

The Search for Fair Dealing: Report on the DOC Road Show



October 18th, 2011
Magnetic North Associates, Rigaud, Quebec

DOC gratefully acknowledges the financial support of the following funders



an Ontario government agency
un organisme du gouvernement de l'Ontario

About DOC

The Documentary Organization of Canada / l'Association des documentaristes du Canada (DOC) is the collective voice of independent documentary filmmakers across Canada. It is a member driven organization dedicated to promoting, supporting and developing the art form of documentary filmmaking. As a national non-profit association it advocates on behalf of its members to foster an environment conducive to documentary production and strives to strengthen the sector within the broader film production industry.

Disclaimer

The Documentary Organization of Canada (DOC) Fair Dealing Road Show project received financial support from the Department of Canadian Heritage. Opinions and analysis in the report are solely the responsibility of the consultant, Magnetic North Associates, who produced the report. As such, these opinions and analysis do not necessarily represent the views of the Department of Canadian Heritage.

The Documentary Organization of Canada (DOC) Fair Dealing Road Show project received financial support from Telefilm Canada. The opinions, analysis and any other information or content in the report (collectively, the "Content") do not necessarily reflect the views of Telefilm Canada. As such, the Content and any reliance on any of the Content are the sole responsibility of the consultant, Magnetic North Associates, who produced the report, and Telefilm Canada assumes no liability for any damages related to the foregoing.

Table of Contents

1) Introduction	4
Road Show Background	4
Road Show Panels	4
Road Show Audiences	6
2) Methodology	7
3) Overview	8
4) Summaries of the Panels	16
Winnipeg	16
Montreal	21
Toronto	27
Halifax	31
Ottawa	36
Edmonton	42
Vancouver	47
5) Key Positions, Interests, and Issues	54
Digital Revolution	54
Process	54
Producers	55
Legal	56
Insurance	57
Broadcasters	58
Foreign	58
DOC Guidelines	59
6) Best Practices, Challenges, and Opportunities	60
7) Recommendations on Next Steps	62
I. Appendices	63
Appendix A: List of Panelists	
Appendix B: List of Films Cited in Panels	
Appendix C: Road Show Volunteers and Supporters	
Appendix D: Fair Dealing Excerpts from the Copyright Act	
Appendix E: Selected Excerpts from “CCH vs. The Law Society of Upper Canada”	
Appendix F: <i>Fair Dealing and Copyright: Guidelines for Documentary Filmmakers</i>	

1) Introduction

Road Show Background

In 2005, the Documentary Organization of Canada (DOC) undertook a survey of its members on Errors and Omissions (E&O) insurance [*Censorship by Copyright: Report of the DOC Copyright Survey*, November, 2005]. At that time, the organization started to look at how fair dealing (FD) might be applied to documentaries.

Members of DOC saw that many types of documentaries, especially on social and historical subjects, were having increasing difficulty being produced due to rising costs of copyrighted material; and insurer over-caution about using FD, incidental use, or even public domain. In some cases, filmmakers could not access material on controversial subjects no matter how much they were willing to pay. There was a growing fear that freedom of expression in this medium was at risk.

The following year, DOC commissioned a White Paper by Howard Knopf [*The Copyright Clearance Culture and Canadian Documentaries: A White Paper on Behalf of the Documentary Organisation of Canada*, November 22, 2006]. Mr. Knopf identified a growing imbalance between users' rights and rights-holders' rights. This "clearance culture" was shrinking the public space within the *Copyright Act* to the detriment of users such as documentary filmmakers.

In its examination of FD, DOC has relied on the University of Ottawa's Canadian Internet Policy and Public Interest Clinic (CIPPIC), and the legal expertise of faculty member David Fewer. It was through that collaborative process that DOC was able to publish *Copyright and Fair Dealing: Guidelines for Documentary Filmmakers* in May, 2010. (See Appendix F.)

The *Guidelines'* main goal was to provide a legal framework in which FD might be applied to documentary production with the appropriate legal references. But it was apparent that the *Guidelines*, in order to be a workable tool, would have to be industry-tested, and a national industry consensus established. That was the impetus for DOC to create the Fair Dealing Road Show.

The seven cities chosen for the Road Show were those in which DOC has chapters, thereby making DOC's extensive grassroots connections available to promote the Road Show.

Road Show Panels

In order to draw specific conclusions, it was felt that the Panel formats should be consistent at all locations. Therefore, most Panels included a filmmaker/producer; a lawyer working in entertainment law; an insurance broker or insurer's counsel; and a broadcaster.

This roster was complemented by a distributor (in Toronto), visual researchers (Halifax, Ottawa, Edmonton and Vancouver), the NFB (in Edmonton) and an insurance underwriter (Vancouver). The purpose was to gather as wide a range of views as possible, and include as many stakeholders as possible, from all links of the copyright chain.

It had been anticipated that broadcasters would be crucial to the process. However, it quickly became apparent that Errors and Omissions (E&O) insurers' counsel were the waist of the hourglass through whom all decisions had to pass. There are only a handful of such lawyers in North America. Brian Wynn is one such insurer's counsel, and he participated in the Ottawa Panel.

When choosing Panelists, DOC's approach was to identify experienced and respected industry players who would be open to dialogue and not fall into narrow ideological positions. It was important for DOC to include FD proponents, as well as those who resist using FD, and this range is clear in the choice of filmmakers/producers invited as Panelists. Similarly, it was important to include producers' counsel who covered the FD spectrum.

Broadcasters were an essential part of this process. In order to fully grasp the entire sequence of events, it was necessary to understand the broadcasters' needs when it comes to dealing with E&O coverage and, more importantly, in assessing risk. Not surprisingly, the public broadcasters were able to look at FD from a different perspective than private broadcasters. This opens up the role of our public institutions such as the CBC/SRC, TVO and the NFB in supporting productions that might be more challenging on the FD front. It became apparent that all broadcasters can choose to waive E&O coverage if they feel the risk is low.

In all instances, DOC aimed to identify important players in the community where the Panel was being held, while bringing in complementary expertise from around the country to diversify the Panel. The Road Show highlighted the fact that experienced entertainment lawyers or visual researchers are difficult to access in some regions, and the approach to FD seems to be far more conservative than it needs to be in those regions.

All of the Panels were preceded by conference calls to gather specific points that Panelists wanted to bring to the conversation, whether it was orphaned works, or the consequences of "messy IP". Each Panelist was canvassed to identify what specific contribution they wanted to make to the dialogue.

Each Panel started with a power point presentation explaining FD; why DOC is pursuing this policy area; and the specific objectives of the Road Show.

Each of the Panelists was invited to explain how they interact with the clearance process and, if applicable, whether or not they have dealt with FD. Each Panelist was allowed 7-10 minutes to speak. In some cases, they showed clips of productions that were applicable to their presentation. After their presentations, Panelists were invited to ask each other

questions on how FD might be applied. The floor was then opened to questions from the audience. Often, lawyers on the Panels were asked by filmmakers in the audience for their evaluation of whether or not a specific situation might fall under FD.

Panels usually lasted two hours, except for Montreal and Edmonton where they lasted 90 minutes. Time allowed for questions varied from no time in Montreal to half an hour in other cities.

Road Show Audiences

Each city offered different opportunities to present the Road Show with the help of each DOC chapter. For example; Winnipeg, Montreal and Halifax included the Panel within a larger event: *Gimme Some Truth* (a documentary conference in Winnipeg); *DOC Circuit* (an industry event during the festival *Rencontres internationales du documentaire de Montréal*); and *Copy, Copy, Copy* in Halifax (organized by the Nova Scotia College of Art and Design and the Law Faculty of Dalhousie University). Holding the Panels within a larger event allowed DOC to broaden its communications strategy and reach deeper within various audiences in each community.

Panels in Toronto, Ottawa, Edmonton and Vancouver were organized by the local DOC chapters and publicized with industry groups connected to the chapters such as AMPIA [the Alberta Media Production Industries Association]. In Toronto, the Panel was organized with Ryerson University's Documentary Media Department. In Ottawa, the Panel was publicized by the Ottawa-Gatineau Producers' Association and Algonquin College's Documentary Production classes.

DOC publicized some of the Panels in press releases and by advertising them on its web site. Panels were also publicized on the Canadian Media Producers' Association daily e-blast. This communication was complemented by each chapter's own communication networks which can be very extensive. DOC Toronto's events list targets 700 individuals.

Audiences were very good for this type of panel discussion. They ranged from 30 participants in Winnipeg to 70 in Montreal. Panels in Halifax, Toronto, and Vancouver drew approximately 60 participants each.

Audiences were mainly comprised of industry professionals, producers, and filmmakers. There were also lawyers and funders, such as Telefilm Canada, in attendance. In Toronto and Halifax, about half the audience were students.

