

Documentary in a Culture of Clearance:

A Study of Knowledge of and attitudes towards copyright and fair use among
Norwegian documentary makers

Leif Ove Larsen and Torgeir Uberg Nærland

Department for Information Science and Media Studies, University of Bergen, Norway

Email: leif.larsen@infomedia.uib.no; torgeir.narland@infomedia.uib.no

Abstract

Copyright law is a mechanism for regulation of production and dissemination of cultural products. In documentary storytelling reuse of copyrighted material such as footage and music is of great importance. This requires filmmakers to get permission from right holders, obtain a license or invoke fair use under copyright law. As most documentarians must handle copyright issues in production, copyright law is influencing the practice of documentary filmmaking in various ways. This article presents a study of Norwegian filmmaker's experiences with and attitudes towards copyright. A key finding is a widespread uncertainty on copyright issues in general and in terms of invoking exception from copyright, such as fair use, in particular. It also discusses the wider implications of the current copyright regime on fundamental democratic ideals of cultural creativity and free speech.

Keywords: Documentary film, copyright, fair use, media production

Documentary in a Culture of Clearance:

A Study of Knowledge of and attitudes towards copyright and fair use among Norwegian documentary makers

Documentary film may be understood as an audiovisual record of our culture. Modern documentary includes a variety of forms and modes such as *cinéma vérité*, investigative journalism, the compilation film, and various kinds of 'reality television'. Documentary has always had a strong position in television schedules, and the genre has had a prominent role in informing and educating citizens in a democratic society. Even though television has been pivotal in the evolution of the genre, documentary is an important genre for small-scale film production companies. During the last decade, several documentaries have been box-office successes at cinemas in Norway and other western countries.

Documentarians often use stock footage, photographs, music and other kinds of archival material. This is especially the case for historical documentaries, or films commenting on media and popular culture, but portraits of people, groups or institutions may also naturally require the reuse of cultural artefacts. Such material is generally protected by copyright. Reuse of cultural artefacts is an issue for most documentaries, even in the observational mode of *vérité*. An artwork or a logo may be protected, as is music on a radio or a television programme that happens to playing be within the location of the shoot. Copyright is a prerequisite in documentary production and has become increasingly so during the last decade.

This paper presents a case study of Norwegian filmmakers' relationship to copyright. The aim of the study is to illuminate whether and how copyright influences creative choices in documentary production. How do issues of copyright influence the filmmaking process, from the chosen subject of a documentary to creative decisions concerning the choice of image and soundtrack? And what is the filmmaker's knowledge of copyright law and how do they comply with it? Of particular interest is their understanding of "safety valves" in copyright law, exceptions from exclusive rights doctrines such as fair use. Debates among filmmakers indicate great uncertainty about the content, limits and implications of these rules of exception. For a genre whose essence is documenting culture through storytelling of reality present and past, it may be of importance to invoke and thrust these rules in order to fulfil a critical function in the public sphere. The questions raised in this study have wider implications, in particular concerning the issue of free speech. We may ask whether copyright is an impediment to or a support for creative and expressive freedom in documentary.

COPYRIGHT, CULTURAL CREATIVITY AND FREE SPEECH

The issue of copyright has been at the forefront of discussions on intellectual property in a digital environment in two decades. Both in the U.S. and E.U legislation has been revised in order to handle digital copying, file sharing and "piracy". One consequence of digitization has been a general strengthening of copyright, its range and scope. Revisions of copyright law both in U.S. (*The Digital Millennium Copyright Act, 1998*) and Europe (*Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society*) in the last decade may be understood as a response to a new digital environment,

giving stronger protection to copyright holders. Even though this has been a long term tendency, the “digital moment” may be understood as a key factor in the recent development of copyright law.

Prominent law scholars as Lawrence Lessig, James Boyle and Neil Netanel have criticized the U.S. copyright act for strengthening copyright, thus creating an imbalance between interest of the creator and the interests of the public. In his book *The Public Domain*, James Boyle argues that extended scope and duration of copyright is diminishing the “public domain” – the reservoir of cultural works not protected by copyright law and, ordinarily, free for all to use. According to Boyle the consequences of this “enclosure” may be detrimental to free speech as well as cultural and scientific innovation (Boyle, 2008). Lawrence Lessig has written extensively on how expansion in copyright may be a threat to “the ecosystem of creativity”, to the cultural and scientific progress which copyright was intended to promote. The current regime of copyright, Lessig argues in *Free Culture*, was made for a world of analogue media. Applied in a digital environment these rules are hindering cultural expressions and freedoms offered by new technology (Lessig, 2004). Copyright must be reformed, he argues, in order to make sense of the creative potential of digital technologies, Lessig argues in his book *Remix* (Lessig, 2008, p.253). Otherwise the current copyright regime is not only a threat to cultural creativity, but may have severe moral implications as a generation of kids is raised as criminals.

