⁴ Although some of these considerations may enter the calculation of whether a particular use in question is “fair,” there is no general public interest exception as such in the law.

23 Interview with subject [11].

24 Interview with subject [19].

25 Interview with subject [23].

26 Interview with subject [1].

27 Interview with subject [34].

28 Interview with subject [23].

29 Interviews with subjects [5], [17], [23], and [34].

30 Interview with subjects [5]; see also interview with subject [12] (explaining: “if there’s ambient sound on a radio or TV that forms part of the natural environment, I don’t feel I have to clear that”).

31 Interview with subject [8].

32 Interview with subject [9].

33 Interview with subject [25].

34 Interview with subject [9].

Role of Gatekeepers

Part of the rigid copyright clearance culture can be traced to a plethora of institutional “gatekeepers” that condition access to distribution channels on various degrees of proof of copyright clearance. These gatekeepers are often more practically powerful and persuasive than official institutional enforcement mechanisms because filmmakers must directly deal with gatekeepers to gain access to audiences and markets.

The national public broadcaster, the South African Broadcasting Corporation (SABC), is the most significant gatekeeper. SABC operates three of the four free over-the-air broadcasting channels that are available in most South African households. All free-to-air broadcasters must schedule minimum percentages of local content into their programming.³⁵ In addition, SABC is subject to a statutory charter, which requires SABC to contribute to the development of the local content industry.³⁶ Commissioning local documentaries for several programs that primarily feature such content (e.g., “Special Assignment”) is one of the primary ways SABC meets its local programming mandates.

Most of the filmmakers interviewed received a majority of their commissions from SABC, and many do virtually all of their work on SABC commissions.³⁷ SABC’s standard contract requires producers to warrant that the film “will not include any material in the PRODUCTION without obtaining the required permission, consent, and authorization of the owners and/or copyright holders of that material.”

Although it is possible to read the clause as allowing reliance on users’ rights to indicate when authorization from owners is not “required,” filmmakers generally interpret the clause as requiring that that all copyrighted material in the film has been licensed.³⁸

³⁵ Both radio and television broadcasters are subject to local content regulations issued by the Independent Communications Authority of South Africa. These regulations are currently under review as part of a larger process: the migration of analogue channels to digital channels under § 61(2)(b) of the Electronic Communications Act No. 36 of 2005.

³⁶ See the Broadcasting Act No. 4 of 1999, § 6, 8 and 10.

³⁷ See *Unlocking the Creative and Economic Potential of the South African Television Sector: Recommendations for Legal, Regulatory and Commissioning Practice Changes: Report to the SABC, Independent Film Producers Organization and South African Screen Federation*, Nov. 2008 at para. 9.2.4.6. (noting that SABC commissions most of the local film content produced in South Africa).

³⁸ Eighty-three percent of the interviewees explained that that they had been required to sign a contract (which many explained to be the SABC contract) “confirming that you will clear all copyrighted material.”

Filmmakers explained that international distributors are often more demanding. Such distributors “want to make sure everything regarding copyrights has been cleared,”³⁹ and “are much more vigorous” in requiring evidence of rights clearance that local broadcasters.⁴⁰ Access to U.S. markets was commonly described as the most difficult, indicating a potential need for foreign filmmakers to become more versed in U.S. fair use law.⁴¹

There are also some production partners that serve as gatekeepers. For example, an individual commonly identified as one of the top archival researchers in the country stated – “If someone was going to assert fair use in a big way in their films, I wouldn’t take it on [as a researcher].”⁴²

Copyright and Clearance

Although cautious practices and attitudes are in part a reflection of the practical lessons they learn from gatekeepers, filmmaker attitudes toward copyright, and their dependence on it for their livelihoods, sometimes reinforce the clearance culture.

Filmmakers were largely supportive of copyright law in general terms. They frequently described copyright as their “most important” right as creators,⁴³ which can or should provide “economic opportunities” to them through the ability to control and license other’s uses of their work.⁴⁴ Filmmakers also commonly gave great importance to their “moral rights” as creators, described as rights “to be recognized as the creator,”⁴⁵ “to be consulted” if the work is going to be used,⁴⁶ and incorporating the norm that “you cannot re-interpret [the work’s] context or meaning without my permission.”⁴⁷

³⁹ Interview with subject [17].

⁴⁰ Interview with subject [20].

⁴¹ Filmmakers stated that U.S. broadcasters “want thorough clearance information on all rights,” and the requirements were commonly described as stricter than in the EU or other international markets. One filmmaker described the U.S. clearance demands as “hardcore.” Several filmmakers stated that they avoid U.S. markets because of the clearance requirements. “You know with certain films, if you haven’t got all your clearances, it’s not worth trying to get a sale to the US.” “Only the US asks for all your clearances. . . . Even European broadcasters don’t ask for them.” The barriers to entry in the U.S. market are “not only clearance documentation (not required locally), but also E&O [errors and omissions] insurance.”

⁴² Interview with subject [23]. The researcher explained: “I have good relationships with the main archives. And they give me good deals for my clients. I’m not going to jeopardize that.”

⁴³ Interviews with subjects [9] and [14].

⁴⁴ Interview with subject [28].

⁴⁵ Interview with subject [11].

⁴⁶ Interview with subject [13].

⁴⁷ Interview with subject [34].

Flowing from a general support for copyright, rigid enforcement practices were sometimes described as both a legitimate understanding of what copyright law should require. One filmmaker, for instance, responded to the question of when one could use unlicensed material in a film with -- "A responsible broadcaster won't let you."⁴⁸ Another explained that restrictive clearance rules were needed to prevent documentary filmmaking from becoming "a corrupt little back-water industry."⁴⁹ Avoiding the unlicensed use of copyrighted material was sometimes described as a "moral" obligation arising from the filmmaker's own position as a creator of copyrighted material who is "potentially a victim" to unlicensed use by others.⁵⁰

When asked about when they would permit the use of their work by others, it was common for filmmakers to state that they would allow use by others "without payment, but not without permission."⁵¹ In many cases, the explanation for this attitude was linked to the moral rights concept that the creator has a right to prevent use of work that destroys the integrity of the creation. One filmmaker explained:

[13] Yes, I would be happy for it to be used . . . as long as someone asked me, for example, where new work is created out of it. I just want to kind of know about it really, that's all, so I can intervene if it is not being used appropriately.

Other filmmakers stated that they would allow the use of their own material only for "a project that I believe in"⁵² or for a "political" or "worthy" project.⁵³ Some stated that they would insist on reviewing the use of footage⁵⁴ or would otherwise "have some form of protocol or formalities" to ensure that their work was used appropriately.⁵⁵

48 Interview with subject [23].

49 Interview with subject [24].

50 Interview with subject [2]. See also interview with subject [7] ("As someone who makes their own footage and owns an archive, [I] don't don't want someone doing that to me"); interview with subject [17] (describing avoidance of unlicensed use as "as the right thing to do" "because we are all producers of intellectual property material and I think we should be rewarded for that"); interview with subject [24] ("In general I support respecting copyright as abusing it would create a culture of undervaluing the work of my peers and of building a value based film culture in SA. I have tended to always insist on championing rights and recognition of the artists and authors.").

51 Interviews with subjects [5] and [9] ("They should at least inform us and ask. . . . I get annoyed when I find out second hand.").

52 Interview with subject [2].

53 Interview with subject [20].

54 *Id.*

55 Interview with subject [5].

Costs and Complications of Clearance

Filmmakers uniformly denounced the high costs of the clearance culture in terms of the amounts of money and time spent on seeking copyright permissions.

It can be difficult to receive replies from licensing inquiries, particularly from major Hollywood studios.⁵⁶ One filmmaker stated that he had a full time staff member work for six weeks only on copyright clearances for one project.⁵⁷

Often the determination of who is the correct rights holder is exceedingly complex. Problems can surface when filmmakers desire to use material from another film but the "producer can't/won't reveal the source."⁵⁸ There can be multiple claimants to a single piece of material (especially music), forcing filmmakers to obtain multiple licenses.⁵⁹ Material is frequently licensed from archives even though the copyrights may actually belong to third parties.⁶⁰ And ultimately rights chains can be "such a mess that one gives up."⁶¹

The cost of copyright clearance was frequently cited as an overriding problem. Seventy-nine percent of the interviewees stated that they have problems finding affordable archive material for their films.⁶² For historical documentaries, the cost of acquiring

56 *Id.* (explaining that "it's impossible even to find the right person to speak to" at major studios).

57 *Id.*

58 Interview with subject [10].

59 *Id.* ("e.g., we have acquired footage though an editor or researcher . . . [who] has said he works through a pool and you can pay him for it, whoever the producer was. Then another researcher . . . has questioned that procedure and said that [the first mentioned researcher] doesn't own it. Another example where we bought rights to a photo through BAHA, and then later [someone] has claimed ownership of the photo."); interview with subject [11] ("Sometimes we've cleared two sets of rights out of three, (e.g., publisher/composer, publisher, mechanical). So in one instance, one of the rights owners has come to us afterwards and we've had to negotiate a fee after the event.")

60 Interview with subject [10] ("[An example] is Danny Schechter's huge archive of South Africa Now, which contains historical material from others' sources, but we get permission from Danny—i.e., if someone says their permission is adequate, we often take that as sufficient.").

61 Interview with subject [5].

62 Another key problem noted was the cost and effort of accessing historical material held in foreign repositories. This is a particular problem faced by films about the struggle against apartheid since the only footage of the period was generally shot for the state broadcaster that then had a monopoly on all television broadcast in the country or for a foreign broadcaster. Accessing foreign material is "hellishly expensive" [3], both because of very high licensing fees and the cost of travel to the repositories to search their libraries and find needed footage. One filmmaker explained:

[39] For example, we were trying to get images of Black soldiers in World War II in North Africa. The way to get it was we had to travel all the way to

archival material can be overwhelming. One described working on a film with a budget of R600,000 and facing a licensing fee of nearly R200,000 for 20 seconds of a 1950s song and R48,000 a second for needed historical footage.⁶³ One common theme was that the SABC commissions do not provide an adequate budget to afford licensing rates from SABC's own library.