2) Methodology

This Report is based on an analysis of video or audio recordings of the DOC Road Show Panels in Winnipeg, Montreal, Toronto, Halifax, Edmonton, and Vancouver, as well as the consultant's attendance at the Ottawa Panel. DOC's *Copyright and Fair Dealing: Guidelines for Documentary Filmmakers* (May, 2010) was used as reference is appended to this report.

Panel summaries in Section 4 are not transcripts but include the salient points made by each participant. Panelists were then asked to check the summary in this Report to be sure it accurately reflected their point of view. Audience or Panelist questions are also included where these raise important issues, or clarify points under discussion. Sections 5 to 7 address consensus, key positions, gaps in knowledge, best practices, DOC initiatives, and recommendations.

The Department of Canadian Heritage (PCH) commissioned the Road Show Report from the Documentary Organization of Canada (DOC). Magnetic North Associates was engaged by DOC in February, 2011 to write this Report on the Road Show.

The Contributors

The Fair Dealing Road Show was organized by Lisa Fitzgibbons and Cameron McMaster of the Documentary Organization of Canada (DOC). The Road Show depended on many volunteers across the country whose names are appended.

The consultant, Kirwan Cox, is an independent film and television policy analyst, documentary researcher/producer, and university lecturer. He was a member of the Board of DOC Quebec and DOC National for a number of years, during which time he chaired the DOC Copyright Committee. In 2005, he undertook the DOC survey on copyright titled *Censorship by Copyright: Report of the DOC Copyright Survey* (November, 2005).

Mr. Cox was also a researcher for the recent documentary on copyright, *RIP! A Remix Manifesto* (directed by Brett Gaylor and produced by Eyesteelfilm) which was a subject of discussion in some of these Panels. He retired from the Board of DOC two years ago, and had no connection with the Fair Dealing Road Show prior to being asked to write this Report.

Lisa Fitzgibbons was an invaluable resource who helped greatly with her insights as well as information. Cameron McMaster was extremely patient with many requests, and Fortner Anderson translated notes of the Montreal Panel. Some Panelists were very helpful by responding to follow-up questions posed by the consultant.

Opinions and analysis in this Report are solely the responsibility of the consultant.

3) Overview

A “Culture of Fear”?

Fair dealing, public domain, and incidental use are the windows through which documentary filmmakers access the real world. Without those windows, “the creative treatment of actuality”, as NFB founder John Grierson defined documentary, would not be possible in our increasingly commercialized world. In the opinion of many Panelists, access to these public spaces, or safe harbours, in the *Copyright Act* is a matter of freedom of expression, and should be defended as a Charter right.

However, fair dealing (FD) in Canada exists in a sea of uncertainty because the definition is deliberately vague, the rules are established by the most powerful players, and there is virtually no case law for reference.

Concerns were repeated throughout the Panels by lawyers, producers, broadcasters, insurers, and researchers that there is no straightforward definition of FD. There are no hard rules about the length of footage that can be used, or the percentage of the original work that will be allowed. Each case depends on the context of each clip or item, and lawyers are uncomfortable applying FD without case law to provide guidance.

This situation has created what Panelist Brian Newman termed a “culture of fear” among documentary filmmakers who believe that they will be sued if they take advantage of the FD exemption on clearing copyrighted materials, or the fair use (FU) exemption in the United States.

Producer Michael McNamara stated that this “culture of fear” distorts the creative process by causing filmmakers to bend and reshape reality, particularly history, when working around copyright barriers. It also limits access to the footage needed to tell controversial or difficult stories.

Producer Trevor Hodgson said that his company avoided FD on principle, feeling the need to comment or criticize on each use of FD footage restricted the creative process, and complicated the production. Producer Stephen Ellis said he avoided FD for fear of the international complications, and the possible negative impact on foreign sales if something went wrong. Mr. Ellis also pointed out that he finds it easier to avoid FD because he doesn’t make social documentaries.

Some Panelists maintained the “culture of fear” was justified, and was simply a matter of prudence and caution required by the lack of FD case law in Canada. Others vehemently disagreed. One berated his fellow lawyers for “over-caution”, and another lawyer said unjustified caution was just “bad lawyering”.

It would seem this “culture of fear” has reached the proportions of an urban legend in North America. We heard that certain rights-holders, such as Disney, the John Lennon estate, or the Elvis Presley estate, are particularly litigious, and will sue on the slightest provocation. One lawyer said he would avoid using any Elvis material, even if it was clearly FD, because the risk of a lawsuit was too great.

Insurers pointed out that they had to pay the cost of defending a claim, even if it was winnable. Their E&O “hammer clause” allows them to stay out of court, and that may be one reason there is so little case law. Insurers manage their risk by settling out of court whenever possible. Apparently defamation cases can be settled for up to \$100-150,000. However, insurer Matthew Davies said defamation was a problem for broadcasters, but rarely for producers. When settlement isn’t possible, the results can be horrendous.

One long-running case about animation plagiarism [*Robinson v. Cinar Films*] may cost the insurer \$9 million if lost, and total legal fees are already pegged at \$4 million. To put this case into perspective, the total cost of E&O insurance premiums paid by documentary producers in Canada is estimated to be less than \$5 million annually. The Cinar case is not about a documentary, but it is the E&O nightmare insurers bring to every insurance contract they write.

It is also clearly the exception. CBC’s veteran senior legal counsel, Dan Henry, stated that the Corporation broadcasts FD material every day and has received fewer than five complaints in his memory. CBC has also used Disney and Presley footage under FD without a complaint.

Hollywood footage has been widely used without complaint in the NFB co-production *Reel Injun*; and the in-house NFB production, *Shameless*. Copyrighted footage, trademarks, music, and much else appeared in *RIP!*, an NFB co-production, and *The Corporation*, an independent production supported by TVOntario. Again, this material was used and no lawsuit ensued. Much to the surprise of those involved in each case, there wasn’t as much as a threatening letter.

When the CBC or NFB are producing a film like *Shameless*, they rely on self-insurance which allows them a fairly robust interpretation of FD. If the CBC or NFB is co-producing with an independent producer, then that producer is responsible for E&O. However, in some circumstances, the producer may be able to get E&O “coverage” from these self-insured agencies to a greater or lesser degree. *RIP!* was covered to a greater degree because the NFB was the international sales agent.

These examples seem to demonstrate different levels of access to FD depending on the involvement of the public sector in the production. If the producer is entirely dependent on commercial insurers for E&O, then the perceived commercial risk supersedes the legal risk. If the producer is able to involve a public agency in the production, then the legal risk supersedes the commercial risk and FD is interpreted more liberally. These examples

further demonstrate the importance of accessible and informed legal counsel who know when and how to apply FD.

Marc Leblanc (TVO), Debbie Schween (APTN), and Andrew Cochrane (CBC), said broadcasters are able to waive E&O if they want, but if there is a claim the producer is ultimately at risk. Many producers do not want to face that possibility, and “bend” the subject matter of their documentaries, or “factual entertainment” as Stephen Ellis called it, to avoid possible copyright problems. Or they don’t tackle certain subjects.

Judging the Risk

Is self-censorship justified in the effort to avoid litigation by deep-pocketed rights-holders?

A 2007 Center for Social Media (CSM) study of case law in the United States involving FU in documentaries or news footage since 1996 reveals only nine cases. Most of these court decisions supported FU, and were decided in accordance with the logic described in the CSM’s *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (2005). In some cases the fair user lost, but those cases were clearly not “transformative”.

One suit was brought by the Presley estate against a producer whose use of footage was extensive, gratuitous, and did not conform to the standards of the CSM *Best Practices Statement*. The Presley estate won. There is no record that Disney sued over FU in a documentary during this period, nor did any recording or media companies. Hollywood studios don’t seem to go to court to fight FU.

American FU case law revolves, to a large extent, around two litigants: a stock news archive fighting over the use of its 1992 LA riot footage; and the widow of a Hollywood B-movie mogul fighting over the use of 1950’s science-fiction footage. The litigants were mostly unsuccessful but, in the process, they greatly improved the case law supporting FU in documentaries. These court decisions have strengthened the legal concept of FU when footage is “transformed” from its original purpose to a new documentary purpose.

After looking at the court records, the Centre for Social Media concluded, in their 2007 study on *Fair Use and Documentaries in Court*, that most copyright holders avoid suing over FU most of the time.¹ Therefore, the American experience, while more litigious than Canada’s, demonstrates that very few copyright holders are prepared to go to court to fight FU.

Does this conclusion apply to Canada where FD is a narrower defence than FU?

¹ Jaszi, Peter, “Copyright, Fair Use, and Motion Pictures”, *Utah Law Review*, p.715, No 3, 2007

There doesn't appear to be any case law on FD in documentaries in Canada. This would indicate that copyright infringement claims have never made it to court, but that does not mean there haven't been out-of-court settlements. Insurer Claude Forest said the vast majority of E&O cases do not reach court because out-of-court settlements are less costly, even if justice is not served. However, no information on such settlements can be found. Litigation on documentary copyright infringement does not seem to have progressed to a court docket, at least not since the Supreme Court of Canada decision on FD in 2004.