A strengthening of copyright may put burdens on free speech. There has always been a paradoxical relationship between ideals of free speech and ideals of copyright, according to Neil Natanel (2008). On the one hand copyright motivate writers and artists to create by giving exclusive rights over some years. On the other copyright is an impediment free speech by preventing artists to express themselves through text, songs and pictures that already

circulate in the culture. Copyright have free speech burdens in three interrelated categories, Natanel argues. The first burden is the “censorial” which occurs when right holders withhold permission to use their works by denying access or licensing, for example to reproduce a picture or music in a documentary. The second burden Natanel labels “prohibitive costs”. When right holders demand an expensive license fee for reuse, this may prevent a certain expression to be made. The third category is “distributive speech burden”. This has to do with concentration of copyright ownership. Big media companies are controlling vast inventories of works and they have tended to deploy their copyright arsenal as a tool to “stifle competition from emerging new media and thus to maintain their dominant market position” (Natanel, 2008. p.111). The issue in Natanel’s analysis is not to invalidate this tension, but to decide whether copyright has imposed unacceptable burden on free speech ideals. This is the case at present, Natanel concludes. In order regain a reasonable balance, he proposes a revision of copyright the act that is “narrowing copyright holders’ proprietary entitlements” (Natanel, 2008:195). The fair use doctrine, which Natanel describes as a “highly unreliable defence of First Amendments values” (Natanel, 2008:66), has no prominent role in this revision.

The rule of fair use has been an important safety valve for free speech in copyright law. Fair use is as a limitation of exclusive rights, allowing reuse of copyrighted material without license or payment under certain conditions. U.S. copyright law gives four criteria for fair use, comprising the purpose of the use, the nature of the protected work, the extent of the use and its economic impact. The rationale for these exceptions or limitations of the copyright holder’s exclusive rights has been to promote “progress in arts and sciences” through diffusion of culture, criticism and ideas. While copyright protects the interests of the rights-holder, fair use represents the interests of the public.

The role of the doctrine of fair use in a digital environment is contested. Critics claim that the recent strengthening of copyright has undermined fair use. Important in this respect is the so called anti-circumvention provisions included in recent copyright law in U.S. and E.U to protect digital rights management system (DRM). These provisions are, according to Peter Jaszi, a “new family of legal norms”, as a kind of “paracopyright”, in which traditional exceptions to copyright, including fair use do not apply (Jaszi 2005, p.12.). These rules make fair use illegal. It allows, as James Boyle puts it, copyright owners to “distribute a particular work *with* the exclusive rights” but *without* the limitations of fair use (Boyle, 2008, p.96).

In Europe the debate on copyright and free speech came later and has been less intense than in the USA. Moreover European courts have been reluctant to apply fundamental principles such as free speech in conflicts between citizens. Free speech arguments have primarily been applied to protect political expressions and the freedom of the press. Law scholar Bernt Hugenholtz explains this partly by a different legal justification of copyright in continental European law, partly by difference in its constitutional foundation. Contrary to the utilitarian principles in U.S. intellectual property law, European copyright is based on a natural rights philosophy (Hugenholtz, 2001). While copyright in U.S. law is given to the author by the law maker to serve certain purposes (“to promote sciences and useful arts”, U.S. Constitution Art I, § 8), copyright in European law is primarily seen as an “essentially unrestricted natural right reflecting the ‘sacred’ bond between the author and his personal creation” (Hugenholtz 2001, p.344). Following from this copyright in most European countries does not have a specific constitutional basis, but in provisions protecting private property and personality interests.

The recent extension and expansion of copyright, as well as commodification and concentration of private control over information and cultural resources have attracted the

attention of European lawyers and scholars (Griffiths and Suthersanen, 2005, Hugenholtz, 2001, Hugenholtz and Guibault, 2006). Today the relationship between copyright and free speech is on the agenda in Europe as well.

CHALLENGES FOR DOCUMENTARY

What may be the consequences for documentarians of the current situation in copyright? A key issue is the weakened position of the fair use doctrine. Lawrence Lessig argues that the current copyright regime has made the doctrine of fair use fuzzy and thus made it a “lawyer zone” (Lessig, 2004, p.292). In a climate of legal uncertainty lawyers for good reasons generally tend to advise against taking the risk of liability by invoking fair use. To be sued by big media corporations for copyright infringement may result in bankruptcy for independent filmmakers. According to Lessig, filmmakers tend to follow the lawyer’s advice and play safe.

This climate of uncertainty is producing what Pat Aufderheide and Peter Jaszi, in their study *Untold Stories: Creative Consequences of the Right Clearance Culture for Documentary Filmmakers* (Aufderheide and Jaszi, 2004), are describing as a “culture of clearance”. The concept is defined as a “shared set of expectations that all rights always must be cleared.” A key finding in their study is that U.S. filmmakers understand copyright as an absolute right, not as a balancing of interests between the copyright holder and public interests. Aufderheide and Jaszi describe filmmakers as hostages of a “clearance culture”. U.S. filmmakers in the independent sector respect intellectual property rights. When they are facing escalating rights-clearance costs and a complicated and frustrating process of clearing, copyright is described as a creative impediment. The result is a “significant change in the

documentary practice” (Aufderheide & Jaszi, 2004, p. 4). Importantly it is influencing the choice of subject-matter, as filmmakers tend to avoid projects involving “current event or modern history” which are seen as minefields in terms of the strict compliance through licensing that they require (Aufderheide and Jaszi, 2004, p. 29).

These findings comply with a survey on European documentarian filmmakers *Licensing and Rights in European Documentary Practice* (Rawie, 2008). This survey concludes that “copyright laws in Europe are a serious and growing problem for documentary filmmakers because of increasing expenses and limitations on the use of archival visual material and music”.¹ Copyright cost is estimated to amount to between 20 per cent and 30 per cent of the budget of many documentaries, and there is a tendency that documentaries on subjects like art or history are not being made due to the costs of archive footage or music. More than half of the respondents report that license costs have prevented them from making the film they planned, and close to 40 per cent have re-edited or re-versioned their documentary prior to release due to copyright issues. Nearly half of the filmmakers have been compelled to withdraw a film from European or world-wide distribution due to licensing issues.