Red Tape and Viewpoint Discrimination

Several filmmakers described clearance issues that went beyond cost, including instances when they believed they were denied licenses because of the viewpoint expressed in their film projects. Such viewpoint-based refusals to license obviously implicate core free-expression concerns of the kind that users' rights are designed to protect. For example, a filmmaker was denied a license to use a popular song in a way that "highlights the deviousness" of the music publisher and copyright owner.⁶⁴ Another filmmaker was denied permission "because I submitted a synopsis of the film [and] they didn't feel it was appropriate."⁶⁵ Another was refused a license to use a popular song in a film about rape.⁶⁶

Filmmakers also highlighted the practical problems with finding and accessing material from large and poorly administered archives. Filmmakers rely heavily on SABC archives for most of the material quoted in their films. The SABC archives were commonly described as difficult to research and use, burdened by "red tape" and bureaucratic delay, and extraordinarily expensive for the quality footage available.

Restrictions on Film Content and Distribution

The restrictive environment around use of copyrighted material in films is inhibiting filmmakers from making the films they desire and is limiting local and international access to South African documentaries.

Eighty six percent of the interviewees stated that they had avoided using desired material in a film or substituted inferior content in order to avoid the licensing process. Filmmakers reported

London and sit at the military museum and British Archives. But just sitting you had to pay a fee for just being there, you have to pay a fee. Considering all the other expenses, traveling, the use of the equipment and to view the material you pay a lot of money just to look [at] it. The only people who always come out of it are the big moneyed companies.

63 Interview with subject [8].

64 *Id.*

65 Interview with subject [14].

66 Interview with subject [22].

replacing "dance music with mood music"⁶⁷ and international with local news footage⁶⁸ and cutting scenes entirely to avoid licensing requirements.⁶⁹ One filmmaker recounted licensing a clip that contained material from a variety of sources and "to play safe, [we] decided not to use any of the material."⁷⁰ Another reported that after paying the research and related archive costs to find historical footage, she "often just dropped" the footage from the film "just because I can't afford [clearance licenses] to broadcast or go to festivals with that archive in the film."⁷¹ Others take pains to avoid using any copyrighted material "in order not to go through that whole [clearance process]."⁷² In sum: "If copyright wasn't an issue, we would have used far more and different stuff."⁷³

Copyright-clearance requirements also prevent finished films from reaching viewers. Sixty-nine percent of the filmmakers interviewed stated they had been forced to limit distribution of their films because of the limited scope of licenses for material used in the film.⁷⁴ Filmmakers explained that they sign licenses that only permit circulation of the material for a limited time⁷⁵ or to particular (e.g. local) markets.⁷⁶

Users' Rights in the Dark

Filmmakers exercise users' rights quietly, reluctantly and often under an assumption that their actions are illegal. South African filmmakers were extremely guarded in discussing instances in their own work where they used unlicensed material, even where they believed that such material was used fairly and lawfully.

67 Interview with subject [21].

68 Interview with subject [1].

69 *E.g.*, interview with subject [22] ("I wanted to use [a certain] song. And the rights are so hard to work around that I just dropped the whole thing.").

70 Interview with subject [1].

71 Interview with subject [22]. See also interview with subject [21] ("[I]f there is a battle over the budget . . . we may take the archive out to save money.").

72 Interview with subject [16]. See also interview with subject [19] ("Whatever we do, we tried to make sure that we don't create content that will need licensing because we knew what the difficulties of obtaining a licence were.").

73 Interview with subject [11].

74 Even when they are available, longer and broader licenses tend to be much more expensive. Thus, over 40 percent of the respondents stated that they had been prevented from accessing international distribution channels because of copyright clearance requirements. And many others reported not seeking international markets at all because of the higher clearance burdens.

75 Interviews with subjects [10], [12], and [25].

76 Interview with subject [14] ("anything that we do with the SABC either the right to fully exploit . . . internationally or in terms of secondary distribution or paternities in the country have been restricted by the broadcaster."); see also interview with subject [14] ("I cleared the rights to a track of music in the film, but when I sought to distribute in the US, they wouldn't allow that.")

Sixty-six percent of the respondents stated they have used copyrighted material without a license at least once. But most described such use as the result of being unable to obtain a license, rather than the product of a considered decision they it was their right to use the material. One filmmaker explained, for example, that he never uses copyrighted material “without seeking a license, but sometimes without obtaining a license.”⁷⁷

A small number of filmmakers stated that they used unlicensed material in their films openly as an act of protest or out of moral conviction. In one particularly dramatic example, a filmmaker described finding BBC video in the ANC’s archive, which had footage of his own arrest that ultimately led to him being imprisoned on Robben Island. He explained:

As far as I know, the clip belongs to the BBC. But I used it in a film. And I did not and will not ask permission to use my images, which have been used all over the world without my consent.⁷⁸

Another interviewee explained the use of “less than three seconds of SABC news footage in a music video” as “an act of defiance against SABC.”⁷⁹

A few filmmakers recounted instances of deliberately using incidentally captured music in the background of scenes; however, as noted in the Legal Review section above, such uses are not explicitly authorized by the Copyright Act’s incidental use provision. There were also a few references to having used footage or music based on “fair use,” but these were not accompanied by explanations as to which users’ rights in South African law (which does not contain a fair use provision *per se*) had been relied upon.⁸⁰

Some filmmakers were more specific: One explained that he had used footage from the motion picture, *The Matrix*, as a “comment on society” and as a type of “metaphor.”⁸¹ Another filmmaker accurately stated that the law permits unlicensed use “if you are commenting on a particular copyrighted clip,” but did not give a specific example of having done so.⁸²

77 Interview with subject [5]. interview with subject [10] (“This process is so labor-intensive, . . . at a certain point we just say that we’ve done enough!”); interview with subject [23] (“[I have used unlicensed] historical material where I do not know where the director got it from. Or where I recognize something and I cannot identify who owns it.”).

78 Interview with subject [9].

79 Interview with subject [24].

80 Interview with subject [6] (“we used a song as fair use”); Interview with subject [39] (“In [one film]—used some material without licence—Fair Use.”).

81 Interview with subject [25].

82 Interview with subject [11].

In the Cape Town workshop and consultation meeting, several sequences from South African and U.S. documentary films were shown to illustrate the potential value of the fair quotation or fair dealing clauses to filmmakers. This proved to be an effective conversation starter. In the ensuing discussion, the filmmakers showed considerable willingness to discuss instances when they used similar quotations without licensing copyrights, often under the assumption that their actions were illegal. The discussion ended with emphatic statements that education about users’ rights is needed in the filmmaking community, and that the dissemination of such knowledge would liberate filmmaking practice.⁸³

Shared Views on a Fairer System

As we have seen, many users’ rights are defined, at least in part, in terms of a “fairness” test. This general, and even amorphous, concept is one that lends itself to different definitions in different areas of information practice (scholarship or teaching or filmmaking, for example). Throughout the interviews and the final consultation meeting, filmmakers expressed numerous conceptions of what fairness standards should apply in connection with the unlicensed use of copyrighted material in South African documentary film.

Filmmakers generally believed that, as a matter of fairness, incidental capture of music, video, advertising and other evidence of mass culture should not have to be licensed. Indeed, many were surprised to learn that this was not the current state of the law for music, broadcast images and text. Another strong norm that expressed throughout the process was that use of the work of others should be properly attributed. This idea was an extension of the strong affinity many filmmakers expressed for core moral-rights concepts.

At the Cape Town workshop, there was considerable discussion around the need for “fairness” standards for the use of art, music and stories that are traditional to indigenous groups or personal to individuals. These views were often framed as an extension of the moral rights concept to include the principle that groups, as well as individuals, should have, at a minimum, a right to recognition for their contributions – and perhaps other forms of protection as well.⁸⁴ Some filmmakers also expressed the

83 See *User’s Rights and User Wrongs*, a short film about the project focusing on the filmmaker workshop held in Cape Town.

84 See Paul Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 Am. U. L. Rev. 769 (1999). See also World Intellectual Property Organization [WIPO], Intergovernmental Committee on Intellectual Property & Genetic Resources, Traditional Knowledge and Folklore, *The Protec-*

idea that people from indigenous or historically disadvantaged backgrounds should have greater rights to access materials about or originating from their communities.

Many filmmakers expressed the view that assessments of the fairness of unlicensed uses of copyrighted material should be sensitive to context, including how the material will be used, and the purpose and budget of the project. Filmmakers expressed a desire to allow a greater leeway for the use of copyrighted material for a “public interest”⁸⁵ or “educational” film or for a “non-commercial” purpose.⁸⁶ Filmmakers commonly expressed beliefs that there should be greater access to historical material. In particular, many filmmakers argued that there should be much freer access for local filmmakers to historical material held by the SABC, in part because of the history and public financing of the institution.⁸⁷ A similar view was expressed toward material about South African history held by foreign archives.

Need for Alternative Archival Access

Filmmakers identified users' rights as part of a possible solution to the problems they face accessing archival footage. They recognized, however, that the exercise of users' rights requires knowledge about and access to quotable material.

The survey indicates that there are a large number of video and image archives of various kinds, many of which are not commonly used or widely known. Although the SABC archives are by far the most used archive for filmmakers, in all, filmmakers identified over 60 archives that they had used. Many of these archives are public or low-cost.

At the March meeting, filmmakers heard from representatives of several organizations that are working on expanding access to archival materials for the general public. Filmmakers expressed the belief that it would be beneficial to create a catalogue of material available in the various public and private

tion of Traditional Cultural Expression/Expressions of Folklore: Overview of Policy Objectives and Core Principles, WIPO/GTRKF/IC/7/3 (Aug. 20, 2004); see generally <http://www.wcl.american.edu/pijip/go/traditional-knowledge>

⁸⁵ Interview with subject [3].

⁸⁶ Interview with subject [2].