Major, high profile Canadian documentaries that used FD extensively (*RIP!*, *Reel Injun*, *The Corporation*, and *Shameless*), have not been sued, nor have they received "cease and desist" letters. Claude Forest estimated that only 1% to 5% of documentaries are "high risk". All of the above high-profile films would certainly be in that category. Yet, they did not attract a single claim. In fact, in a survey DOC did of its members in 2006-7, none of the respondents had had a copyright claim against a production, ever. Thus, it seems reasonable to conclude that the chance a documentary film will be sued in Canada for using FD is vanishingly small.

Of course, past experience is no future guarantee. Precisely because the productions named above were reliant on FD, they were particularly careful to document their FD diligence. These producers worked extensively with legal counsel and visual researchers to follow due diligence; and they prepared for an anticipated court fight which never came. Also, *RIP!* had the benefit of generous legal assistance from the Canadian Internet Policy and Public Interest Clinic (CIPPIC), and the NFB "insured" *RIP!* when commercial underwriters would not provide E&O insurance.

Some Panelists considered the dearth of Canadian case law as reason for extreme caution. Yet, the 2004 Supreme Court decision on FD ² gives reason to believe that a Canadian documentary producer who is diligent in applying the best practices described in the DOC *Guidelines* is on a strong legal footing should a court appearance become necessary. Still, the Canadian definition of FD revolves around that one Supreme Court decision.

Specifically, the Supreme Court said that the "exceptions" to copyright infringement in the *Copyright Act*, including fair dealing in s.29 to 29.2, are more properly understood as "users' rights". ³ The Court clearly stated in this *CCH* decision that copyright is a balance between promoting the public interest through the dissemination of copyrighted works, and obtaining a just reward for the creators of those works. The Court emphasized that encouraging the public domain, including FD, is necessary to help foster future creative innovation, and that it is in society's interest to help creators build on the ideas and work of others. ⁴

² See Appendix E, *CCH Canadian Ltd. vs. Law Society of Upper Canada*, 2004 SCC 13, 30 C.P.R.(4th) 1, [2004] 1 S.C.R. 339.

³ *ibid.* at paragraph 12

⁴ *ibid.* at par. 23

Further, if the amount of copyrighted material taken under FD is “trivial”, the Court said that no infringement has taken place. The definition of “trivial” is complex, but it does not mean miniscule. Fair dealing, for example, may even include the entire work, as in the case of a photograph.⁵

The Court ruled that the custom or practice in any particular industry or craft may be relevant in considering the standard for FD in that industry.⁶ In lieu of case law, identifying Best Practices that reduce the fear of the unknown for documentary filmmakers, their lawyers, insurers and broadcasters is encouraged by the Supreme Court. Establishing Best Practices for documentary FD was the intention of DOC’s Road Show.

The Financial Squeeze

In the digital age, technological innovation and concentration of ownership are increasing challenges for copyright. Archival rights-holders are forming ever larger conglomerates. Panelist Elizabeth Klinck observed that important rights-holders have shrunk from hundreds to six or seven huge corporations.

Panelists reported that independent documentary producers are squeezed between these corporate rights-holders demanding ever-higher fees, and broadcasters who are pushing documentary licensing fees down while demanding more program rights. In some cases, those rights extend even to product placement. One Panelist said a broadcaster had asked for the right to place products in their non-fiction production.

Panelist Stephen Ellis pointed out that negotiating power rests with broadcasters. Independent documentary filmmaking is financially dysfunctional, but filmmakers are passionate about their projects. They plunge ahead before they do the math, or assess the financial risks of their production.

Errors and Omissions: business risk or legal risk?

One Panelist called Errors and Omissions (E&O) “content insurance” designed to cover the damages a producer may unwittingly do to others, and the costs defending those claims. It covers a wide range of perils, such as defamation, plagiarism, title infringement, and privacy. Several Panelists said these perils are a greater danger to the documentary filmmakers than FD or incidental use.

In the final analysis, it is the willingness or unwillingness of the E&O insurer to cover

⁵ *ibid.* at par. 56

⁶ *ibid.* at par. 55

FD that defines an acceptable FD risk in each situation. If the insurer excludes particular FD clips, the producer must decide whether to take on that risk and proceed with an E&O exclusion, or remove the offending material.

Many Panelists stated that insurers define their risk as business or financial risk, rather than legal risk. Without statistical information, it is unclear how insurers calculate their risk, and if their calculations are reasonable. Are they looking at their potential losses compared to their potential revenue from Canada, or from North America? Are they looking at “producers’ E&O” data for all media, or only documentaries? Are they looking at risk based on the American FU experience, or the Canadian FD experience, and which is actually riskier?

The Panels seemed to reveal a pattern differentiating documentary productions that use commercial E&O insurers from those that are able to access Government self-insurance. The FD standard for films that acquired E&O from a commercial insurer is judged as business risk, and it is much more cautious, though there are exceptions.

The ground-breaking 2003 doc *The Corporation* had important exclusions in its E&O coverage, so the independent producer was at risk had there been complaints. *Reel Injun* apparently was able to get complete E&O coverage despite extensive use of FD either because it was an NFB co-production, or because it benefited from a recent change in the FD climate, or because it had a particularly persuasive lawyer.

The FD standard applied to films that are insured or indemnified by the CBC or NFB is judged as legal risk, and less cautious. *RIP!* and *Shameless* were “insured” by the NFB, an agency of the Crown. Without that indemnification, it is unlikely these films would have been made as they were, nor seen as widely as they have been. *The Corporation* was broadcast by educational stations in Canada that are self-insured by their provincial governments.

It would seem that the requirement by broadcasters and funders that independent documentaries carry E&O from commercial insurers tends to limit the users’ rights that documentary producers may exercise with FD. This applies particularly to any controversial subject matter. Public agencies want to limit their own risk, but they seem willing to “push the envelope” in some cases, and take risks that commercial insurers refuse to take.

Of course, all broadcasters want to broadcast only fully insured independent productions, but they self-insure their own productions, use FD regularly, and apply their own Best Practices protocol for in-house productions that use FD. Some broadcasters said they could waive E&O for a low risk independent film, or an exceptional film.

The Pendulum Swings to the Rights-holders

Some Panelists said it might be easier and cheaper to simply pay for clips, and music, rather than try to use them under FD. Yet, that isn't always an option. Rights-holders may withhold their footage from a film that may criticize them whether or not the documentary producer is willing to pay for that footage.

As clearance fees increase, and documentary budgets decrease, historical or social films that require extensive copyrighted footage or music become unproduceable. They are disappearing from our screens. Some Panelists and audience members raised the concern that copyright was being used to functionally censor critical productions.

The conglomerates which hold most copyrighted footage are, for the most part, vertically-integrated Hollywood studios and music companies. They see their intellectual property (IP) rights as the very basis of their profitability, if not their existence, and lobby to expand those rights as aggressively as possible across the world. This lobbying seems especially intense, and successful, whenever Mickey Mouse is on the verge of falling into the public domain, as one day he must.

Copyright payment is sometimes demanded whether legally justified or not. Warner Chappell Music earns \$2 million per year from "Happy Birthday", and claims the copyright will not expire until 2030. However, one legal scholar, Robert Brauneis, has written that this song published in 1912, "is almost certainly no longer under copyright, due to a lack of evidence about who wrote the words; defective copyright notice; and a failure to file a proper renewal application."⁷ Yet, who can afford to call Warner Chappell's bluff?

There was certainly a consensus among Panelists that music was the most complicated segment of copyright, and required legal guidance.

Unlike dramatic productions, documentary depends on access to footage of the real world. Without that access, there is no documentary, and in our view, diminished freedom of expression. Over time, as the copyright pendulum has swung against users' rights, and in favour of rights-holders, documentary has suffered. On the other hand, the dramatic production environment can be completely controlled by the producer, and the need to access current or historical copyrighted reality is not always necessary.

DOC Guidelines

There was a consensus among Panelists that the work done by DOC in this area has been very useful, and that the *DOC Guidelines* are a key resource in understanding FD in Canada. Counsel Linda Callaghan said she "loved" the *DOC Guidelines* because they

⁷ Brauneis, Robert, "Copyright and the World's Most Popular Song", George Washington Law School, Oct.14, 2010

explain Canadian law rather than American law, and they have so many wonderfully small footnotes.

There was also a consensus that FD hinges on the context of each case. For that reason, and because there is so little case law to rely on, law professor Graham Reynolds said that a Best Practices regime can really help the producer.

Stephen Ellis reiterated the need to develop a simple set of questions that producers might be able to use to assess whether or not the material they want to use could fall under FD. This will be one of the next steps DOC pursues.

Road Show moderator Lisa Fitzgibbons said the *Guidelines* were always intended to be a living document. The Road Show and DOC's ongoing work on FD is providing an opportunity to refine the document with a variety of suggestions by Panelists and audience members.