The attitude among the majority (85 per cent) of European documentary filmmakers is that copyright law is more harmful than beneficial to them. According to the filmmakers, it gives too much control to copyright owners such as the music industry, commercial and national archives, and national rights associations. According to the report, the current E.U regime of copyright has severe implications for the documentary genre and is described as a threat to the freedom of expression and information.

The summary does not describe how the exceptions in European copyright have been employed. The American study, on the other hand, documents a widespread uncertainty

among American filmmakers about when and how to invoke fair use. If filmmakers claim fair use, the gate keepers, distributors and televisions companies will not publish or broadcast without having documentation of all rights being cleared or that sufficient insurance against litigation can be put forward.

The fear of litigation seems to be a key element in a “culture of clearance”. Thus, if documentarians invoke fair use they will either not talk about it or do so explicitly. The latter is the case in Robert Greenwald in *Outfoxed: Rupert Murdoch’s War on Journalism* (2004) and Danny Schechter in *Weapons of Mass Deception* (2004) as Fox Network denied them licence to use footage from Fox News. However both Greenwald and Schechter used the material and they invoke fair use in the title sequences of the films. Neither of the two filmmakers was brought to court. This is normally the case in the U.S.: Copyright holders unwilling to give a licence are demanding an extremely high price, well aware of the filmmaker’s limited budget, or threatening to bring any copyright infringement to court with bankruptcy as a possible outcome.

Outfoxed and *Weapons of Mass Deception* are examples of documentaries criticising media coverage of political issues in an American context. Norwegian copyright act differs from U.S. and E.U law. Importantly in this context, Norwegian copyright law does not have a fair use paragraph, as in U.S. law, or an exhaustive list of exceptions of exclusive rights, as in E.U law (Directive 2001/29, ch.1, art. 5), but a generally-formulated “right to quote” from “a published work in accordance with good practice and to the extent the purpose demands” (§22) The reason given for this limitation is the public interest, in particular the promotion of such important democratic values as freedom of expression and freedom of information. However, lack of criteria and court decisions makes the rule vague and contested, not only concerning how to define a quote but also whether it is applicable to digital media (Aakre,

2002). In order to underline the similarities and differences between the U.S fair use doctrine and the Norwegian (and Nordic) citation rule, we will depict the latter as “fair use”.

METHODOLOGY: SURVEY AND INTERVIEWS

The methodology, and questions put forward, has two inspirations. The first is the study by Aufderheide and Jaszi (2004) mentioned above. Their study is based on interviews with 45 filmmakers from the independent sector, all in charge of making creative decisions, primarily directors but is also including some producers and editors. Informants were selected through business networks and catalogues for film festivals. A questionnaire guided the interviewees to focus the discussions on three issues: first, problems in rights acquisitions of completed projects; second, rights problems that resulted in stalled or incomplete projects, and third, experience with unauthorized or inappropriate use of his or her work.

The second inspiration is a questionnaire developed by the European Fair Use Initiative. In 2007 a group of European documentary filmmakers made the resolution *On Freedom of Expression and Information in Documentaries* (Documentary-campus, 2007). The document is arguing for the prominence of documentary in a democratic society as a disseminator of knowledge and ideas, and as a genre committed to social and cultural criticism. In order to perform its functions in a democratic society, documentary depends on its ability to “quote or otherwise use third party copyrighted works” as (1) an object of criticism; (2) to illustrate an argument or point; (3) when captured in the process of filming something else; (4) to illustrate an historical sequence. The resolution argues for a strengthening of fair use in European copyright and to consider developing a European

document for best practice in documentary. In 2008 the initiative was followed up by the above-mentioned survey of European documentary filmmakers aiming to identify the impact of copyright issues on documentary production in general and the clearing process in particular. The questionnaire for the survey has 26 questions focusing on (1) respondent information; (2) experience with copyright, and rights clearance in their own films; (3) the filmmakers' own copyright; (4) attitudes towards copyright laws in their own country.

Our questionnaire is, with some exceptions, similar to the European questionnaire in design and content. Two deviations are of importance: first, we give more attention to experience as users of copyrighted works and less to own copyright; second, while the European study has a qualitative design, our questionnaire has pre-defined alternatives with space for voluntary commentary. This has certain advantages in analysing the answers and may increase the validity of the survey.

Furthermore, in the process of developing the questionnaire we got valuable feedback from filmmakers. The two associations for, respectively, Norwegian filmmakers and producers (Norsk filmforbund and Norske film og TV-produsenter forening) kindly allowed us to use their e-mail lists. In November 2008 the survey was e-mailed to 29 members of the documentary group of the producers association and 140 members of the association for film workers registered as directors (both documentary and fiction). Three weeks later we had received 28 replies from 20 directors and 8 producers (main occupation – some have both roles). This was lower than expected. However, taking into consideration double membership and the number of directors not primarily engaged in documentary, this reply rate is acceptable.