⁸⁷ Interview with subject [8] (“If something is publically funded, then there is a moral right to use copyrighted material without clearance.”); [34] (“One assumes the state has [...] compensated for the use of material [that is archived nationally and owned by the state]”). Many also argued that South African filmmakers were specially entitled to access recent historical material held by foreign broadcasters. This claim was articulated both as an expression of the social need for the material and also as a matter just desert, since political activists made the footage possible and therefore “paid [for the footage] with our time and by risking our lives.”

archives. Since the meeting, the South African History Archive working with the Visual History Archive at the University of Cape Town released the first version of its Audiovisual Audit Report: The South African Liberation Struggle.⁸⁸ The report recognizes that “one of the greatest drawbacks facing any researcher” of film history “is that no easily accessible databases” exist of where to find source material. The audit responds to this need by cataloguing over 30 historical footage archives and hundreds of documentary films that provide public access to historical footage on the liberation struggle in South Africa.

RECOMMENDATIONS

In consideration of the legal analysis, survey and workshop deliberations, the DFA, the BFN and the American University programs adopted the following recommendations:

Short Term Goals

Develop a consensus ‘best practices’ document

The organizations agreed that a best practices statement would be useful for three related and complementary purposes. First, the statement could be used immediately to promote greater understanding and use of existing users' rights, thus helping to lessen the burdens imposed on documentary film production by the clearance culture. Second, because “fairness” is a key concept in South Africa's existing users' rights provisions, a filmmakers' statement could influence the development of the law by lending specificity to this general ethical concept. Third, the statement would be useful in the legislative reform process, to help filmmakers identify which aspects of the current law are worth defending and which would benefit from reform.

Develop a legal advice network

Compounding the problem of a lack of accurate knowledge about copyright law and users' rights, many filmmakers stated that they do not have ready access to affordable legal advice or other sources of guidance on legal questions. Filmmakers described a very small copyright bar consisting mainly of lawyers who serve content owners and provide guidance that

⁸⁸ AUDIOVISUAL AUDIT REPORT: THE SOUTH AFRICAN LIBERATION STRUGGLE (South African History Archive 2009). Available at http://www.saha.org.za/publications/audiovisual_audit_report_the_south_african_liberation_struggle.htm

reflects the interests of those clients. Others stated that their main sources of guidance are from other filmmakers or researchers. There are, however, a number of lawyers in academic institutions, non-governmental organizations, and private practice who are sympathetic to the interests of documentary filmmakers and are knowledgeable about the law. A legal advice network would aim to identify, educate and mobilize the existing legal resources that could provide free or affordable advice and assistance to filmmakers.

Develop a list of pressing copyright policy proposals

Although many of the filmmaking organizations have been working on certain copyright-law reform proposals (especially ones related to ownership interests in commissioned work), none has been working on the law's users' rights provisions. It is nearly certain that these provisions will be reconsidered as part of the copyright reform process, and that there will be strong pressure from copyright owners to "modernize" copyright by making users' rights less generous. Through this project, filmmakers have identified a number of areas for potential positive reform of South African users' rights. These areas range from issues about which there appears to be broad consensus on a proposed revision, such as expanding the incidental use exception for "artistic works" to include audio and broadcast video sources, to issues where there is much less current consensus, such as whether the law should be amended to include a U.S.-style generalized "fair use" clause. The organizations agreed to work together to develop a consensus list of desired reforms that could be communicated to stakeholders and the government during the impending law reform process.

Develop standards for the ethical use of art, music and stories that are traditional to indigenous groups and the personal narratives of individuals

As discussed above, there was a broad consensus among filmmakers that fairness standards must be contextual, and should depend, in part, on the nature of the material being used. Certain categories of material were singled out as requiring special attention in the South African context. Traditional culture is an important input into South African documentary filmmaking, but one that raises special fairness issues of proper attribution, among others.

Longer Term Goals

The organizations also agreed upon a list of activities that may not be completed during the next 12 months, but will be increasingly important in coming years. These include:

- ✘ Articulate additional law-reform goals, such as positions on copyright term extension;
- ✘ Research law-reform strategies, including research into constitutional free expression grounds for user rights in copyright ;
- ✘ Recommend ways in which documentary filmmakers can create or contribute to projects in South Africa to audit archival and documentary footage (publicly and privately held) and to create "open" archives through which material would be more widely available to filmmakers and others;
- ✘ Develop model transfer agreements for footage from filmmakers' personal archives to open archive projects; and
- ✘ Investigate the utility of international best practices statements that attempt to harmonize users' rights across borders.

APPENDIX: EXCERPTS FROM RESPONSES TO QUESTIONS

To safeguard the confidentiality of the participants in the study and encourage truthful exchange of information, the quotations included in this report have been identified with a distinguishing number rather than by name.

INFORMATION ABOUT RESPONDENTS

COPYRIGHT EXPERIENCE

What kind of material have you used in your films?

Television news archives, 72.5%

Video or film from commercial or historical archives, 87.5%

Stock footage, 67.5%

Sports coverage, 17.5%

Newspaper archive, 67.5%

Ambient music (music that was playing in places where you were filming), 77.5%

Mood music from library, 87.5%

Commercial music released on CD used on a music/effects sound track, 75%

Photographs, 85%

Clips from other documentaries, 55%

Feature films and TV shows, 47.5%

Music videos, 15%

Material from the internet that is not covered above, 37.5%

Other (posters, historical papers, literary works, commissioned works, clips from radio archives, open source), 15%

Please describe the sources of copyrighted material that you have used most often.

Archive or repository, 100%

DVD, CD or other retail source, 57.5%

Incidental capture of background activity, 42.5%

Off-air capture, 17.5%

Other, 22.5%

Have you ever obtained permission or paid for the rights to use copyrighted materials in your films?

100% said yes; 0% said no.

Are you aware of any circumstances under which the law in South Africa allows you to use copyrighted material in your films without a license from the content owner?

32% said yes; 68% said no.

[8] I think that there are cases where you can use a public interest argument for Fair Use. If something is publicly funded, then there is a moral right to use copyrighted material without clearance.

[11] If you are commenting on a particular copyrighted clip, you can show it.

[11] If you film a performance, you can use it, or even a person. If they let you film it, they can't later turn around and say you need my permission.

[19] There is no law, unless it's content that is in the public domain.

[23] Only if its incidental - and I don't even know if that's the law. I'm not aware of any circumstances when you can use clips deliberately without permission, and a responsible broadcaster won't let you.

[33] The exception is when I can find the source by myself who then repeats, probably what is actually copyrighted. I think it's an exception because the effort is mine to go and re-produce what has been produced or to re-originate what has been copyrighted,

for instance, if I wanted to do [a story about a famous woman] and I could then find [that woman] and speak with her even though she repeats what has already been copyrighted, I think it's my right not to go through the copyright owner. It is my right not to go to copyright owner, but to the source of the material.

Under what circumstances, if any, do you think it is acceptable for you to use copyrighted material in your films without seeking a license?

[1] If the material is very old and one cannot trace the owner of the material, and if the program is for educational use, and for public television.

[2] When it's for the public good. [I] also [give] material away when it's for the public good, or good cause, or not for profit. If it's not for profit then of course no charge. If it's for the greater good, then fine.

[3] When it's in the public interest. The Broadcaster should allow usage of archive footage also when it's in the public interest.

[5] When it's incidental, i.e., when you are doing a doccie and you capture something in ambience.

[6] In all news broadcasts, worldwide (not just in South Africa)—using news clips to show the state of the nation, for example. In [one of my films, we] used a news clip about the death of [a man], and [I feel that we] shouldn't have had to pay.

[7] If it's in the public interest; if it's information that is in the public domain; if it belongs to the public broadcaster (news or magazine)—cos we actually pay for that stuff to be created; different with ETV and MNet because they are commercial operators. SABC we should be able to use their stuff for free; National Archive should be free; Private Archive rates should be controlled, or different rates for different usage; If filmmaker is using it in insignificant way in order to demonstrate something else, then no payment should be required (i.e., 4 seconds from Fox—they quoted starting price as \$10,000).

[8] [You should be able to use] stuff that is part of the public culture—Mandela's face for example . . . I would try to get away with using ambient music in a film, whether recorded or whether done in front of the camera.

[9] Where the material is going to be used for educational purposes and the general benefit of the community and for non-

commercial purposes. When you use it like that, you are using it in a fair way.

[10] Circumstances where you cannot find the rights holder. Use of 15 seconds or less. Where broadcasters get rights to cover something, it should go into public domain after a certain period, say 10 days (e.g., Mandela's release). Also, there are historical events that overseas broadcasters hold rights to, and I feel that as a South African producer we may have more right to that material than them, certainly after a period such as 5 years.

[11] For a place like South Africa, where the heritage has been documented by foreign broadcasters, they shouldn't then charge us first-world rates to use that footage.

[12] Using material in public domain to prove a point—i.e., to construct an argument.

[14] Basically I think the material from within the national broadcasters should be available for use, for a particular film/production without the requirements of payment to use.

[16] I think when you are not making profit from the actual content, when it's for educational use then I think you can use copyrighted material without a license, when it's a student doing research and also school projects.

[17] Like incidental music in the scene while you're shooting. Sometimes it's defined—you know which song that's going to play—given the circumstances I don't think you should really pay for that.

[18] I think there should be licenses for certain groups, so people who don't have access to funds and they have to pay thousands per minute for SABC stock footage or archives. I think sometimes there should be leniencies. I think if it's not done for profit and for a social cause, those kinds of aspects.

[22] I think that news, and things that are in a public archive—I don't think we should have to pay for that. We can pay for the sourcing of it, but the copyright belongs to SABC, I think that's pretty unfair. Same with newspapers . . . I think, anything somebody has created out of their own, unless they say you can, you shouldn't really be using it. Also, incidental things; it would be easier to make documentaries if I could show people singing along to a song or watching TV.

[23] Incidental. If there is a painting or photo on the wall, or a TV set is on - but not if you are broadcasting something on the TV

set for that program. Otherwise, none. Newspaper headlines & still photos are a great way to tell a story. If you can't afford the footage—use that!