4) Summaries of the Panels

The Panel summaries are not transcripts, nor minutes, of these events. They are, in the opinion of the consultant, summaries of the key points made by the Panelists, and their responses to questions posed by other Panelists and members of the audience.

Winnipeg Fair Dealing Panel October 22, 2010

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Brett Gaylor	Eyesteelfilm	Documentary filmmaker	British Columbia
Claude Forest	Multi-Media Risk	Insurance broker	Winnipeg
Marc Leblanc	TV Ontario	Broadcaster	Toronto
Devan Towers	Taylor McCaffrey	Producers' Counsel	Winnipeg

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC)*, moderates the panel.

Following introductions, LF explains the copyright Panel process and reviews Fair Dealing (FD) as defined in the *DOC Guidelines*. FD is not a substitute for appropriate clearance of rights, and is not “free dealing”. It is a legitimate right that all users can access if they meet the tests set out in the *Guidelines*.

However, FD is not a simple right, but a balance between the rights of copyright holders and users within the context of each case.

There is virtually no case law on the subject in Canada, and the Supreme Court of Canada has said⁸ that creative “community practices” should be used for guidance in establishing the fairness of FD. Current insurance policies do not have a provision for FD.

LF points out that the DOC concern about FD started five years ago, and that an industry consensus is needed on a practical working definition of FD, regardless of the current proposals to modernize the copyright framework. This is needed to minimize the risk for documentary producers, broadcasters, insurers, and other stakeholders in the industry.

Who owns a clip? If it isn't cleared, how upset will the owner be about its use? Do “mash-ups” fall under our approach to FD? Is the clip essential to the argument of the film, the “golden thread”? How do we test for FD? How does FD work in foreign markets?

⁸ See Appendix E, *CCH Canadian Ltd. vs. Law Society of Upper Canada*, at para. 63.

We should create a FD tool kit that includes a sample log showing the original clip, copyright holder, length of original, length of clip used (expressed as time and percentage of original), and analysis of reasons it falls under FD.

Most important, how does one define the level of risk?

Brett Gaylor (BG), *documentary filmmaker who made RIP! A Remix Manifesto, about copyright and the clearance culture; now working for Mozilla.*

Documentary filmmakers are over-clearing rights. *RIP!*'s public interest lawyer David Fewer from the Canadian Internet Policy and Public Interest Clinic (CIPPIC) said that FD is like a muscle. If it isn't used, it will atrophy. He carefully reviewed all the footage used in *RIP!*, and then wrote a letter saying that the footage that wasn't cleared in *RIP!* fell within FD defence.

Despite that letter, and the support of the film's Canadian broadcaster- the Documentary Channel, *RIP!* was unable to get E&O insurance. *RIP!* could not get E&O with one new U.S. insurer because Eyesteelfilm was based in Quebec⁹, and a local insurer didn't want to take on this film as his first major FD case. The NFB stepped in and agreed to indemnify broadcasters if they were sued, so broadcasters [worldwide] were insured by the Crown.

Nonetheless, broadcasters didn't want a court fight so as much footage as possible was cleared with Disney, Fox, the Beatles, and others.

The Documentary Channel in Canada, the Documentary Channel in the U.S., Canal D in Quebec, NHK in Japan, and others broadcast *RIP!* without E&O. Eyesteelfilm was never challenged, and Girl Talk [the mash-up artist in the film] hasn't been sued either.

In response to a question about tee-shirt logos, BG says he doesn't believe documentary filmmakers should alter the environment they are filming. Incidental use protects against logos that are filmed. An interviewee wearing a tee shirt with a logo should not change it for the interview. (See Towers and Henry below.)

⁹ Quebec producers may have difficulties with American insurers based on this opinion from Chubb's Denver E&O counsel Debra Hodgson: "Even if there is no negative context to a shot of persons in a public place, be careful if your client is filming in jurisdictions like Quebec or France. Court decisions in those jurisdictions make it inadvisable to use any shots of individually identifiable people even if they are simply walking down a public street." Hodgson, Debra, *A Production Lawyer's Guide to Obtaining E&O Insurance and Preventing Litigation: Update 2005*, paper presented to the Law Society of Upper Canada, 2005, p.22.

Claude Forest (CF) *entertainment insurance broker and E&O specialist; President of Multi-Media Risk Inc.*

Insurers don't want to defend a lawsuit. If the insurer is concerned about "offensive" material in a film, they may issue exclusions for that material. Exclusions are a problem for broadcasters.

The insurer deductible is \$10,000 on \$1 million per event, or \$3 million aggregate. The deductible is set above the frivolous threshold, and the producer has to deal with those claims.

What is the risk? CF estimates that 55% of documentaries have little or no risk, about 40% have some potential risk, and only 1-5% have a high risk. These high risk films tend to upset the powerful, or include "offensive" or "controversial" material. The insurer may raise the deductible to \$50,000 or \$100,000, or exclude the offending parts from E&O coverage.

The question for the broadcaster is this. Can the producer cover a higher deductible? CF is concerned about funding the higher deductible.

In the DOC survey¹⁰, the data on the size of the market was slim. CF agrees that claims are few and far between, but major claims can be expensive.

The pool of players buying E&O in Canada is very small and that means the risk of losing money with a big claim is great for an insurer. Insurers put a reserve aside for claims, but that is limited by the total amount of the premiums. For example, with 400 active producers in DOC spending \$3,000 once or twice per year in E&O premiums, you can see the market is not big enough to absorb a large claim.¹¹

On a question from the audience, CF says FD often depends on the experience of the producer's lawyer. In some cases, it is better for the producer not to ask for rights, than to ask and be refused.

An insurance company can settle out of court if they want to, regardless of the wishes of the producer. The vast majority of E&O claims fade away or are settled out of court on the basis of the bottom line rather than the principle involved, often at the expense of justice.

¹⁰ Mr. Forest refers to an online survey that DOC did with his company in 2006-7. Extrapolating from the responses, he estimated that the DOC membership spent roughly \$2.5 million per year on E&O premiums, and another \$2.5 million on Commercial General Liability and Entertainment Package insurance premiums. No respondent to this survey had had a claim, ever.

¹¹ With approximately \$2.5 million paid by DOC members, we estimate the total Canadian market at \$4-5 million in E&O premiums only.

Mark Le Blanc (ML) *formerly private practice IP, CBC; now Director of Legal Services and Business Affairs, TVO.*

TVO's interests as a broadcaster are aligned with those of the independent producer because TVO itself produces content for broadcast and online use as well as licensing it from independent producers. In this way, TVO is interested in FD as a producer.

As a producer of current affairs programming, TVO is its own insurer with its own FD Best Practices guidelines based on the context and the source of the content. Visual researchers have standards they must apply to use FD. Having these standards means being prepared to say no to the in-house producer.

As a licensor of content from independent producers, if the independent producer's lawyer and insurer's lawyer are satisfied with the E&O policy, so is TVO. If there are gaps [exclusions], the producer must close them.

With small-budget productions, E&O may not be warranted. For some small-budget productions, TVO may look at the film itself to see if it can waive E&O, but TVO can only do that a couple of times a year. The important thing is for independent producers to be consistent in their practices.

On a question about *RIP!*, ML says TVO would need to be involved at the beginning with such a project because it can't afford to spend time on an uninsurable film.

On the question of tee-shirt logos, ML says it depends on the context, and whether or not the owner of the trademark will consider the footage derogatory. (See Gaylor and Towers)

There is an initiative called Creative Commons¹² licensing which is changing industry practice. (See Reynolds below) The Supreme Court of Canada decision in the *CCH* case (cited above) which granted a user right shows there is hope for a more liberal approach to FD.

¹² Creative Commons (CC) is a non-profit organization founded by copyright lawyer and visionary Lawrence Lessig in 2001. Based in San Francisco, it is devoted to expanding the range of creative works available to the public, especially on the internet. It has released copyright-licenses which allow creators to decide which rights they reserve and which they waive for the benefit of the public. Wikipedia uses such a license. CC has been described as being at the forefront of the "copyleft" movement which seeks to support the building of a richer public domain by providing an alternative to the automatic "all rights reserved" approach to copyright. There are over 100 affiliate groups in 70 jurisdictions working to expand CC activities worldwide. See creativecommons.org.

We must remember the documentary community, with its inherent commentary, or in the vernacular of the *Copyright Act*, 'criticism or review' of its subject matter, is very different from drama or entertainment production when it comes to considering the issue of FD.

Devan Towers (DT) *partner, Taylor McCaffrey LLP entertainment law, intellectual property and technology; lecturer on clearance and copyright issues, Film Training Manitoba; Board of Directors: On Screen Manitoba, PAL Winnipeg and Manitoba Centennial Centre Corporation.*

DT agrees with the need to use FD. As the producer's counsel, her job is to make the FD argument to the insurer's counsel, but the insurer's counsel may not agree. This point has been raised with Bob Stein, New York counsel representing the Chubb Insurance Company, and he seems willing to listen and consider the argument.¹³

On the question of tee-shirt or clothing logos and trademark or copyright props (ie., soda cans, books, etc.), DT recommends that the clothing be switched for a non-logo clothing and the props be removed from the frame in an interview because it is within the control of the filmmaker. Keeping these trademark and copyright items in the frame is a "deliberate" decision of the filmmaker and not incidental. (See Gaylor above and Henry below)

However, if its use in a film is not considered derogatory, the trademark or copyright owner is less likely to bring an action against the filmmaker, but it is still a possibility and filmmakers should make informed decisions about the risks involved.