The survey drew our attention to cases which could highlight key issues to be followed up in the interviews. Our interviewees were not chosen by random, but from what we

considered interesting and representative cases mentioned in the survey. We interviewed eight filmmakers, directors and producers, experienced and newcomers to the business, and representing well-established production companies as well as the one-man company so typical of the business. Thus the interviewees represent a diverse group of films in subject matter, narration and intended audiences. *USA vs Al-Arian* and *Min datter terroristen* (“My Daughter the Terrorist”) deal with international politics and are made for an international market. *Blod & Ære* (“Blod & Honour”); *Oljeberget* (‘Mountain of Oil’), *Odds Odds*; *Min mors hemmelighet* (“The Secret of my Mother”) and *Den hemmelige klubben* (“The Secret Club”) are portraits of, respectively, a former boxer and European champion; the Norwegian Prime Minister; a social isolated alcoholic; the unknown history of the director’s mother; and the gay movement in Oslo during the 1950s. Budgets range from less than one million NOK to more than five million. Documentaries are normally co-financed by public and private funds and by pre-sale to the two major Norwegian public service broadcasters, NRK or TV2. All films are, however, dependent on financial support from Norsk filminstitutt (Norwegian Film Institute) which administers the state subsidies for Norwegian film production. In 2009 the Norwegian Film Institute manage funds of NOK 356 million to be use for film purposes, of which NOK 28.4 million is allocated to documentary. Generally there are between 50 and 70 application to every allotment and the number of applicants is increasing (Filmfondet.no, 2009).

The interviews were done in April and May 2009. Supplying the survey with interviews proved valuable as they gave elaborate information on the key issues in the survey, as well as more detailed information on the implications of copyright issues on specific productions. The interviews were carried out using a semi-structured interview guide, allowing the interviewees to elaborate freely on key predefined aspects of documentary

practice. The interview guide contained two sets of questions. The first were individually adapted and focused on the productions the interviewee had been involved in. In the second set of questions, similar for all interviewees, we focus on general issues such as attitudes towards copyright law, knowledge/experience with “fair use” and suggestions about how to improve legislation and procedures in this field

In interpreting the answers we must take into consideration the possibility of an overrepresentation by individuals with troublesome experiences with copyright. Those that have had no relationship, or an unproblematic one, with copyright may be less motivated to reply than those who have had problematic and frustrating experiences. It is not surprising, then, to find that all respondents have used copyrighted works either a few times or many times in their films. Even though critical voices may be overrepresented, the survey gives without doubt a good indication of experiences with and knowledge of copyright among Norwegian documentary makers.

FINDINGS

COSTS, RIGHTS AND SIGNIFICANCE OF NATIONALITY

A key finding in the two studies mentioned above is the increasing cost of clearance. Norwegian documentarians tend to share the same view about high prices, but opinions about escalating costs are not entirely uniform. More than half of the respondents reports that there is either considerable or some increase in costs. However 40 per cent do not know or do not have any opinion on the issue. Looking at the most experienced group, filmmakers who have been in the business more than ten years, a majority reports considerable or some increase in

costs. However 6 of the 15 in this category report either small changes or they have no opinion. This dispersion of views seems to concur with the experience of international copyright holders. Filmmakers who have licensed foreign footage or music are more inclined to report escalating costs than those who only have dealt with national rights holders.

The cost of licensing of music is a recurring issue in the survey. One respondent comments that “music has become relatively cheaper over the last years.” But he still finds reuse of music too expensive due to small production budgets and poor financing of documentaries. However, filmmakers attempting to use music that has foreign rights holders, such as Lou Reed, Andrew Lloyd Webber or (the Norwegian group) Røyksopp, report exorbitant prices. In a documentary on Prime Minister Jens Stoltenberg, *Oljeberget* (2006), director Aslaug Holm wanted to use Lou Reed’s song *A Perfect Day* to illustrate the Labour Party’s election victory. After a four-month long and complicated process to find the rights holder, the price offered was \$75,000. For the same film the producer got the rights to two of the most popular songs by Creedence Clearwater Revival for \$500 each.

In the portrait documentary *Odds Odds*, director Aanund Austenaa tells a story of a socially-isolated alcoholic named Odd. Besides his dog, music is the pleasure of his life. Listening to recorded music is a predominant activity in the daily life of Odd and, consequently, music of many genres is present in the space of filming. The director did not, however, have the budget to use all necessary recorded music – he had to choose the less-expensive. In particular, he describes a very emotional scene where Odd is listening to Andrew Lloyd Webber’s music from *Phantom of the Opera*. The price demanded by the rights holder was beyond reach and Austenaa had to change the music and re-edit the soundtrack. Thus, in the final film, the man seen on the images is reacting to quite different music from that heard by the audience.

Footage owned by foreign rights holders can also be expensive. In the portrait of Norwegian boxer Ole Klemetsen, *Blod og Ære*, approximately half of the screen time is archival material, mostly from the family archive, but still a lot of footage had to be licensed from television companies and boxing promoters. The ups and downs of Klemetsen's career are illustrated through archival material, so is the other main theme of the film: the relationship between the boxer and his father. An early highlight – and failure – of his international career was the Olympic Games in Barcelona in 1992. After winning a bronze medal in the European and World Championships as an amateur, expectations for Klemetsen were high. However Klemetsen lost on points against Robin Reid in the early stages of the tournament. According to the director, it was of great importance for the narrative to include footage of that match as it became not only a turning point in his career but also included several recurring conflicts in the career of the publicly-profiled boxer. The rights owner, The International Olympic Committee, demanded NOK 80,000 (app. \$12,000) for a 13-second clip. This amounted to 5 per cent of the film's production budget and 40 per cent of the final rights-clearance expenses including legal advice. Producer Dag Hoel did not take the risk of invoking "fair use" and cleared everything, but identifying all rights holders took six months. Hoel describes the process of rights clearance as a situation of great uncertainty and stress.