[25] Public interest (when it's in the interest of the public to hear a story, and the story can only be told using copyrighted material); when it's unavoidable (e.g., shooting a scene which is unfolding with an advert in back inadvertently). When you grow up surrounded by a set of images, those images become part of your dictionary. We now learn more from AV sources than from books.

[30] As documentary filmmakers, we should be allowed to use news or current affairs reportage that occurs while we are making our films as a reflection of the time and place in which the story plays off.

[34] Incidental location music in short bursts to create ambience or where unavoidable. Material that is archived nationally and owned by the state must be accessible to creatives to use in documentary. One assumes the state has then compensated for the use of material.

[37] I think that time and newsworthiness should count. Also, [exceptions should be made] if you're quoting it and appropriately recognizing the source. For example, I did a commercial parody of the "I Have A Dream" speech.

Have you ever used copyrighted material in a film without seeking a license?

66% said yes; 34% said no.

[1] We always seek clearance for everything Used music from an artist that was not in the country at the time, and a friend of the artist told him that he could. Johann insisted that the artist gave email consent for the usage. She was in London on tour, and she emailed her consent.

[5] Never without seeking a license, but sometimes without obtaining a license. Music copyright: seek copyright owner but cannot find the owner. Or copyright is in such a mess that one gives up. In making one film, I could not find copyright owners, not known or copyright is in dispute. Used the track anyway and usually paid one person, and if copyright owner cannot be found, used the track because the track is obscure.

[8] [We] used [some classic, old] songs—an old man playing—

without seeking a license. If I know that [a particular piece of material is subject to] copyright, I would have to have an argument [for why I would not have] to get clearance before using that item in my film. [We] tried to get copyright clearance on songs used in [a] film. We used [a song] as fair use. BBC also had blanket music clearance. Can't sell or release it cinematically or on DVD, because they don't have the copyright clearance - even though the moral argument is for the song usage.

[9] With historical archive material from the apartheid days, the BBC for example came and did stories when cops wouldn't allow them in and we (the activists) escorted them in. We paid with our time and by risking our lives. By comparison, the BBC and other news agencies paid very little. Why should we now have to buy this footage from the BBC and others. It was in our interest for the world to know, because there wasn't fair reporting. The best example is some footage [that] I discovered when I was doing archive research at the ANC. I was looking through some BBC footage from the struggle days, and I kept being drawn to a particular clip. Eventually I realized that the clips [were] of me being arrested by the security police in 1976. As far as I know, the clip belongs to the BBC. But I used it in a film. And I did not and will not ask permission to use my images, which have been used all over the world without my consent. . . . In my forthcoming film, I am facing two issues. One is historical material about [a political figure] that is included in documentaries. The other is commercial reggae being played by rastas that I am filming at a dance hall or similar place. In both cases, I feel I should be able to use the material. With the music - my focus wasn't on the music - but how do you go into a dance hall and tell them to stop the music because you are filming?

[10] Where it's a short piece of footage and the obstacles to clearance are enormous, and I'm working against deadline, I've gone ahead and used it, e.g., when we wanted to use a clip from MGM, it's impossible even to find the right person to speak to. But for international use, we often then have to clear it. Another example is footage embedded in another docc, and the docc producer can't/won't reveal the source. Another example is where there appears to be a dispute about who owns copyright - e.g., we have acquired footage through an editor or researcher . . . [who] has said he works through a pool and you can pay him for it, whoever the producer was. Then another researcher . . . has questioned that procedure and said that [the first mentioned researcher] doesn't own it. Another example where we bought rights to a photo through BAHA, and then later [someone] has claimed ownership of the photo.

Where there are two claims I pay and get clearance from the cheapest. A final example is Danny Schechter's huge archive of South Africa Now, which contains historical material from others' sources, but we get permission from Danny—i.e., if someone says their permission is adequate, we often take that as sufficient. This process is so labor-intensive; there comes a point where you draw a line. We have had someone working for say 6 weeks just on clearances for a project . . . ; at a certain point we just say that we've done enough! Whatever is outstanding, so be it.

[11] Music—have encountered problems. So many rights to clear. Sometimes we've cleared two sets of rights out of three, (e.g., publisher/composer, publisher, mechanical). So in one instance, one of the rights owners has come to us afterwards and we've had to negotiate a fee after the event.

[12] [I]f there's ambient sound on a radio or TV that forms part of the natural environment, I don't feel I have to clear that. [re: Mandela walking out of prison] that footage in my opinion is in the public domain.

[13] Because we were not sure of the laws. We downloaded stills from the internet to use in our productions.

[16] Research purpose at college but other than that not for public broadcasting.

[23] Historical material where I do not know where the director got it from. Or where I recognize something and I cannot identify who owns it. Then I recommend putting a [disclaimer] at the end of the film to say every effort has been made.

[24] I used less than 3 seconds of SABC news footage in a music video; this was done in the spirit of an act of defiance against SABC, which blatantly abuses IP of authors and creators.

[25] I used clips from [from a popular film] in [one of my own films] where I was commenting on the system, which is built on the basis of control. I think it was justified because [the popular film] is a metaphor for the state of our society. I was using its message in order to comment on society. Also when it was unaffordable or too difficult to clear material. In fact, you can't illustrate history these days. What do you do when material is too expensive? I use history to illustrate the present. I don't believe the history should be copyrightable. BBC and ITN for example should not have a monopoly on South African history images. It's like them saying they own my family album.

[32] I have allowed my distributor in Australia to seek sales of material where I don't have prior permission from SABC, but if I got a sale and then were sued I would have a counter claim—SABC is selling my material without paying royalties.

If you have not used copyrighted material without seeking a license, can you explain why not?

[1]. Combination of a moral decision and because it's so easy to pick up—and then be sued over something as silly as not getting the necessary permissions.

[2] It makes one too vulnerable. As someone who is potentially a victim to it, one has a moral obligation to work both sides of the spectrum and to uphold the law.

[3] It would not be safe to do so, and I wouldn't want to end up in litigation.

[7] [My] own moral view on the matter. As someone who makes their own footage and owns an archive, [I] don't don't want someone doing that to him.

[14] Because I have operated outside of this environment where not clearing or not seeking information with acknowledgement can result in injunction of a program or a film, so in the interest of ensuring that doesn't happen, we just don't use it.

[15] . . . My understanding of using any material especially for broadcast it has to be cleared, so maybe I don't know enough about it and I don't know what the exceptions are For example, I know if I use the Michael Jackson track for ten seconds or thirty seconds, I would be liable for something like thirty million dollars and it's just totally outside Generally, I wouldn't use a commercial track at all, except if I have an understanding with the publisher or with the artist. So without a formal agreement then I wouldn't use it and if there are exceptions, I would like to know about them.

[16] I think it's the red tape that goes around SABC where you have to go to this person and must be approved by that panel, by the time you are done you've already lost three weeks of your time which you need to edit, so obviously it's knowing, and also the turn-around time within the SABC & employees is quite drastic so therefore the new people don't really know, so you can establish a relationship with someone new then in three weeks they are out of the SABC so it kind of disorients the producer and the filmmaker

in terms of establishing the relationship and understanding all the red tape and all the proto calls in getting stock footage.

[17] Well because we are all producers of intellectual property material and I think we should be rewarded for that. It's the right thing to do.

[18] I think ethically was a reason why we would not do it so I guess it wouldn't be safe.

[20] I believe that it's illegal and that I would be opening myself up to be sued. And I know of a time when Curious pictures used a piece of music and were sued, and it cost them R 80 000.

[22] I did not know of any exceptions.

[24] In general, I support respecting copyright as abusing it would create a culture of undervaluing the work of my peers and of building a value based film culture in SA. I have tended to always insist on championing rights and recognition of the artists and authors... otherwise we remain a corrupt little backwater industry.

[33] I have never used copyrighted material without seeking a license or permission, because I have believed that it would not be safe, that is, it would not be legal; and, from a moral perspective, I thought it would be plagiarism, simply plagiarism.

Have you ever licensed and paid for material just to be safe when your gut feeling was that legally you didn't have to?

28% said yes; 72% said no or didn't have a response.

[1] We always seek clearance for everything Used music from an artist that was not in the country at the time, and a friend of the artist told him that he could. [I] insisted that the artist gave email consent for the usage. She was in London on tour, and she emailed her consent.

[8] In order to avoid legal battles, I have. On [one movie] I paid for using the song in South Africa—the BBC blanket clearance covered these rights. [The owner] said these rights don't apply in South Africa. We made a compromised deal with [him] to get around this.

[12] Photos taken by famous SA photographers where I felt a fair use argument might have applied, but didn't want to take the risk.

[14] No, I haven't done it on the basis of gut feeling, we have licensed purely on the basis of requirement even when we have felt that the requirement should not be required.

[16] Yes, fortunately as a business we've grown quite a bit, we deal with large budgets so therefore we budget [for rights clearance] from the onset. Se we always pay for stock footage [and] library music; it's always in our budgets.

[16] You experience a lot of those things where you feel you belong to the country and the celebrations of what happened in 1994 should belong to the country. . . . So at times there's been points where it's like you know this is part of my heritage. Not all of those actors that were there in that footage were actually paid, so it belongs to the country. But yet you know I had to swallow my pride and go pay [to license the footage] to move the process forward.

[21] eMakhosini photos of chiefs. I think we maybe shouldn't have to pay for heritage photos when it's for educational purposes.

Have you ever decided not to use material in order to avoid having to license it, or because of difficulties in obtaining a license?

86% said yes; 14% said no.

[1] We licensed a program—on which [I] was the EP—it contained CNN material and from a variety of sources and [we] could not determine whether the person who sold [us] the program had the necessary clearances. To play safe, [we] decided not to use any of the material that did not belong to [the seller] and that she could not prove the clearances for. [We] substituted with SABC stock footage.

[2] Occasionally too expensive. Or copyright holder has put too many conditions on how it can be used. Clear minimum rights than what you need because of cost of clearing worldwide rights. Made a query on Mandela footage and was quoted 8000 Euro per 30 seconds from the SABC.