Hopefully a case will go to court and the judge will look at the *DOC Guidelines* to shape the decision.

¹³ Chubb uses two counsel for E&O, Bob Stein in New York and Debra Hodgson in Denver. Ms. Hodgson writes: "...'fair use' in copyright law is the copying of someone else's copyrighted material, when done in an appropriately limited way, for purposes such as comment, criticism, and parody. What will constitute fair use in the U.S. is hard to pin down because each case depends on the specific facts of the particular situation. As a result, producers may be frustrated by how rarely their lawyers can tell them that something is sure to be fair use. The boundaries of Canada's fair dealing law are still being developed, so it is prudent to be more conservative when dealing with Canadian copyrights." Hodgson, Debra, *Op. cit.* (Emphasis added)

Montreal Fair Dealing Panel November 12, 2010

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Rémy Khouzam	Lussier et Khouzam	Producers' Counsel	Montreal
Pierre-Olivier Laporte	Ogilvy Renault	Producers' Counsel	Montreal
Brian Newman	Sub-Genre Media	Media consultant	New York
Jean-Pierre Laurendeau	Canal D	Broadcaster	Montreal

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC)*, moderates the panel.

Before introducing the Panelists, LF explains the FD Panel process and reviews FD as defined in the *DOC Guidelines*.

See Winnipeg Panel for a summary of LF's statement on copyright and FD which she repeats at this Panel.

On a question whether DOC was considering creating its own insurance fund, as lawyers or notaries have, LF says an insurance fund is one of DOC's options. It will consider that possibility when the recommendations of these Panel discussions have been prepared.

Remy Khouzam (RK), *co-founded the law firm Lussier et Khouzam specializing in new media, film, and television copyright*.

RK worked on the *Reel Injun* project. This film describes the myths and stereotypes of the Indian portrayed in Hollywood films, and uses both FD and licensed excerpts. *RIP! A Remix Manifesto* was also one of RK's projects.

RK explains how producers can frame their FD use, which is not a free-for-all, nor is it something that competes with copyright. These FD exceptions are foreseen by the copyright law. If FD is well understood, it can be a very useful tool for the filmmaker.

RK presents a clip from *Reel Injun* which includes a musical excerpt of *Cherokee People*.¹⁴ This clip did not critique the content shown, but merely illustrated the narration. In this context, FD use was not considered.

¹⁴ Presumably, song by Tim McGraw.

A second excerpt from *Reel Injun* includes a long clip from a Hollywood film, *One Flew Over the Cuckoo's Nest*. FD was applicable in this second example. Here the narration extensively commented on the excerpt.

Each scene used from ...*Cuckoo's Nest* was placed within an historical context and commented on. This allowed FD use.

The filmmaker at first held that *Reel Injun* was a critique in itself and so everything included within it should be considered FD. This argument was untenable, and the insurers would not accept it.

The music rights were considered separately. The question of music is more complex.

Each FD use must be considered and justified separately. Creative considerations may also limit the use of FD because it is cumbersome to comment upon and critique every FD use. It is often better to purchase the rights.

In response to a question about the possibility of FD to obtain excerpts for Denis McCready's production of *Montreal Punk: the First Wave* which was beset with many problems in obtaining archives, RK says the version he saw was not suitable for an extensive use of FD. It would have required a re-thinking of the film. Also, a filmmaker can't first approach rights-holders asking for their material, find it is too expensive, and then turn around and try and claim FD.

Because the film *Montreal Punk* deals with an historical music period, the producer needed to obtain many levels of rights. It was very complex. In the use of a single video clip, for example, the producer needed to obtain the rights to the music, mechanical rights, images, performance rights, graphics etc. If one person in the chain says no, then the excerpt can't be used.

Clearing a photo of Iggy Pop in concert was easier. The producer had obtained the right from the person who took the photo, and Iggy Pop was performing so could not claim rights to the image.

On a question about *RIP!* not getting a broadcast in the US, RK says certain broadcasters in the US will not accept a work if all rights have not been cleared. These broadcasters are usually associated with larger production studios. They reason that they would be stealing from one hand to give to the other. So one needs to understand the consequences of FD decisions.

Responding to another question, RK says some cases of FD are very obvious, and broadcasters have been known to accept films with FD exclusions in E&O. These films are backed up by legal opinions which reduce the broadcasters' exposure to risk. This is not the rule, but it can occur.

Pierre-Olivier Laporte (POL), is a specialist in intellectual property who formerly worked as an associate at the law firm Ogilvy Renault LLP (now Norton Rose OR LLP) and is now a legal officer at the Global Fund to Fight AIDS, Tuberculosis and Malaria, an international financial institution based in Geneva, Switzerland. Previously, he studied U.S. copyright and trademark law at Harvard University, and was a legal consultant at the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center.

POL says the general rule followed by the insurers, is that all rights must be obtained. There are cases where the insurer will forego this rule, for example, when the work is in the public domain.

FD is difficult to use because it first must meet the test of the law. Does the use constitute review, news or commentary? Then is it a fair use? Has too much material been used? Given the subjective nature of the questions, lawyers will always respond equivocally. Maybe yes, maybe no. There is no certainty, which is viewed as a risk by insurers where rights are not cleared.

On the other hand, the lapse of rights after the death of the author¹⁵ is more easily verified, and an objective assessment may be made to establish that the work is in the public domain. Other questions on using FD are much more ambiguous.

E&O insurance is designed to cover risks associated with the use of copyrighted works, but the insurer wishes to limit risk. Usually that means the insurer requires that the filmmaker obtain all rights necessary. If the risk is too high - to use a metaphor, a homeowner today heating with coal - an insurer might decide not to provide insurance at all.

Whenever a case of FD is presented, the analysis of risk decides the issue. Even if some legal precedents do exist, this does not preclude risk. Each case is different, and different courts may judge FD differently.

The process of determining risk and deciding on appropriate measures to cover it is sometimes very long and complex. Producers are encouraged to begin this process early in the project.

Asked how many FD court cases there have been in Canada, POL says there are very few lawsuits. Lawyers' letters are sometimes sent. In the United States litigation is more common, but it's rare in Canada.

In Quebec, insurers can sometimes be reluctant to accept FD based arguments because there is little jurisprudence about FD, and the costs of defending cases can be very high.

¹⁵ Copyright term expires fifty years after the year of the death of the author in Canada. If the author is unknown, the term ends on the earlier of either 75 years from the date of creation of the work, or 50 years from the date of publication. For sound recordings or performances, term ends 50 years from date of creation. In the United States, copyright term ends 70 years after the year of the death of the author.

On a question about the reason for a deductible of \$10,000 for E&O insurance, POL says the deductible is there to reduce the price of the insurance by letting the insured assume part of the risk. In general, insurance exists to deal with more significant problems, not small ones.

Brian Newman (BN), *President of Sub-Genre Media, a new media consultant focusing on business development projects in the entertainment and cultural industries in the United States. He was previously CEO of the Tribeca Film Institute and, for ten years, was manager of non-profit independent film institutions.*

The battle for FU in the United States has been led by American University and the Center for Social Media (CSM). Success in the United States has been due to the efforts of CSM. They worked with the various stakeholders, and have been successful because all felt it was in their interest. Mexico is also working on this issue.

There is a limited monopoly of copyright in the U.S. Therefore, FU is important to inform or critique, that is, encourage freedom of expression.

The Tribeca Film Institute funded young filmmakers who were often unpleasantly surprised by rights issues. As a result, Tribeca began looking into copyright issues and supporting FU.

CSM worked with artists to determine what was FU. Their *Best Practice Statement* can be downloaded from the Centre for Social Media website. BN showed a clip from the documentary *Outfoxed: Rupert Murdoch's War on Journalism*.

The filmmaker must ask if the copyright material is “transformed” by its FU for a different purpose. Is the length appropriate? But there are no hard and fast rules.

There are four principles that need to be met for FU:

1. Is it the object of a social, cultural or political critique?
2. Is it used to illustrate an argument or point?
3. Does it capture copyrighted material in the process of doing something else?
4. Is it using copyrighted material within an historical sequence?