Producer Tore Buvarp summarizes his experiences with national and international right holders thus:

There's a marked difference between international and Norwegian rights holders in terms of the clearance-process. Norwegian rights holders are relatively straight forward and predictable to deal with. International rights holders are by comparison more complicated and less predictable. The process of identifying the rights holders,

establish contact with the correct office or person, get them to listen to you and then wait for an answer, with demands of a highly unpredictable fee, is an altogether both time- and money-consuming process that can put great strain on a project.

These examples illustrate, first, differences in policy among right holders as well as the unpredictability of this market. Second, it points to a recurring problem for documentary makers from a small country of being taken seriously by big international copyright owners, in particular American media companies. Some do not bother to answer, or they demand a price far beyond the filmmaker's budget. On the other hand filmmakers describe Norwegian right owner as reasonable and they are in general satisfied with the Norwegian (and Nordic) model of collecting societies. In this model rights-management organizations and extended collective licenses are core elements (Olsson, 2005). Price lists for licensing and procedures of clearance procedures make the system predictable. This model is also well suited to handle the problem of orphan works (van Gompel, 2007, Hugenholtz, 2008). Under current law reutilise of copyrighted works require right owner's consent and in cases were right owner not can be found important works, or extracts from these, may not be reutilised, which is clearly not in the interest of the public.

CREATIVE IMPLICATIONS

Clearing costs do have implications for creative choices. Nearly all respondents (25 out of 28) report that licensing is important when deciding whether or not to go ahead with a documentary project. More than one third of the filmmakers say that clearance has a decisive

role in the decision-making process. Six filmmakers report that copyright issues have resulted in cancelling a project due to either costs or permission denied. Half of the respondents have re-edited one or several films prior to the première due to copyright issues. Again, music is the problem, and re-editing of the soundtrack is more frequent than of the images. The main reasons are either the price level or lack of reply from right holder.

Denial of a licence as the reason for re-editing is reported by two filmmakers. Again *Blod og Ære* is a good example. The boxer and his father are also musicians, with public performances. In an emotionally-strong and, for the story, an important scene, Klemetsen and a fellow boxer play and sing Paul Simon's *The Boxer*. Simon's management refused licensing and the director had to re-edit the music. According to director Haavard Bustnes, this was a great loss for the film.

A second example is from the film *Park Lane*, a portrait of a woman who plays in a dance band. In one scene the band is practising Randi Newman's melody *Keep Your Hat On*. The agency handling Newman's rights replied, upon request, that license would on no account be given. Director Aanund Austenå decided to commission music which would fit the filmed performance of the band.

Most of the filmmakers have experienced delay in production schedule or unexpected costs due to copyright. Director Haavard Bustnes describes the unpredictability with the phrase "a creative catch 22":

We can't start clearing rights before we are well on our way in the editing-process – it's first at this point we know which clips we want to use and can start the clearing process. We then face a big risk of not obtaining the clips, due to high costs or even problems with identifying or communicating with the right holder. To leave out clips at

this stage of the production, in a film that we have built up through a long and elaborate editing- process, can cause major harm.

To avoid the “creative catch 22” there must be an awareness of copyright issues in pre-production. And costs and a time-consuming clearing process is to an ever-increasing extent taken into consideration in pre-production of documentary projects, according to experienced producers Tore Buvarp and Dag Hoel. Both have terminated projects due to anticipated costs and/or uncertainty concerning the clearing process. Hoel says:

Considerations on the time and money involved in obtaining rights for certain types of material are already essential in the planning-stage of a project. The pre-estimated cost of clearing material sometimes causes us to shelve a project.

This statement confirms that copyright has implications not only for creative choices but also for the kinds of stories documentarians choose to tell. It is outside the scope of this article to discuss whether a change in subject-matter of Norwegian documentary has taken place over the last few years – this would require a thorough historical study of the genre. What can be seen from our material is the strong position of the portrait documentary. When asked in what kind of documentary they last used copyrighted material, nearly two third of the respondents answered: in portraits of individuals and groups. Some made historical films (7) and a very few (3) critiques of contemporary society. This is in accordance with film scholar Gunnar Iversen’s observation that portrait is the predominant subgenre of contemporary Norwegian documentary (Iversen 2008, p. 73).

UNCERTAINTY

Portraits can be made and told in many ways, but normally it includes archive footage of the person's media performances; music either to illustrate the pictures or characterize the person portrayed; or works of culture that accidentally are in the diegetic space. The informants report that music or pictures in the filming space is a frequent issue. Whether or not to clear diegetic music and audiovisual material listened to or watched by the portrayed is an area of uncertainty. When asked what kind of copyrighted material they used in their most recent film, works in the space of filming amounted to 23 per cent of the cases reported, which is higher than music for illustrative purposes (19 per cent), footage from film (22 per cent), and television (19 per cent). Besides the relative importance of such material, it is worth noting that documentarians tend to consider cultural artefacts in the space of filming as copyrighted even when they appear incidentally.

Cultural artefacts in the space of filming are contested, as is the case of "fair use". More than 85% of the filmmakers confirmed to have been in situations of uncertainty about whether reuse of a cultural artefact needed clearance. Despite this uncertainty, few filmmakers have called on legal expertise: when asked whether they have consulted a lawyer on issues concerning reuse of copyrighted material, 18 of the 28 informants (64 per cent) answered "never". Does this indicate widespread willingness to take a big risk on copyright infringement among filmmakers, or are small budgets a more probable explanation? There is evidence for both. The finding that more than half of the respondents have used copyrighted material in their own documentary, most of them on several occasions, supports the first explanation. The non-cleared material in question covers a broad range of artefacts from music (both diegetic and on the soundtrack), orphan works, photography, news footage, and

feature-film footage. In such cases filmmakers seem have two options: either to invoke “fair use” or remain silent.