[7] Loads of material owned by Pathe, which is incredibly expensive. Outrageous amounts for archive. SABC footage, which is very expensive and not such good quality. So then one turns to get around it, do without it. Too painful dealing with Sias Scott. Too much of a mission—written repeatedly to SABC for stuff, and never got a reply, even when requesting an invoice!!

[8] Shot film over 3 years. Edited over 9 months. Hard production financially and otherwise. No salaries for editing period, and hardly for production. Entire budget 600,000—want to use 19 seconds of archive and are being quoted R48,000 per second. Would add huge production value, but would be approx 9% of budget if they went ahead. People not getting salaries, but SABC taking money on archive that they got free. Another example: I wanted to use about 20 seconds of a version of a song by a band from 50's that was found through Gallo's archives. They wanted \$22,000—almost 50% of the budget for entire film. Their argument was they wanted the money or nothing.

[9] In [one film]—used some material without license—Fair Use. We cleared and paid for some. But we used less than we would have liked due to cost. We refused to pay their inflated research costs for archive as well, due to their inefficiency in finding the clips we asked for.

[10] Where we know the cost is going to be prohibitively expensive (700 Euros per 30 seconds). International rights holder—unique piece of footage. Replace it with something.

[11] In a number of cases, if copyright wasn't an issue, we would have used far more and different stuff. In this stuff on human evolution, there is no material, so you are always looking for stuff.

[16] As a young creative, I prefer to shoot my own footage in order not to go through that whole [process]. And it makes business sense to me to shoot my own footage.

[17] It's a financial factor.

[19] Whatever we do, we tried to make sure that we don't create content that will need licensing because we knew what the difficulties of obtaining a license were.

[20] Many times. On [one] film there's a lot of footage we'd love to use but we simply can't afford it. To use all the footage we want to use would cost nearly a million Rands.

[21] Yes—eMakhosini there is a battle over the budget, so we may take the archive out to save money. Wedding show—sometimes we replaced the dance music with mood music—didn't work very well—harmed the production.

[22] For example, I'm making a film . . . about women, violence and the law in SA, and I wanted to use [a certain] song. And the rights are so hard to work around that I just dropped the whole thing.... EMI is giving lots of problems.... Same with archive, archive is so

expensive to get out of the SABC, I've often just dropped it, even after having sourced it, just because I can't afford to broadcast or go to festivals with that archive in the film.

[27] I can't recall specific examples but I know there have been many times I've wanted to use stock footage but have had no budget for it and therefore chosen not to even begin searching. It would be great to know about footage that would be available for use free of charge.

[33] Budgetary constraints. Some of the material we used had been provided by the WITS History Workshop and it was through their access to the material and them paying for the material that actually we've got the material. But some material like the Jim Bailey archives has been rather beyond the reach of our budgets and we have avoided . . . it and rather try to go to narrative sources, you know, the original sources of the material. The main cause of avoiding getting a clearance or a license has usually been financial because archives don't come cheap in South Africa and the red tape before you actually get to the material that you want is quite cumbersome.

[35] We recorded a local band in Sudan and later discovered they were very popular there and decided not to use it.

Have any South African industry players, such as broadcasters, funders, required you to sign a contract confirming that you will clear all copyrighted material?

83% said yes; 17% said no.

[4] Every contract with broadcasters in South Africa has such a requirement. This is also true elsewhere.

[8] SABC - standard contract. . . . The grant funders aren't that particular. I would not clear archive and footage for films showing at festivals only. Generally don't make money from those deals.

Have you ever been asked to provide evidence of copyright clearance?

45% said yes; 55% said no.

[33] No, they (e.g., SABC or broadcasters in general) have really not been strict about that. They are very lax in that regard, because, I think, maybe it's because you might take the blame, they might pass the blame unto you. And

it's actually easier for them if they can use material without having to pay for it. As a result, many filmmakers do not know what rules apply in that regard.

Have you ever been refused a license to use copyrighted material?

31% said yes; 69% said no.

[1] Yes. ETV, which is a free-to-air broadcaster, refused the license to use footage, which they owned. They insisted on an on-air credit, and the SABC felt it tainted the program.

[3] Yes - [for one song in a film]. [The owner] penned the lyrics to the song, but the actual music [was written by someone else] - who never received royalties for his work. [I] finally cleared broadcast rights using the blanket broadcaster clearance of rights. Thus, this work is only licensed for broadcast.

[6] When I was doing an educational piece - early days of AIDS. I contacted a music company and asked to use a song, and I was turned down.

[6] [I] made [a film] commissioned film by SABC – a sociological report on crime. [I] went to SABC and requested more archive for the film than what the budget sustained. SABC said no. The reasoning was no money, although the archive was their property. They denied the right to use their own archive in their own movie, for which they owned copyright. The film lost production value and was a lesser film than it could [have been].

[8] The people that own the publishing rights to [a popular song] denied me a licence because the film highlights their deviousness and I did not offer enough money for them. On another film, I cleared the rights to a track of music in the film, but when I sought to distribute in the US, they wouldn't allow that. I had to replace the track with a composer's track.

[14] Basically in one instance, a piece of music which I start to use and I was not given permission because I submitted a synopsis of the film they didn't feel it was appropriate, I will also start to use archival footage and been denied usage pretty much on the same basis.

[22] Yes, Music, many times. With [a popular song]... in a film about rape, you may not want your song to be associated with that. Often I just get no and I don't know why, they don't want their song covered or used.

[24] Usually done by pricing material out of range. On one or two occasions, international producers . . . denied FRU archive license on their work because they did not trust our regulatory environment or our capacity to ensure the security of rights - a fair enough call. I hope that someone has responded to this question in relation to the Lion's Tale - that is a very NB one and VERY CLEARLY illustrates US cultural colonialism and monopoly protectionism that keeps the rest of the world at bay in terms of being able to profit from original work.

[33] In fact, I don't even understand who actually is supposed to issue the license. But I have been refused access to material that is copyrighted. For instance I wanted to do a film about the origins of prison gangs from a book [. . .] the publisher referred me directly to [the author] and he actually placed conditions that amounted to refusing the material that I wanted to use.

Have you ever been forced, in order to clear material, to accept a license for a limited term that could prevent you from distributing your film at a future date?

69% said yes; 31% said no.

[10] Some copyright owners limit the timeframe to 5 years. . . . Sometimes I accept the licensing terms and then hope that in 5 years time they won't check! We never clear for more than 10 years, because our ideal "in perpetuity" is just too expensive.

[12] I have bought a 3-year license in the hope that no one comes after us.

[25] I buy the shortest/cheapest license (e.g., from SABC I buy the local license) irrespective of where the film is to be used or for how long. Nobody ever follows this up. Anything else would be unaffordable. I never pay for the actual duration I use. And I always exclude US because of the cost.

Has the assertion of copyright license renewals ever required you to withdraw one of your films from public circulation?

24% said yes; 76% said no, or not applicable.

[2] [One film] can't be distributed because of a limited license (5 years) that has now expired.

[3] He has had to limit the duration of the license due to the cost.

[8] [In one film, the] music licenses have expired, but the film is still selling. Conclusion: to use as little as possible of copyrighted music - pre-recorded. [Another film]: wanted to clear a . . . track (\$18,000) - so they got composer to do similar track for a fraction of the cost.

[12] We didn't clear educational or cinema or DVD rights.

[38] I could not afford to clear music beyond one local broadcast.

Has the clearance of rights ever prevented you from international distribution of a film?

41% said yes, 59% said no or not applicable.

[3] To clear world rights for a title is extremely expensive. These days, producers work backwards: They clear rights as they sell to territories.

[9] For a certain period we didn't even bother trying to distribute our films internationally.

[10] Not only clearance documentation (not required locally), but also E&O insurance (Errors and Omissions insurance for 3 to 5 years of first transmission). Can be \$12000 for doccie feature.

[14] Well again anything that we do with the SABC either the right to fully exploit whether internationally or in terms of secondary distribution or paternities in the country have been restricted by the broadcaster.

[24] You know with certain films, if you haven't got all your clearances, it's not worth trying to get a sale to the US. Only the US asks for all your clearances. People do forge them at times. Even European broadcasters don't ask for them.

With films for international distribution, do you face increased or decreased demands from foreign broadcasters, funders or others to provide evidence of clearance of rights?

55% said they face increased demands to provide evidence of rights clearance; 45% said no or couldn't answer because of no experience.

[4] US stations especially want thorough clearance information

on all rights including personal rights of involved characters, and all footage, music, etc. European stations are less demanding but still more demanding than the SABC by far.

[12] US are hardcore - Europeans less. With [one film] I am clearing for 3 years not seven - hoping ITVS doesn't find out. Am working to get E&O insurance.

[17] [W]hen you're selling a film overseas, they want to make sure everything regarding copyrights has been cleared.

[20] They are much more vigorous. What all the foreign broadcasters are doing is ensuring that there can be no legal comeback, e.g., Al Jazeera. Recorded a band in Madagascar - had to take it out because we couldn't show that we had the band's permission to use the piece. Was a traditional band in a bar- we gave them some money. But Al Jazeera was not satisfied with that.

What problems if any have you encountered with music copyright?

[2] Music copyright - being in business for 20 years - most difficult thing she deals with. . . . Enormously complex. Would be great if there was one body.

[3] [We wanted to use a popular song in our film.] One of the partners was BBC - Agreement is MPCCA about blanket clearance given to broadcasters that allows them to transmit content if it's in the public interest. [We] never got the rights from [the copyright owner] in the USA, for usage because it reflected him in a bad light. It can never be shown - other than on television.

[4] The SABC's rights budget for music are always too small and they want to own the music if it is originally composed.

[6] Often the most sticky area. The AIDS educational film was one example. Maybe problems are more perceived as in: the admin will be too intense in obtaining clearance, so one goes for library music instead.