The CSM *Statement* was written by artists who wished to be remunerated for their work. Once the *Statement* was created, it was brought to insurers. Only certain insurers and broadcasters have accepted the *Statement*.¹⁶

¹⁶CSM Director Pat Aufderheide says, “ In the US when we first issued the Doc Filmmakers’ Statement, E&O insurers all, universally, said it would make no difference. But this is a commodity business; the product is undifferentiated. Each insurer offers the same thing. So when one insurer was persuaded by an enthusiastic broker to accept fair use claims for E&O, within a month they all did despite their initial statements. As usual it was the people with the strongest freedom of speech concerns that pressed the case, but then everyone

Michael C. Donaldson, an attorney in California, has negotiated lower average licence rates for projects by obtaining rights for all material, balancing both free FU clips and other expensive clips.

BN shows an excerpt of *Mickey Mouse* clips using Glenn Beck's voice. This film parody has not found a broadcaster, but the filmmaker has been able to keep the film on YouTube in the face of demands that it be removed.

On the question of how many court cases there have been in the U.S. on FU, BN says that a review¹⁷ by American University found only a handful, of which fewer than five went against the producer. These were usually very obvious abuses. However, court cases are expensive and most producers fold when confronted with a lawyer's letter. Courts are usually open to FU, but there is a culture of fear.

Jean-Pierre Laurendeau (JPL), *Vice President Programming, Canal D French-language documentary channel.*

It is quite rare that filmmakers approach the broadcaster at the inception of a project suggesting the use of FD.

RIP! was based on the controversy surrounding sampling, mash-up and downloading in the music industry. It did not get E&O insurance which was unusual, and a very difficult corporate decision. JPL evaluated the risk, but ultimately it was his decision. Broadcasters fear everything. It's all about tolerance of risk. In the end, the NFB took the risk, and indemnified the film. Then there was no problem broadcasting the project.

The damage caused by a single showing of *RIP!* on Canal D, for example, is not too serious. If someone were to come forward and make a claim, the solution would be simple: don't show it again. This would be regrettable, but not a huge problem.

else rushed in. The film that was accepted was *Hip Hop: Beyond Beats and Rhymes*. [2006]", correspondence with consultant, March 29, 2011

¹⁷ This 2007 study, *Fair Use and Documentaries in Court*, found nine cases on fair use in documentaries since 1996. Six of these cases were brought to court by two persistent plaintiffs: two by a news service, and four by Mrs. Hofheinz, the widow of one of the principals in American International Pictures. In most cases, the fair use defendant won.

The Centre for Social Media (CSM) drew the following three conclusions from these cases.

- Most copyright holders avoid fair use lawsuits most of the time (Mrs Hofheinz excepted).
- The most important "umbrella" factor American courts currently consider in weighing fair use is "transformativeness", or the repurposing of material rather than simply re-using it for the original purpose.
- In general, American courts favour the definition of fair use endorsed by the *Documentary Filmmakers' Statement of Best Practices in Fair Use* on the CSM website.

In another film, *Posthumous Pickle Party*, the broadcaster did not need E&O insurance because it was a production with a very small budget, and material came from home movies. There was really no risk, in JPL's opinion, and E&O insurance would have cost \$8,000 which the production could not afford. JPL chose to waive the E&O requirement, but this still required a long discussion with Canal D's legal department.

However, that is Canal D. The approach of Corus and TVA may be different.

In response to a question on whether Canal D would have broadcast *RIP!*, if the NFB had not indemnified it, JPL says he doesn't know- maybe.

One problem is that if the film is not broadcast, the contract with the CMF [Canadian Media Fund] is not fulfilled and the financing house of cards collapses. There have to be very important reasons to prevent broadcast.

JPL wants to be clear that E&O insurance is absolutely necessary for the broadcaster. It is there to prove that due diligence has been performed and that few if any problems will occur because the insurance is in place.

JPL describes the very difficult problem of receiving a lawyer's letter before broadcast. Often a postponement of broadcast gives time to deal with the problem, but it is much better to discuss these issues in advance.

Defamation is a much more serious problem than copyright. The FD case for *RIP!* was clear. Copyright infringement is a very rare problem, and *RIP!* was unique. In JPL's experience over eight years, there has been only one such copyright claim, but defamation claims occur much more often. (See Davies below.)

Toronto Fair Dealing Panel January 27, 2011

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Barry Averich	Melbar Entertainment	Documentary producer	Toronto
Bob Tarantino	Heenan Blaikie	Producers' counsel	Toronto
Robin Smith	KinoSmith	Documentary distributor	Toronto
Debby Schween	APTN	Broadcaster's counsel	Winnipeg

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC)*, moderates the Panel.

Following introductions, LF explains the FD Panel process and reviews FD as defined in the *DOC Guidelines*. See Winnipeg Panel for more details on her presentation.

On due diligence, LF explains the process used in *RIP!* They had a spreadsheet with the origin of the clip, its length, the length of the original work, the percentage used, and the rationale for FD.

Barry Averich (BA) *has produced and directed over 17 documentaries, often biographies on powerful media personalities such as Lew Wasserman or Harvey Weinstein, that have been sold in 100 countries.*

BA is more familiar with American FU concepts, and hasn't used FD per se.

He describes the complexity of his current film on Harvey Weinstein, a producer of over 150 films now owned by Disney. For this film, BA needed to clear clips from 500 sources and 250 stockshot houses.

His biggest problem was figuring out who owned the footage he wanted to use, and if it was in the public domain. In his film on Churchill, he had wonderful footage, but he couldn't find the rights-holder so he had to look for alternative footage.

BA finds it easier negotiating cheaper rates from Canada. Music is a different issue, and more difficult.

In response to a question about incidental use, BA says he doesn't tell people what to wear, but keeps an eye on big brand names.

On due diligence, BA says that he is careful about the process and keeps a log and journal. He feels a good visual researcher is important. They follow up different companies

that have used the footage. If they keep hitting a dead end, and it looks like the rights have lapsed, then he is open to FD.

Bob Tarantino (BT) *is a partner in the Entertainment Law Group of Heenan Blaikie LLP. His work focuses on entertainment and intellectual property law, and he has acted in a variety of roles, including as producers' counsel. He has written a detailed and positive assessment of the DOC Guidelines which he sees as an attempt to overcome the analytical straitjacket caused by the paucity of Canadian case law.*

FD is complex because it isn't simply a legal analysis, but also a business analysis.

When insurers assess risk, they often don't rely solely on legal analysis. Even if there is an airtight legal case, insurers can still conclude based on a business analysis that there remains a high risk.

In Canada, very few people are being sued over FD, but many insurers are subsidiaries of American companies. They operate cautiously in the context of American law, and American litigation costs.

American FU and Canadian FD are different environments. Navigating between them becomes quite difficult, and predicting risk impossible. FU or FD is context-driven, and firm decisions are not possible. The process is about allocating risk.

BT uses the example of a long clip from *Imagine* by John Lennon in the documentary *Expelled: No Intelligence Allowed*¹⁸. The clip wasn't cleared at all, and the estate sued. BT thought it wasn't FU, but the court said it was because it was transformative. In Canada it would never be considered FD.

In another case, a court said a poster in the background wasn't FU and the broadcaster had to settle.

On incidental use, U.S. judgments can be expensive because they involve statutory damages. Documentaries have to deal with reality and if a McDonald's truck drives by in the background, that would be incidental use.

BT believes the prospects for reform aren't great because the process is irreducibly complex. There is no bright line. He feels some ideas, like "flexible fair dealing" models, are terrible because they lead to more uncertainty.

¹⁸ 2008 anti-evolution documentary hosted by Ben Stein, former Richard Nixon speech writer

The debate is also a double-edged sword because documentary filmmakers are both rights-holders and rights-users. Drawing the line too far on one side could hurt their interests on the other side.

FD should not be the default position, but used in exceptional circumstances.

As important as FD is, it is only related to copyright. Films involve more than copyright. They also involve defamation, image rights, and other rights. When a producer sends BT a thick binder with the licenses and cue sheets, he goes through the film and matches everything with the releases.

Music is not something to fool around with. It is at the top of FD complexity. You need a lawyer because if you film a DJ you have to worry about his master recording, the synch rights, the performance rights, etc. If a busker is playing a song in the background, the producer should clear that.

On the FD “criticism” defence, BT says the definition of criticism is fluid. Criticism must be of the material, and the work can’t be used to criticize something else. There’s a single case in Canada citing an English appellate authority where ideas are criticized rather than the work itself.¹⁹ There’s almost no documentary litigation on this subject. Somebody has to fight it through the courts to establish a legal basis for the criticism argument.

Robin Smith (RS) runs *KinoSmith*, a distribution, production, and marketing company that releases documentaries in the theatrical, television, and other markets.

E&O insurance is critical when selling a production to a broadcaster. RS has lost television sales because of lack of E&O, but he doesn’t worry about exclusions to an E&O policy. As long as the filmmaker has the policy, RS is satisfied.

The blanket E&O that his company has covers the small films, but not major films like *RIP!* which could not get E&O. Eyesteelfilm showed it to 20 or more lawyers and insurers, but it was “insured” by the NFB in the end. Quebec broadcasters like Canal D, which broadcast *RIP!*, are more lenient than English-Canadian broadcasters.