My Daughter the Terrorist and *USA vs Al-Arian* are good examples of invoking “fair use”, however in a somewhat inconsistent way. For both films, some of the news footage is licensed and some not. Producer Morten Daae cleared footage from the independent Sri Lanka channel YATV and the LTTE (The Liberation Tigers of Tamil Elam), but invoked “fair use” on footage from the government-controlled broadcaster and from international news agencies such as Associated Press and Reuters. Producer Jan Dalchow used the same strategy on *USA vs Al-Arian*. He intended to clear every news clip used (approximately 10 minutes of the total film and an important element in the narrative), but after a time-consuming and frustrating process he succeeded in clearing approximately 50 per cent of the copyrighted material.

One example is a clip from Fox News. According to Dalchow the total cost for all rights and insurance would be close to NOK 400.000 (20 per cent of the total budget of the film). He was advised to invoke “fair use” on this footage. Another expensive clip from CNN was licensed. Dalchow describes the price as “half-fair” (total costs of NOK 50,000 for 11-second footage). His reason for clearing this footage (from an interview with Sami’s wife Nahla Al-Arian) is the clip’s importance for the story. Both films have been widely shown at international film festivals, cinemas and television and are distributed on DVD. There have not been any complaints for infringement. Recently (summer 2009) the film has finally been released on DVD in the U.S.. One precondition was a number of expensive and time-consuming insurances to be taken out against insult to third parties, the title and fair-use claims.

Another example is from filmmaker Ellen Lundby. In *Min mors hemmelighet*, a story about Lundby's own mother's ethnic Lapp background, previously unknown to her daughter, she used two unlicensed clips. After what she experienced as a long and frustrating process of clearing in the archive of the Norwegian Broadcasting Corporation (NRK), she gave up on two clips, for which she could not find the rights holders. Lundby describes the two clips as "iconic" representations of the Lapp people and thus important for her story. However invoking "fair use" on two clips, each of 16 seconds and owned by NRK, was unsuccessful. The first clip is TV footage from a celebration of the Norwegian constitutional day in Oslo in the late 1960s, including the-then young director in a parade; the second, news footage from civil disobedience in Northern Norway in 1978. Both clips are short, well-motivated by, and integrated within, the narrative and can hardly be said to harm the interests of the state-owned broadcaster. However, NRK refused her claim of "fair use" without giving reasons – and the director decided to pay the bill. The documentary has been shown on Norwegian TV2.

A fourth example is Kenneth Elvebakk's film on the gay movement of the fifties. The film is partly based on contemporary interviews with people looking back on history, and partly on extensive use of still photography, music and audiovisual material to tell the story and to illustrate the cultural climate. All material from Norwegian, Swedish and Danish archives were cleared for broadcasting distribution in Norway. Total cost was approximately NOK 100,000 (close to 10 per cent of the film's total costs). *Den hemmelige klubben* has been screened on NRK-TV and at film festivals. Despite interest from Swedish and Danish television to buy the film, it is now a "dead film". It was not broadcast abroad and is not even available on DVD. The explanation is this that the costs of clearing the rights for Scandinavian TV and DVD distribution is twice the price offered by TV stations, which, for the production company would constitute a financial hazard.

While seventeen of our informants have used unlicensed material once or several times, only seven have met problems in distributing the film. Elevebakk is among them. For him it is primarily an issue of costs. Others have been met by demands of broadcasters for re-editing. And in the case of *USA vs Al-Arian*, the problem is due to the demand for valid insurance. There are no examples of litigations for copyright infringement in our material. Two informants do, however, report requests from copyright holders, but differences seem to have been solved amicably.

These examples should not be understood as an indication of a widespread lack of respect for copyright among Norwegian filmmakers. Rather, they illustrate a profound willingness to clear all reuse of material and to comply with the law. This is confirmed by the survey. A vast majority of our informants support a system of copyright: it serves their interests as copyright holders well, says 22 of our respondents (78 per cent). There is, however, a tension between their interests as copyright owners and as filmmakers. The dual role of the documentarian illustrates the ambivalence in the current regime of copyright. Issues of attitude and knowledge are addressed in the final part of the survey, putting forward a number of statements on copyright in general and “fair use” in particular.

KNOWLEDGE, ATTITUDES, AND THE DUAL ROLE OF THE FILMMAKER

While two out of three (17) of our informants report having used non cleared material in their own documentaries, only two out of five (11) have ever invoked “fair use”. Why this discrepancy? And how can we understand why so few documentarians have invoked the “fair

use” right in the copyright law? Only three filmmakers have used material under a creative commons license. Thus this model of free use under certain conditions does not **have** an important role at present.

The answers indicate a widespread lack of knowledge about “fair use”. Of the 17 filmmakers who have never invoked “fair use”, one half say they do not know the rule and the other half are insecure about whether the paragraph holds good for the material in question. Uncertainty is understandable, taking the vagueness of the Norwegian “fair use” rule into consideration, but the number of “do not know” answers is surprisingly high. The latter may partly be qualified by looking at background data: even though most of the informants (20) have education on university or college level, only four were introduced to copyright in their studies. Some have educated themselves in copyright and intellectual property while working, but the majority has no formal education on the subject.