[8] Getting access to credible explanations - SAREL is difficult to work with. Royalty collection is completely confusing . . . SAREL - gave him a form for music clearance where it was clear they had no idea what they were doing. Music industry is dirty, so access to credible sources of information is problematic. What would help is a fair use guiding principles when it comes to music copyright in South Africa. Also, when does copyright expire?

[14] The key problem with music usage, let's say in the case of SABC and their projects, is that they don't have standard blanket agreements for use of what they call commercial music, which means as a producer you're forced to pay for the clearance of that music. If you're operating within an SABC budget, that is not viable. It doesn't make sense at all. That is a big problem because what it means is that there is wide range of music that will be appropriate for a particular project that will be excluded because of the absence of SABC agreeing to what is standard in most markets around the world.

[23] In the Mandela exhibit at the Apartheid museum, we wanted to use a clip of Hugh Mas playing "Mandela: Bring Him Back Home." Pretty much all of the other copyright owners had donated their material. But Gallo and Universal and BMG have between them asked for R 15 000 for a 7 second clip. As a result, I'll probably remove the clip.

[25] Can be expensive, especially when rights are split between different companies. Rates vary hugely. Certain music is so engrained in the public mind (e.g., rebel music like punk, soul, reggae) that it should be far more accessible. Artists are often better to deal with than the record companies.

USE OF ARCHIVES

Which archives or repositories of footage and other material have you used?

85% of respondents said that they used SABC.

One or more respondents said that they used the following archives:

BBC, Pretoria National Film Archives, National Archives, Private Archive from other filmmakers, Mayibuye, ITN, Reuters, APTN, CBS, ANC, African Mirror, Photographers, Independent, BAHA, National Geographic, GCIS, Internet Repositories, ZBC, CNN, CBS, ANC, Robben Island, Museum Africa, Johannesburg library, Galio, Sarel, Danny Schechter's, Vaties and Aquavision, International Social Sources, News11, WKNET in US, Channel 13 New York, Old Killarney Films Archive, Majors, South African Police Service, eMakhosini, Library in KSN, South African History Archives, Gay and Lesbian Archive in Joburg, BFI, Peter Davis, CBC, ABC,

Huntley's UK, Russian state archives, Afravision, Promarte, Mozambican National Archives, "that guy's garage", ZimTV, Zimbabwe National Archives (Film Section), Film Resource Unit (FRU), Local production houses' archives, UCT archive project, UCT African studies unit, Iziko, Killie Campbell Library, Freddie Ogetrop, ETV, Government, District Six Museum, Baileys, Public museums and libraries, ANC library, Johnnic, MGM, & MNET

[29] I want to use CBC archives that I shot personally (I was producer/director) in 1990, 1992, 1994, but I can't access it without paying a fortune.

Have you had trouble accessing affordable archival material?

79% said yes; 21% said no.

[2] Once made a . . . not for profit film, and NPO organization. Asked for reduced rates [on material from BBC]. Absolutely refused.

[3] A lot of historical archive is owned by foreign repositories and is hellishly expensive. Because of that, they have had to reduce the amount of footage due to cost.

[4] SABC archives are among the most difficult and frustrating to work with. . . . Other libraries, which are better organized such as BBC, Reuters, are usually more expensive than SABC, although deals can be struck.

[8] African mirror archive: SAIS is charging R48,000 per minute. It was given by national archive to SABC to manage, and it was given for free. They are now charging exorbitant rates. SABC should have rate for SA programs. Archives have become big business. Costs are ridiculous. Stuff that is publically disseminated, filmmakers should be allowed to use free.

[8] Music is easier to get round than archive. You cannot emulate archive. Power of archive repositories is a huge problem, because doocie budgets don't sustain these. When the war is over: the TRC hearing recordings were given to national archive and to SABC. TRC was taxpayer funded and very important for country: then archive was housed at repository where one has to pay to view, and then to use it in doocies, one has to pay full SABC rates. Completely morally bankrupt. [He] has stopped working with archive because of the corruptness of the system.

[12] SABC - archive not managed properly – can't find good stuff - have to suffer pains of gatekeeper. Not properly catalogued. Have to pay huge amount for research. . . . Wanted us to use the SABC commission budget to buy their own archive at huge rates.

[14] If one is forced to use SABC archival material specifically for an SABC project, the cost base for doing that is too high. Other problems arise if one has a project that requires the use of archival material located in other countries. So the truth is that from any source the cost requirement for using or clearing archival material can be too high.

[22] SABC rates for archive they sell compared to the budgets they give local people to make documentaries are completely . . . inexplicable. I don't know how they expect us to pay in the space of the budget they give in the first place. They I would say are the worst for archive. They also have a terrible system, there is like one guy who runs the whole archive. If you can't get him on the phone you just can't get any archive. Other archives are good.

[23] Archive costs can and should be paid for to reflect the work involved. Except for, e.g., at Smithsonian it is often free. *** Thank god that there are commercial archives who filmed our history otherwise it wouldn't [be available] If you look at logs from ITN and BBC, they'll give you the cameraman's name. Or where they got hold of it, they've bought it. To the argument that we wouldn't have to pay overseas companies for our own history - WE SHOULD!! *** It's well maintained & looked after. There are cases where people have signed over rights to me, where I have questioned them about whether they really own it. [One filmmaker] has said, "Well I filmed it for that broadcaster." If they sign it to me, I have to accept it. Where there was a pool arrangement in the 1980s where camera people divided up the work in the mornings, it was only pool for that day, e.g., you go to Thembisa, I'll go to Kettlehong, but after the news event, it then reverted to the company who shot it.

[33] In fact, that is the basic trouble of archive material in South Africa. It is extremely inaccessible, both in terms of expense and the red tape. You have to undergo a lot of ordeal just to get the material that you require. It is very closely guarded by the archivists.

[39] Archives have become the most expensive part of the production; even trying to get to see the archives has become the most expensive process. That is the main difficult[y] I have been encountering in trying to acquire archive. For example, we were trying to get images of Black soldiers in World War II in North Africa. The way to get it was we had to travel all the way to London and sit at the military museum and British Archives. But

just sitting you had to pay a fee for just being there, you have to pay a fee. Considering all the other expenses, traveling, the use of the equipment and to view the material you pay a lot of money just to look [at] it. The only people who always come out of it are the big moneyed companies.

Have you ever used a second-hand copy of footage originally from an archive?

75% said they had used second hand footage originally from an archive. 52% said that they had used such material without clearing rights with the archive.

[1] Legally, a lot of the very old material (prior to 1976) - apartheid struggle material, which is mostly foreign - and they will use this in their documentaries. Sometimes this has been cut into other programs, and they will use this from the cut footage. The Mandela footage specifically is owned by overseas repositories. They will use this in their doccies without necessarily getting clearance. Often in their program Special Assignment, they will use images from books - have always considered this to be inconsequential. If they film picture in a book, they also don't clear copyright. If they film a picture in a newspaper, they will get clearance from the Newspaper. They will then credit the particular newspaper.

[4] Not 100% sure. Have used footage from other people's films and believe it was all their original footage - but cannot be certain.

[17] Like all over the world there's a growing amount of open source mentality where you can go on the website, you listen to whatever music you like and you can take it, it's free, and put in music if you want, it's all social. If that grows, I think it will take us to the next level – where you just drop stuff and people get credit for it or you don't have to pay and stuff like that.

[36] I was under the impression the rights were cleared through the initial archive sale. I was not really worried.

ASSERTING YOUR OWN COPYRIGHT

Do you sometimes find yourself giving up copyright in your own productions by virtue of the deals you have to enter into with funders or broadcasters or other organizations?

79% said yes; 21% said no.

[9] SABC. And this makes me reluctant to work with SABC under present circumstances. SABC doesn't deserve some of the material I have produced because it denies us our IP. But we gave up the copyright with a bleeding heart, just to get the information out there.

[13] Yes, of course! You sell your whole bloody soul, and your leg and your kitchen sink and your toes and your footage and your creativity and your brain, all those, all those to the national broadcaster (SABC). . . .

[16] If you've got a sitcom on SABC1, they will want you to give your copyright to them so that they can exploit it and really make that the kind of increase whatever they tried to create and they will make sure they beef up contracts that protect them and not the producer and when you ask them, "But why, can we change it?", and they say no it's [in the copyright law], it happened a long time ago, there is no way you can negotiate it, many have tried and many have failed forgetting that those laws were made by human beings.

[17] Broadcasters in SA basically don't give copyrights because they say they pay for the product so your intellectual property doesn't count and you don't really have a choice because that's the only deal you can get.

[18] SABC, whenever you do a commissioning from them, you have to cede all your rights.

[28] The problem with the SABC and its understanding of how one deals with copyright, they don't see it as a bundle of rights they want one monolithic right. They want the whole thing and then [they do] nothing with it. [For example, for one of the films] they brought on an international sales agent. But we've gotten nothing from that. For me, I'm not so worried about the money, but if it weren't for the international external sales agent, it would have sat on the shelf. We're not even paid for SABC's rebroadcasts.

[32] When I shoot on commission to SABC, and others, I generally keep my own copy of generic shots that could be re-used in another production. My justification is that the SABC's approach to IP is unfair and is being reviewed by the industry anyway, e.g., in the first commissioned production I ever did, we hired a special lens to do a shot of the moon. We spent extra money of our own to make this showpiece, and we continue to use the shot to this day. We have an electronic library system where we log everything so we can reuse it from our own library, and on occasions to sell it.

[33] This happens quite often. It happens both in literature with publishers, with producers and also with broadcasters and in many instances if not all instances that I have made films I've had to cede all the rights to the producer or broadcaster because of the definition that they become owner by virtue of making it possible to happen. So even if you have copyrighted your material, it's just a little symbol on a piece of paper, the moment you sign for it to be done it is out of your hands.

[39] It happens all the time with SABC when you sign SABC contracts, we do so much that we think its normality, that's how business is done. But, it's a matter of time before this injustice imposed on us has to stop at some stage. I don't think we can be robbed forever. I think morally and ethically, there is no amount of money that can buy an artist's creation. Even though they may give it to you and you own it, it's still their creation and no amount of money can take that away from you.