¹⁹ Mr Tarantino later said that he was referring to *Hager vs ECW Press Ltd.* (1999) 2 F.C. 287. This is a Federal Court case dealing with copyright infringement over a book about Shania Twain. Although this decision precedes the 2004 *CCH* decision, it is notable in two respects. First, this Court describes publishing industry practice as “confused and unreliable” regarding FD for extended quotations, and testimony about industry practice was ignored. Second, the Court found that “The jurisprudence has established that it is not merely the text or composition of a work that may be the object of criticism but also the ideas set out therein. *Hubbard v Vosper*, [1972] 1 All ER 1023 (C.A.) is most often cited as setting out the relevant tests”.(Emphasis added.)

RS had hoped someone would sue to create controversy around *RIP!*, and director Brett Gaylor was disappointed that they weren't sued. The presence of the NFB as co-producer reduced the risk for the producer, broadcaster, and distributor.

It is always important to know the filmmaker has a lawyer, but some lawyers save you money, and some drag things out to increase their billings. As a distributor, RS wants to know who a producer's lawyer is.

Licensing outside Canada can be a problem. *C.R.A.Z.Y.* was a fantastic film but the Rolling Stones' music wasn't licensed outside Canada. The licenses weren't extended and, as a result, it can't be seen outside Canada.

The higher the profile of the film, and the more successful it is, the greater the potential for a lawsuit. If it is an "anti-whatever film" that raises hackles, the chances of a lawsuit increase. If the film is small and light, then no one cares. RS would be more cautious if he was distributing *RIP!* now. KinoSmith is a small company and doesn't have the resources for a legal fight.

You need to secure all the possible rights to the film, and depend on FD as little as possible.

In cases where it may be impossible, or too expensive, to get footage cleared - like *Star Wars* - then the filmmaker will often get around the problem by using alternative material. In the case of *The People vs George Lucas*, the filmmaker used *Star Wars* fan re-enactments from YouTube.

Debbie Schween (DS) *joined the Aboriginal Peoples Television Network (APTN) programming department in 2008, and is legal counsel for APTN's in-house production company, Animiki See.*

APTN has an aboriginal mandate, and must broadcast 75% Canadian content. In her job, DS looks at FD both from the producers' point of view and the broadcasters'. For the broadcaster, E&O provides an important level of comfort.

Broadcasters know that clearances and E&O are expensive, but FD can't be used to get around the rights clearances needed. DS knows a lot of filmmakers say they don't have the budget for E&O. Therefore, they hope for the best and plan to ask for forgiveness later, if necessary.

Despite the costs, it is much better to do the due diligence first. As a producer, you should develop a process and follow it regardless of the size of the production. Get a lawyer earlier rather than later, and set up a process that works.

APTN can waive E&O, but in those cases the filmmaker must answer a questionnaire. APTN wants to know if a lawyer reviewed the film, if they were denied E&O, if the producer has a history with E&O on other productions, and if this film has been broadcast before.

In answer to a question, DS says APTN has not been sued but they have received about six “cease and desist” letters in the last two years. These were usually for American or Australian movies where the distributor didn’t have Canadian rights.

Halifax Fair Dealing Panel February 12, 2011

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Caroline Martel	Artifact Productions	Documentary filmmaker	Montreal
Elizabeth Klinck	E Klinck Research	Visual Researcher	Ontario
Rob Aske	Stewart McKelvey	Producers’ counsel	Halifax
Graham Reynolds	Dalhousie Law School	Professor IP law	Halifax
Andrew Cochran	CBC Atlantic Region	Broadcaster	Halifax

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC), moderates the panel which is part of the “Copy, Copy, Copy” symposium organized by Dr. Darrell Varga of NSCAD.*

Following introductions, LF explains the copyright Panel process and reviews fair dealing (FD) as defined in the *DOC Guidelines*. See Winnipeg Panel for details of her presentation.

Caroline Martel (CM), *documentary filmmaker with a special interest in archival material, invisible histories, and technologies e.g. Phantom of the Operator (2004); member of DOC Quebec.*

In the last ten years, filmmakers have been availing themselves of FD more than before, but there is still a lot of resistance.

Phantom of the Operator was made up entirely of archival footage and CM wanted film clips from the 1930s and 1940s on up. There were problems finding the copyright holders of orphaned works. This presented a special dilemma. CM wonders how to demonstrate due diligence in looking for the copyright holder. (See Klinck below.)

When CM asked the National Film Board for their FD policy, they sent her the French version of the *DOC Guidelines*, so the NFB accepts the *DOC Guidelines* as authoritative

and Best Practice. CM believes the *Guidelines* are gaining traction in the documentary milieu.

Integrating FD practices in an actual shoot can be awkward. CM tried to get a musician to mention the authors of works he was playing. (See Reynolds below.)

CM raises the question of how criticism and review are defined: does a clip always need to be critical if the film is critical, such as an illustrative quotation in an essay? (See Reynolds and Aske below).

Elizabeth Klinck (EK), *veteran researcher and rights clearance specialist; founding chair of the Visual Researchers' Society of Canada; member of DOC copyright committee.*

A good visual researcher will reduce a producer's legal and insurance costs. There are about one hundred visual researchers in the Visual Researchers' Society, and using one of them will save money. They often get preferred rates from copyright holders. Visual researchers are also experienced in documenting due diligence, and this reduces legal costs.

E&O brokers are happy if a producer can show them a good visual researcher's copyright report and due diligence. It is all about risk and context. It is important for a producer to get an experienced entertainment lawyer who isn't too fearful of venturing into FD territory.

On the question of orphaned works, EK says the producer needs to document the efforts made to find the copyright holder. The Canadian Intellectual Property Office (CIPO) does have a protocol to deal with this, but it is very time-consuming and complicated, and should be avoided if possible.

The CIPO protocol requires sending money in trust in case the copyright holder makes a claim later. EK has no information on what happens to this money if a claim isn't made within a set time frame.

EK says that the internet has changed the culture of rights clearance. Years ago there were hundreds of companies holding the copyright to archival material. Some studies²⁰ a few years ago in the US found that most rights are now owned by only six or seven international corporations.

²⁰ Among other studies, Ms. Klinck was referring to:

a) "The Future of Hollywood: Creators, Conglomerates, and Culture", a CSM-organized panel at the Virginia Film Festival, October, 2003, <http://centerforsocialmedia.org/making-your-media-matter/documents/other-documents/future-hollywood-creators-conglomerates-and-cultu>

b) "And Then There Were Eight- Our Shrinking Media Universe, 25 Years of Media Mergers From GE-NBC to Google-YouTube", *Mother Jones*, Mar/Apr, 2007 <http://motherjones.com/corporations/2009/06/and-then-there-were-eight#>

On a question about *RIP!*, EK says that Brett Gaylor had a great deal of ~~free~~ legal advice and his approach is not easily reproducible. *Reel Injun* was a challenge and used over 120 Hollywood clips, including one very long clip from *One Flew Over the Cuckoo's Nest*. Narration in a film can be an important tool to provide the framework for FD.

On a question about a fairness test for FD, EK says she is not a lawyer or insurer, and every situation is unique. A general fairness test would be difficult to make because the problems are not simple. Distributors are often tougher on FD than broadcasters. We need to work together to find solutions and we need to be careful not to polarize the debate.

On music, EK says get a license.

Hollywood film clip licences are becoming more expensive and complicated because you now have to prove that you paid re-use fees to third parties like SAG and AFTRA, DGA and WGA.

Rob Aske (RA), *partner at the law firm Stewart McKelvey, dealing with film and television production, Errors and Omissions clearance, intellectual property, trademarks, advertising, and privacy; current chair of the Atlantic Film Festival.*

RA says he encourages a liberal interpretation of FD and deals regularly with E&O insurers. He says that there are only a few insurance lawyers and they must develop trust with each other. They expect him to be straight up with them. They need to understand the level of risk involved.

RA makes the point that E&O covers more than copyright. It covers defamation, intellectual property, and privacy claims.

E&O companies insure against accidents, but not incompetence. Producers should demonstrate they avoided risks, and realize they are responsible for the obligations they have undertaken in their contract with the insurer.

If a film is challenging, see a lawyer early. The FD clip should be a single use in the film, and not repeated use, nor used in publicity. Due diligence is not a legal defence, but it is helpful to identify potential problems.

Liability coverage includes legal costs to defend against an action, as well as a possible court decision awarding damages. Therefore, insurers will always be more conservative than the law allows. If the legal standard changes, the insurers will change, but they will never catch up to the new standard.

RA reads from the 2005 paper by Chubb's E&O counsel, Debra Hodgson:

“Your clients must understand that any unlicensed use of copyrighted materials in their productions involves some risk. Even if a claim can be defended against, it will cost both your client and the insurer money. Thus it is unwise to count on an insurer’s cooperation if your client wants to use unlicensed footage, photos, or other works under the fair use theory.”²¹

Concerning orphaned works, the question is whether a claimant is likely to appear.