Lack of knowledge of “fair use” rights may explain the widespread uncertainty about when to apply the rule. A consequence seems to be a general attitude that every kind of reuse of copyrighted material in documentary must be cleared. Only one filmmaker disagrees, in a statement claiming that copyright law demands all *copyrighted* material to be licensed, while 25 agree. However, three following statements indicate a certain level of bewilderment. The first says that “fair use” is not applicable for moving images: 50 per cent disagree and 17 per cent agree, while the remaining **informants** do not know or do not have any opinion. The second claims that “fair use” only applies to non-commercial works. The figures are similar to the previous issue. The third statement claims that unlicensed material can be reused if the subject-matter of the documentary is social or political critique. One third of the respondents agree with the claim, while 50 per cent disagree. Thus, there is a discrepancy between the first statement and the three following. On one hand half of our informants insist that “fair use”

applies to moving images and even commercial productions, on the other hand there is unanimity that all reuse of copyrighted material in documentary must be cleared. We may ask whether these answers are contradictory and thus uncover a belief that “fair use” does not apply for documentaries.

As hinted at above, filmmakers do support copyright and are of the opinion that it takes care of their interests as holders of copyright. On the other hand there are some critical voices towards certain implications of the law. Close to 60 per cent totally or partly agree that copyright obstructs cultural creativity and development. A statement claiming that copyright gives too much control to the rights holder sharply divides the filmmakers between agreeing and disagreeing. Finally a great majority (17) agrees that the length of the copyright term is too long. Only three disagree. Following this, the predominant attitude is, on the one hand, supportive of the principles of copyright but, on the other, they are sceptical about a copyright that is, or may become, an increasing obstacle in their practice as documentarians. Conflicting interests? As copyright holders they may be in favour of a “thick” copyright, giving maximum protection to their works in time and space. As filmmakers they would benefit from a “thin” copyright, increasing the public domain and minimizing formalities and fuzziness of “fair use”.

No unambiguous conclusion about the filmmaker’s attitude toward copyright can be drawn from this survey. They support and respect a copyright regime, but are sceptical toward a thick copyright. Another finding is a high level uncertainty and lack of knowledge about copyright law in general and the exceptions of copyright in the “fair use” rules. Lack of formal education in copyright is one dimension, but of equal importance is the fuzziness of these rules. Our interviews confirm a high level of frustration with time-consuming procedures and unpredictable costs, for licensing of rights and, not least, for expensive

lawyers and insurance. Thus none of the filmmakers disagree in our final statement arguing for the need for more unambiguous rules concerning reuse of copyrighted material in documentaries. What is to be done according to the filmmakers? There are four recurring subjects in this material:

- Predictability in costs and procedures. There should be a system of fixed prices at a decent level.
- Collecting societies such as TONO (music) and NORWACO (moving images) should have a more prominent role in the rights-clearance process.
- The policy of public service broadcaster NRK is frustrating. There is a mismatch between prices for archival material and payment for screening of independent documentaries. Footage from the television archive is too expensive and routines for research too complicated.
- The rules of “fair use” must be elucidated. Consistent guidelines must be developed and a document or declaration of “best practice” for reuse of cultural artefacts would be of immense help in making procedures transparent and predictable.

CONCLUSION

This case study documents the creative implications of copyright on documentary filmmaking in Norway. Despite differences in copyright law and the media system, our findings are to a large extent concurrent with the study of the independent sector in U.S. (Aufderheide and Jaszi, 2004). Reediting and use of second best solutions are frequent due to lack of permission, exorbitant prices, or no reply from right holders. More importantly it indicates a

tendency towards self-censorship by avoiding certain subject matters due to expected costs and time expenditure on clearance processes. As in the U.S. there are mechanisms in the Norwegian copyright regime that may motivate filmmakers to tell certain types of stories in documentary. Thus the three kinds of speech burdens in copyright that Neil Natanel describes, “censorial”, “prohibitive cost” and “distributive” (Natanel, 2008), are identifiable in the field of documentary production. Whether these impose an unacceptable burden on free speech remain to be answered.

Concerning the free speech safety valve in copyright, the “fair use” doctrine, we found a widespread uncertainty about and lack of thrust in its legal status. As documentarians tend to respect copyright, they hesitate to invoke the fuzzy rule of “fair use”. This study indicates the existence of a “culture of clearance” in the Norwegian documentary sector.

For media studies there may be a lesson to be learned from this study. However limited in range and methodology, our study underlines the significance of copyright for documentary production in the independent sector. Lack of knowledge and uncertainty about copyright s among filmmakers should draw our attention to the curricula of media production as well as media theory. To give copyright a more prominent position in media studies would be a significant contribution to improving the competences of future filmmakers, as well as our understanding of an essential mechanism in contemporary media culture.

One implication of our study is the importance of transparent and reasonable system of “fair use” for documentarians. But is “fair use” worth fighting for? Advocates of the new system of cultural production founded on file shearing and free use, have forcefully argued that the development of digital media technology will undermine and finally make copyright superfluous. According to this argument, to control copying in a digital environment must either be given up or made into a system of total control. The latter alternative is a narrative of

increasing concentration of intellectual property rights on the hands of a few big media and entertainment companies willing to enforce those rights. The former may be seen as a narrative of unlimited creative freedom without the old regime of copyrights, founded on a shearing economy. Even though the current regime of copyright is under pressure from Internet as well as the anti-circumvention rules in current law, there is not yet a convincing alternative for viable cultural economy. And even though there is the Internet and an emerging culture of remix, old media and old genres will exist for a long time yet. If so we are stuck with a regime of copyright for many years. Thus it will be of importance to defend the rules of exceptions in the exclusive rights and to develop a transparent and reasonable system of licensing of copyrighted artefacts. What is at stake is not only the use of footage and music in documentary films, but the fundamental democratic ideals of freedom of expression and freedom to receive and impart information and ideas.