[34] My employment contract with Zim TV transferred all copyright to them in my work. As such, I had no rights in any of the slate of work I produced.

Have people or institutions ever re-used parts of your work? Do you know of anyone misappropriating your work or using it without giving you proper payment or recognition?

55% said that their work had been re-used. 41% said their work had been misappropriated or used without proper payment or recognition.

[2] Oprah Winfrey. At the Kempton Park World Trade Centre, when the Afrikaner Weerstandsbeweging (English: Afrikaner Resistance Movement, aka AWB) crashed through glass. [We] were there. We jointly owned footage with SABC. The material was licensed in film about Mandela. Oprah did something on Mandela, used the footage [without licensing from the filmmaker who shot original footage].

[11] I have directed films for a producer, who then owned the rights, and I have subsequently seen the footage used in corporate videos and not been pleased with that.

[15] I think the piece about the women who were in prison, but several other pieces the SABC has X number of repeats and I know with the one about the women prisoners called Survival Strategy was definitely played more than six or seven times and I

don't think that's in the contract but then again where do you go to and to whom do you complain?

[26] One of the Why Democracy films on China was put on internet in China without permission - but I was happy because it was the only way to reach the Chinese people. Other films were posted without permission and I got them taken down. I've had problems with bootleg DVDs too.

Are there circumstances where you are happy for your work to be used without permission or without payment?

69% said yes; 31% said no.

[1] Government often uses material for public screenings. Recently [a filmmaker] spoke to a tic addict [crack addict] - who told [the filmmaker] that he saw [his] program on tic addiction as an awareness program in a different format. It was not for profit but to raise awareness. They welcome this kind of usage.

[2] [F]or non-commercial enterprise then generally happy to be used without payment, or for friend, or project that she believes in. If she doesn't trust the person, and the material is sensitive, she would insist on seeing the material in the cut, usually to protect the person in it.

[3] I don't mind doing this if the work is for the public interest and the NGO's are distributing the film for free. When it's in the public interest and when it is for the common good. I would allow creative commons usage in order for material to be maximized. But would have to have some form of protocol or formalities.

[4] The point here is that it is actually part of the content of the film, not reused in a different way. Finally, on a case-by-case basis, it could be discussed to allow no-cost use by a filmmaker who really doesn't have the money and is doing something I support.

[5] Yes without payment, but not without permission.

[6] Educational, for the broader good, for raising awareness.

[8] [N]ot such a big deal for people on the ground, NGO, educational usage is okay. [Someone] used his first film . . . as example on unethical filmmaking - was recorded off the television. Was not happy as she was saying bad things about the film. Probably [would] not [have] minded if she was saying good things. SABC sold [another film] illegally - sold it to SAA, which was not included in the contract.

[9] Where it's being fairly used in the interest of public information and education for the community - strictly for that purpose. We often give it away, when people approach us and ask us. I believe universities have a budget - so they should at least inform us and ask if they need to pay. It would suffice for them to send us a letter explaining how they intend using the material. This would be a benefit for us - for our resumes. I get annoyed when I find out second hand.

[10] Depends on the project and the material. Happier for them to use factual rather than fictional, e.g., social issues. For example if someone took footage from . . . our film about AIDS . . . to make [an] important [work] about AIDS. Key thing their purpose or motive - if it's educational - socially useful. We have given permission without asking for payment e.g., workshops for mineworkers - 'community outreach projects'.

[12] Don't mind giving bits and pieces to friends who are filmmakers, who don't have money, and when I believe in their film. Global witness recently contacted me and I let them go ahead. Also, if they are using a short clip (under 30 seconds) to construct an argument that is not stealing IP - because their film makes a bigger arguments and the sum total creates new IP, of which my clip only forms a small part.

[13] Yes, I would be happy for it to be used without permission or payment as long as someone asked me, for example, where new work is created out of it. I just want to kind of know about it really, that's all, so I can intervene if it is not being used appropriately.

[14] Support would be the nature or the type of program where we want it as broadly distributed as possible and actively encourage a kind of viral distribution of the program like the child refugee program we did, . . . , we wished it to be distributed and have promoted broad distribution of it across any platform so it gets out there because we think it's important. So yes, we do support that type of usage for particular types of programs.

[17] Well because I don't own the work, it's not my call. Yes, I like supporting people in a context where somebody is making a film and my stuff comes appropriate and they feel like it could help. I wouldn't have a problem especially if it's SA filmmakers, we all have the same struggles.

[19] Well if it's for a good cause that I believe in, I wouldn't have a problem, e.g., any documentary work that is transformational and educational. A documentary that is not about profit making, but about uplifting communities.

[20] Without payment - a non-commercial production - especially a political project I wanted to support or a worthy project. Or a struggling filmmaker.... For fair use of my material - it would depend on the material. Worthy project by educational filmmakers would be OK. So fair use would have to concern itself with the rights and dignity of the people in the footage.

[31] If it's for a charitable cause. If it's for a fellow documentary maker with a limited budget and I agree with the theme/concept of documentary.

[33] Unfortunately, you have to live with it if you want your work to be distributed or to be seen. You do that reluctantly with great reservation. The exceptions depend on the cause for which the work is done. If it's for developmental purposes I have no problem, in the same way as I use other people's material, for example in teaching film, but with acknowledgement that this is so-and-so's work that's being used. I think that's like the minimal condition that one can put, that acknowledgement is very important.

[37] On a global level, it would contribute some works to a creative commons, for use by anyone with specific guidelines.

Have you ever given permission for your work to be used and then been dissatisfied with the result?

10% said yes; 90% said no, or had no response.

Have you ever considered taking (or have you taken) any action against anyone who used your work without the necessary approval?

25% said yes; 75% said no.

[14] In the local context, we actively sought support from Surfact, which is the agency tasked with routing out piracy and that kind of enforcement practice. We actually contacted them, we had many discussions and forwarded documentation to them to try and do something about it. Unfortunately, Surfact didn't feel that it was a useful exercise.

What are your most important rights as a creator?

[8] Copyright and equity. Put copyright notices on the films and on all documentation related to the films. Don't give masters to people. Lower quality copies when handing these out, with time code. Equity: make sure you do good contracts.

[9] Copyright, creative rights. We always fight with SABC that we are not service-providers. But we make the content happen through our creativity and we make the content happen.

[11] The right to be recognized as the creator of that thing.

[12] Right to earn money from the film. In Angola, I have no legal remedy. Moral rights don't really matter - it may get me recognition, but it doesn't allow me to earn money.

[13] I have rights as a creator and if my work is to be used, I have a right to be consulted about that. I have a right to have an input even potentially into the new work. I suppose I would have to sue someone if they kind of transgressed (my rights), but I wouldn't know how to go about doing that, I wouldn't know what my rights are and how far I could go, I wouldn't know. And, I suppose I need to go read the copyright act.

[14] The first and most important is to own or co-own IP embodied in a project and to have the right to optimize the use of that by way of distribution of sales to as many outlets as possible. How one protects that is through normal means of placing disclaimers on the material in the first place. But that's really no means of protection, but if it's certainly through some means of license or sale agreements is to specify the nature of usage and the duration of usage and the various platforms of usage, which increasingly has become quite important as traditional broadcast or theatrical are no longer the primary mean to material being distributed.

[17] I don't take any steps because it's like you don't have a choice and the only deals you can get in SA are the ones that take away your intellectual property.

[21] With SABC, I have none. In general, I have none. It's a disaster. I could be really wealthy by now with everything I've produced. When SABC rebroadcasts dramas, actors have 'residuals', production staff receives no royalties. My key concern in terms of my rights over doccies, would be an ability to maintain sensitivity to subjects, the people in the doccie.

[28] The right to sell it, and resell it to different people, the right to write a book based on it, sequel, all are economic opportunities, that's what copyright is about. In a less capitalistic society, one would say copyright is about the right to make sure your work is used fairly and appropriately.

[34] Moral rights are more important to me. Meaning you cannot re-interpret its context or meaning without my permission.

COPYRIGHT KNOWLEDGE

When you have a question or concern about a copyright issue, where have you gone to seek guidance? Do you have trouble finding competent legal advice?

41% stated they have difficulty finding legal advice.

[8] In Africa, that's a huge problem. Getting a bit better. Lawyer friends, to see what they say. Fair usage guidelines from the Net. [Another filmmaker] is getting advice from legal experts in the states.

[11] Often you just ask someone else in the industry. I think there is a common law on the ground that everyone thinks is the law, and it probably is not necessarily so.

[12] AU PIJIP document on Fair Use. Lawyers are generally too expensive. [One SA attorney] didn't give us a clear argument. (The top guys on copyright in SA are Spoor & Fisher)

[23] If someone was going to assert fair use in a big way in their films, I wouldn't take it on [as a researcher]. If they want to use fair usage, they need to have that cleared up before they come to me. And I don't know how they'd do that. So I wouldn't take the job on. I have good relationships with the main archives. And they give me good deals for my clients. I'm not going to jeopardize that.

[13] Copyright lawyer. If I was really concerned about copyright I would probably hunt out a copyright lawyer, but generally it's the word of mouth.

[17] Never because there is no point of consulting.

[20] Lawyer - Mark Rosen. He's OK, but he's generalist. Isn't enough work here for people to really specialize in copyright. I think copyright law is hugely misunderstood by many of us. Clear that the law is open to a lot of interpretation. Often not a clear-cut answer. Often makes people err on the side of caution. So we are looking for short concise answers - in fact, the answer may be more complex but we just back away. . . . Got David Dyson in at that time - couldn't give us 100% assurance. Copyright overlaps with so many other rights. There is a notion that it is much easier to use images of poor people because you will never be sued. Much harder to use images of wealthy people. Generally True. Interesting thing - attitude that people have to the poor.

What is the impact of current copyright law on filmmaking in South Africa?

[1] I have come across work from new producers, with footage included that is in flagrant disregard for copyright law and thus cannot be used. Scans of works from libraries that cannot be used.

[2] Law is against the creators. Archaic. SABC operates like this: he who pays the piper owns the tune. Desperately needs to be overhauled. Enormously prejudicial.

[3] Broadcasters are the main source of funding, and thus they take over ownership of copyright because of commissioning. Disinclines us to become creative partners with the broadcaster. Long term effect is to diminish viability of documentaries as a sector of the film industry. One of the most damaging legislation that exists and reluctance of the broadcasters to address these issues.

[4] Existing copyright laws in South Africa are arcane and are not up to speed with international developments such as those being promoted by Creative Commons. Financial input is regarded as far too important in the copyright attached to a work, and the rights of creators inherently are not considered at all. Additionally, fair use is impacted because once copyright is owned it is far too absolute and not related to public interest or needs.

[8] Discourages certain kinds of storytelling, and decreases production value.

[9] Black filmmakers are so desperate that they don't care about copyright - they just want to tell their stories - often because they just want to earn. . . .

[9] Depends on situation - under compensates original creators but overcompensates some institutions that monopolize all copyright *** like where SABC owns copyright in your films for many years.

[9] Indigenous IP doesn't give enough control.

[10] Don't know what law says . . . different point of view on different projects. Fictional project originated from nothing where someone created something from scratch . . . I value more about their copyright. Documentary makers are using real underlying events, while the way they present them may be original, the underlying footage of events often I feel should be more widely available. With wildlife & natural history, people have gone through such hardship and have material that is so rare, costly,

and involved so much endurance (e.g., snow leopard) I feel that's another category. But with current events, it's a different matter.

[12] I believe in copyright 100%. But there should be different tiers. Local filmmakers should access local archive more cheaply than international ones.

[14] [T]he key issue around copyright is really about the rights of those who created IP in the first place and how to add and optimize those rights for the creator and this is where the issue comes in, I mean SA actually has good copyright laws or compatible with the way the law is structured anywhere in the world.

[18] Discouragement – you do a lot of work for the broadcaster, the copyright is vested in them so you get discouraged to put extra amount of work in it because you are not going to get any benefits of it after. So therefore, the work becomes mediocre.

[20] It makes certain kinds of films impossible for us to make, even though we are in a crucial period of our history, where we would be examining our past. We don't own our own history. You couldn't make a film on the Soweto Uprising in SA unless you had big international money. Isn't that a tragedy?

[27] Making a documentary film is more difficult than it should be with regard to copyright issues. Broadcasters demand 100% copyright of films and then don't distribute them internationally for broadcast or non-broadcast such as educational usage. If they allowed filmmakers to retain distribution rights and rights to their source footage, filmmakers could exploit this opportunity and be more financially empowered.

[35] The laws in South Africa are fairly good, but the implementation, monitoring, and policing of these laws are non-existing.

[39] A lot of the laws are not meant to empower ordinary folks like us. They have exploited people in so far as they have for years and years raped us and our people.

Outline any ways you think South Africa's copyright laws might be improved to encourage the production of documentary films.

[1] Certain material should be allowed in order to encourage new filmmakers. Copyright restricts them. The amount of money required is excessive. These fees should be restricted, as a lot of films cannot be made because the producers cannot afford it. There should be a cap on the fees.

[2] If people were able to own and sell their own work, industry might be more sustainable. If public broadcasters were forced to act like broadcasters and encourage creativity instead of discourage, then we wouldn't have to pay them large amounts of money for stuff in the public interest. Broadcaster should be repository of public interest. The SABC is a privileged system because they have three channels, on some level they act as broadcaster when they protect their rights, but they act like commercial broadcaster holding onto copyright and not reselling content.

[3] Main way: interpretation of the act - different interpretation. Addressing creative rights to their own IP, and the right to benefit from their own IP (like IT, software patents invested in creators). Industry needs to get . . . together and work as cohesive body - across all the different bodies that make up TV industry. Cohesive, coherent task team that speaks with one voice to the broadcasters and ICASA.

[4] Look at models in other countries where copyright of creators is implicitly respected, and fair use is in place. Compare to Creative Commons to find ways that the national legislation could allow for more flexible copyright laws.

[5] A clear distinction between ownership of copyright versus who's paying for the cost of creating something: i.e., SABC abuses copyright because they do not recognize that copyright vests with the creator. They should be empowering the creators, and they should hold on to copyright.

[6] Things that are in the public domain like the news and current affairs programs, and that are sociological in nature should be allowed to be used without permission or payment. . . . In a way, if you can see that it was generally incidental, it should be allowed. If the program is quantifiably educational in nature, one should be allowed to use music or footage to enhance the production. Moby has free tracks online for anything that is proven educational.

[7] Consult with all stakeholders to revise the copyright law, taking input from our organizations such as DFA, for a new law to be passed. Also some kind of controlling body that one can appeal to in the event of problems with copyright or excessive fees being charged - some kind of ombudsman on copyright, with 'teeth.' Portal [on which] people can easily [access] info on archives . . . - where one can find good lawyers, where the archive is kept; best practice from other countries. One Stop Shop. Should be sponsored by the Department of Communication, as this is their job.

[8] Careful assessment: differentiation between footage. Stock footage can be sold, but news and historical events should be more easily accessible and handled differently. SABC should not be allowed to charge R48,000 for footage – taxpayers' money paid for it to be created.

[9] An ideal situation with [some] clips is to acknowledge the filmmakers. The material is public Information and educational. And we don't have the budgets to clear stuff from around the world.

[10] Material entering public domain after specified period.

[11] Archive material should pass into the public domain much sooner, almost like drugs, the developer gets a window to exploit their R & D and then it gets thrown open to everyone.

[12] Very clear rules and guidelines around fair use. Find a way to force our national broadcaster to give filmmakers access.

[13] I think people need to learn what the (copyrights) laws are. I mean if I knew what the laws were then I could know if should be angry about them or not. But I have got a clue what the stuff is out there. So I need to be educated, you know, like what are my rights? Where are, you know, what I think should be my rights, where are those being undermined?

[14] With regard to France where the rights of the creator is in the law so that the creator will have some share and benefit.

[15] I think the world is exploding right in front of us in terms of new media, in terms of images, in terms of value, in terms of relevance, in terms of how it's been used. There is a whole new world being opened up and I think for those of us who generate information, stories, the whole in terms of improvements it's at our finger tips and everything can change but we do need to equip ourselves with digital rights, with understanding all secondary rights and how to make it work on our favor.

[15] If there were laws that did have exceptions to allow us to make more films, better films and films that could travel a lot more. I know there are a couple of sites where they allow you to use the material as long as you acknowledge the source, because the main thing is what's the point of having all this information if it never comes to light, as creators and as people who are putting it together, if we have more access we would see different kinds of stories out there.

[17] An open source of information where creators are properly credited.

[18] I think an international survey needs to be done to see best practices in different countries. In special relationships in developing countries such as ours, [and see] what they're doing and make an informed decision based on that.

[19] People should not own documentaries, they should have a right to use for a period of time and that property should go back to an archival institution when it can be used and treated in an organized manner so that you know what is happening to it.

[20] I think that our current copyright law which is apartheid law is unconstitutional. And it is being challenged as we speak. Hopefully, with that will come new laws to help us all. We once did a study for TPA. Unconstitutional because it denies ownership. Problem is that the definition of ownership is too narrow. If you recorded stuff in 1976 - the only person with rights is the person who paid for the tape. In the same way the SABC gets to own all the content it broadcasts. So the problem is with the definition of ownership - and who the ownership goes to.

[21] Would like to use material without permission if knew it was ok. Copyrighted material often out of our budget range. Also too much material in SA is owned by SABC... difficult to access, both physically, and then copyright control.

[23] Our copyright laws should be following international law. I always ask license lawyers to put festivals in for free. Would be nice if there was some sort of universal law. Would like it to follow US law, where if something is shot with government/state money it is free usage. Perhaps that should apply to the SABC. One could do a discount at SABC because it's only part state.

[28] It's not the law that needs to be improved, there needs to be a better understanding that copyright is a bundle of rights that can be separated and negotiated individually.

[34] I know the US is promoting "Fair Use" principles, and I think that may be a good idea for South Africa also. Encourage the set up of a public access archive vault of treasured heritage or historical material.

[39] My justification was based on the principle that the story needed to be told, and I could not afford the money that people were asking for. I'm still waiting for the legal problems that will follow me. But, I think whatever legal problems are coming, I am expecting and I am anticipating them. In fact, I want them to happen so that this subject can now be discussed in public, in court, so that we can debate about these images. So, I am

waiting, I wonder who is going to have the guts to sue me for that. But, I use the material. I have never sued anybody for using my material, and I'm sure there have been so many people that are using material, and I've actually given material away.

Give details of any copyright laws in other countries that you believe are more conducive to the work of documentary filmmakers than South Africa's laws.

[2] France - enforces copyright returns to artist after certain period. Britain - copyright act overhauled: broadcaster does not own copyright even if full commission.

[3] UK [is] doing reversals now, due to heavy losses. [It is] u-turning on gains being made by producers. Claiming back much of the rights. The USA where there have been major gains in the area of copyright - producers are benefiting.

[7] In the USA and England and probably Europe, growing trend towards Fair Use and people pushing boundaries and actually fighting for it. Here we are not at that stage yet. Growing awareness around issues of IP, and the more awareness, the more people with fight for it.

[8] The fair usage principle in the US is a good thing. Blanket license agreement that the BBC has should be used in South Africa.

[11] Brazil has a whole creative commons thing.

Do you know of the fair dealing provision in South African law?

17% said they had at least some understanding; 83% said they had little or no understanding.

Do you understand the concept of "insubstantial copying" under the copyright law?

7% said they had at least some understanding; 93% said they had little or no understanding.

Are you aware of the "incidental use" provisions in the Copyright Act?

61% said they had at least some understanding; 39% said they had little or no understanding.

Do you have an understanding of the concept of the "public domain" and its application to your work?

78% said they had at least some understanding; 22% said they had little or no understanding.

Do you have knowledge of the exception for quotations under the Copyright Act?

22% said they had at least some understanding; 78% said they had little or no understanding.