REFERENCES

Aakre, H. (2002). *Retten til å sitere fra åndsverk*. Bergen: Fagbokforlaget.

Aufderheide, P. & Jaszi, P. (2004). *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media/Project on Intellectual Property and the Public Interest report, 35 , released Nov. 8, 2004 at Washington College of Law.

<http://www.centerforsocialmedia.org/resources/publications/honest_truths_documentary_filmmakers_on_ethical_challenges_in_their_work/> Accessed 14 September 2009.

Boyle, J. (2008). *The Public Domain: Enclosing the Commons of the Mind*. New Haven & London: Yale University Press.

Centre for Social Media (2005). *Documentary Filmmakers' Statement of Best Practices in Fair Use*.

<http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use> Accessed 5 September 2009

Centre for Social Media (2009). *Honest Truths: Documentary Filmmakers on Ethical Challenges in Their Work*,

<http://www.centerforsocialmedia.org/resources/publications/honest_truths_documentary_filmmakers_on_ethical_challenges_in_their_work/> Accessed 5 September 2009.

Documentary Campus (2007). *Resolution on European Fair Use Initiative*.

<<http://www.documentary-campus.com/v2/page/news/89/>> Accessed 5 September 2009.

Filmfondet (2009). *Disposable fonds 2009*.

<<http://www.filmfondet.no/icm.aspx?PageId=2355>> Accessed 13 October 2009.

Griffiths, J. and Suthersanen, U. (eds.) (2005). *Copyright and Free Speech. Comparative and International Analyses*. Oxford: Oxford University Press.

Hugenholtz, B. (2001). Copyright and Freedom of Expression in Europe. In Dreyfuss, R, Zimmermann, D, and First, H. (eds.) *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society*. Oxford: Oxford University Press, 343-363.

Hugenholtz, B. (2008, October). The Orphan Works Problem. The Copyright conundrum of digitizing large-scale audiovisual archives, and how to solve it. In Gripsrud J. (Chair), *Television and the Digital Public Sphere*. Symposium conducted by the research project Democracy and the Digitization of the Public Sphere, Paris, France.

Hugenholtz, B. and Guibault, L. (eds.) (2006). *The Future of the Public Domain. Identifying the Commons of Information Law*. Alphen aan den Rijn: Kluwer Law International.

Iversen, G. (2008). *Vinduer mot verden*. Norsk dokumentarfilm anno 2008. In *Z Filmtidsskrift*. Oslo: Norsk filmklubbforbund, (1), 70-82.

Jaszi, P. (2005). *Fair Use: An Essential Feature of Copyright. Testimony in the Subcommittee on Commerce, Trade and Consumer Protection, Hearing on 'Fair Use: It's Effects on Consumers and Industry' November 16, 2005.*

<http://www.centerforsocialmedia.org/resources/fair_use> Accessed 5 September 2009

Lessig, L. (2004). *Free Culture. How big media uses technology and the law to lock down culture and control creativity*. New York: Penguin Press.

Lessig, L. (2008). *Remix. Making Art and Commerce thrive in the Hybrid Economy*. London: Bloomsbury Academic.

Olsson, H. (2005). *The Extended Collective License as Applies in the Nordic Countries'*. Paper presented at KOPINOR 25th Anniversary International Symposium. Oslo.

<http://www.kopinor.no/opphavsrett/artikler_og_foredrag/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries> Accessed 5 September 2009.

Rawie, M. (2008). *Licensing and Rights in European Documentary Practice*. Not published report.

Van Gompel, S. (2007). Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe? In *International Review of Intellectual Property and Competition Law*, Vol. 38, No. 6, p. 669-702.

Filmmakers interviewed

Tore Buvarp, producer

Aanund Austenå, director / producer

Morten Daae, producer

Kenneth Elvebakk, director / producer

Ellen Lundby, director / producer

Dag Hoel, producer

Håvard Bustnes, director

Jan Dalchow, producer

Film titles

- *Blod og Ære / Blod and Honour* (2008). Director Håvard Bustnes. Producer: Dag Hoel

- *Den hemmelige klubben / The Secret Club* (2003). Director: Kenneth Elvebakk. Producer:

Medieoperatørene

- *Min datter terroristen / My daughter the Terrorist* (2007). Director: Beate Arnestad.

Producer: Morten Daae

- *Min mors hemmelighet / The Secret of My Mother* (2008). Director and producer: Ellen

Lundby

- *Odds Odds* (2009). Director Aanund Austenå. Producer: Torstein Nybø.

- *Park Lane* (2007): Director Aanund Austenå. Producer: Torstein Nybø

- *Oljeberget / Mountain of Oil* (2006). Director: Aslaug Holm. Producer: Tore Buvarp

- *Outfoxed* (2004). Director: Robert Greenwald. Producer

- *USA vs Al-Arian* (2007). Director: Line Halvorsen. Producer Jan Dalchow

- *Weapons of Mass Deception* (2006). Director: Danny Schechter

¹ The report is not published. We are grateful to Marijke Rawie, Coordinator of the European Initiative for Copyright Reform, for making the results available to us as, well as for giving information on the content and implementation of the survey.