On criticism and review, the particular clip must be reviewed, and not the general point being illustrated by the clip. If a clip is illustrative rather than critical, it is borderline FD.

On student works, the question is how big is the potential audience? Students can rely on FD more liberally. The law isn’t different for student films, but the risk is different.

Graham Reynolds (GR) *Rhodes Scholar now on the faculty of Dalhousie Law School focusing on copyright, property law, intellectual property (IP), and law and technology.*

Copyright is inherent in creative activity. Copyright law emerged due to the printing press, and has evolved with various technological changes. The internet and digital technology makes perfect copies possible on a larger scale than ever. In the digital age, copyright law is more challenged than ever before.

In establishing a fairness test for FD, Best Practices can really help. An argument can be made that clips are equivalent to literary quotations.

On the question of the definition of review and criticism, GR says the *Michelin Man* decision²² gave criticism a narrow definition. FD was seen as an exception. But the CCH case in 2004 said FD was not an exception, but a users’ right. The Supreme Court gave FD a large and liberal interpretation in this decision (cited above), but has not dealt with this issue since CCH.

There is a connection between copyright and censorship where possible plaintiffs use copyright to shut down a film. Lawrence Lessig once said that FU was simply the right to hire a lawyer.

On the FD authorship requirement, a credit at the end of the film, or a subtitle, could arguably meet this requirement. (See Martel)

²¹ Hodgson, Debra; emphasis in original, *op. cit.*

²² *Compagnie Générale des Établissements Michelin- Michelin & Cie vs. National Automobile, Aerospace, Transportation, and General Workers Union of Canada (CAW- Canada)* (1996), 71 C.P.R. (3rd) 348 (F.C.T.D.)

Online distribution, in many cases, means making a copy and that raises copyright issues. GR foresees two paths in the future, among others. One has digital locks, watermarked works, and is very restrictive. The other involves blanket licenses to pay for content, with the creator deciding upon the level of protection, for instance, through the use of licences developed by Creative Commons - "creativecommons.org" - (See footnote 12 above). He prefers the latter path.

On student works, GR points out the establishment of Artists' Legal Information Services, where Dalhousie University law students provide legal information to artists.

Andrew Cochran (AC), *CBC Atlantic Regional Director; former independent producer and investment banker.*

DOC is helping the public policy debate through its *Guidelines* and these Panels.

"Where you stand depends on where you sit". As a producer, AC defends FD. As a broadcaster, CBC wants to get your film on the air, but there is a common enemy: uncertainty. Intellectual property is an asset that needs certainty if it is to have value, and "messy IP" can destroy value.

Permission is needed either from the rights-holder, or the law. The rights-holder is certain, and Canadian law is uncertain. Broadcasters download this uncertainty to the E&O insurers which gives them third party assurance that their risk is low. If there is a problem, E&O insurance covers it.

It matters who the broadcaster is. If FD is part of the strategy of the film, that is one thing. If FD is an excuse to solve a problem, that is another thing.

Best practice is more about your method than about your lawyer. Broadcasters need documentation, but can waive E&O in some cases. For some internet programming, like the regional "Download" program, the fees are modest, and CBC doesn't require E&O.

Ottawa Fair Dealing Panel February 16, 2011

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Paula Sawadsky	Found Images Res.	Visual researcher	Vancouver
Stephen Ellis	Knightscope	Producer/distributor	Toronto
David Steinberg	Heenan Blaikie	Producers' Counsel	Toronto
Brian Wynn	Gardiner Roberts	Insurers' Counsel	Toronto
Daniel Henry	CBC	Senior Legal Counsel	Toronto

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC)*, moderates the panel.

LF explains the FD Panel process and reviews fair dealing (FD) as defined in the DOC *Guidelines*. She introduces the Panelists.

See the Winnipeg Panel for a summary of LF's statement on copyright and FD which she repeats at this Panel.

Paula Sawadsky (PS) *has been working in the British Columbia film industry since 1996, and started her company, Found Images Research, in 2003. It is the leading clearance researcher in western Canada, and has cleared footage for hundreds of documentaries, including The Corporation.*

PS says she never dealt with FD before working on *The Corporation* [released in 2003] which was a huge, tremendous experience. In that case, the producer was fully prepared to use FD, but most archival footage was cleared. The production counsel agreed with the producer's assessment that these clips [screened for the Panel] were FD, but the E&O insurance had "oddball" exclusions.²³ In any event, *The Corporation* was broadcast, and there never was a claim.²⁴

²³ Ms. Sawadsky was able to speak at more length with *The Corporation's* counsel after this panel, and was told that the insurance policy didn't contain actual exclusions. The counsel described it as an "oddball" policy which, without excluding any specific time codes, in the counsel's estimation didn't protect the producer in the event of a claim based on materials used under FD.

²⁴ The producer, Mark Achbar, accepted the risk for the E&O "exclusions". Only a cereal company raised a concern about Tony the Tiger, but didn't pursue it. *The Corporation* was broadcast by surprisingly few major networks in North America, namely TVO, Knowledge Network, SCN, and Vision TV in Canada; and Link TV, Sundance Channel, Free Speech TV, and West Virginia PBS in the U.S. CBC in B.C. wanted a three part version, but this was never broadcast due to a labour dispute.

The Corporation experience raises the question that if using FD clips can be covered by E&O, who decides what is FD or not FD?

In terms of criticism and review, no one in the film was commenting on a specific clip, but a montage of clips was used to analyze a general issue, and made the case for a general critique under FD.

Stephen Ellis (SE), *has run the family business specializing in nature documentaries for 25 years. He has produced over 200 hours of documentaries, and distributed thousands of hours of programming. His company, Knightscope Ellis International, is now part of TSX Venture Exchange listed as Knightscope Media Corp., and produces and distributes a wide variety of “factual entertainment”. SE is the former chair of the Canadian Media Producers’ Association, and founding chair of ISAN Canada.*

“Factual entertainment” describes what his company does better than “documentary”. They have always been very conservative in their copyright practices. They like making films about animals because there is a good international market, and the animals don’t have agents, unions, or residuals.

In one series for the History Television called *Tank Overhaul*, the archival rates were expensive, ranging from \$150 per second for some archives to \$500 per second for clips from the Imperial War Museum. Great footage, but unaffordable. So they spent a lot of their \$75,000 archive budget on CGI [computer animation]. They could insert a tank into World War II footage, or create an animated tank from drawings and plans. Of course, this approach to archives doesn’t really work for social documentaries.

SE says his company can reduce the cost of E&O by going back to the broadcaster if there are no claims in the first two years after broadcast, and asking them to waive or reduce coverage for subsequent years.

SE says that he thinks ISAN²⁵ is part of the solution to all of this, because half the battle in the world of copyright, clearances, and FD is being able to uniquely identify works. ISAN can make all of this activity more orderly. The ISAN database provides for cross-references to other identified works that may be included in a registered program.

The real problem is that making documentaries is a financially dysfunctional activity, but filmmakers are passionate about their projects. They plunge in first and do the math later. They don’t have a lot of leverage with broadcasters who are pushing licence fees down, so they have to do more with less.

²⁵ ISAN is the International Standard Audio-visual Number. Similar to the ISBN for books, it is a voluntary identification system run by a non-profit association in Geneva under the auspices of the ISO. Stephen Ellis helped establish the Canadian branch.

Documentary filmmakers need to make documentaries financially viable, and an easy-to-use FD standard is an important initiative of DOC.

In answer to a question from the moderator, SE says his company always tries to clear everything and not use FD. If you sell your programs to every country in the world, you have to be super-cautious so your shows can have a long shelf life.

SE sees E&O coverage in practical terms. If his insurer gives him E&O for a FD clip, and there is a claim made somewhere outside Canada, then his insurer will increase his premiums or his deductible in the future.

David Steinberg (DS) *is a Heenan Blaikie partner in entertainment, media, and intellectual property law. He often practices as a producers' counsel in the film, television, and music industries.*

DS says that when a producer 'clears' everything in their film, it's a lawyer's dream. In many cases, when a producer approaches him with a documentary that has already been completed, DS says "uh-oh" because there may be problems with some of the material in the film and it may be too late to address them. Also, documentary producers can be incredibly passionate about their projects...and sometimes frighteningly so.

DS says that producers should generally see a lawyer as soon as possible. Otherwise, he has to "reverse engineer" the process. This can be a difficult and more costly procedure – especially when paperwork needs to be created 'after the fact' and at times with unwilling participants.

As *The Corporation* experience demonstrates, the argument that no clearance is required and that FD will be relied upon may create an exclusion on E&O coverage, and that makes broadcasters and other insureds unhappy. In fact, it may interfere with the producer's ability to make complete delivery to distributors and broadcasters. It is dangerous to rely upon FD in the context of uncleared music. It may be easier to rely upon FD when using certain photos or other incidental material.

At times, the context of a use must be taken into account. For example, the "incidental use" of signage in the background may not be problematic, but blowing up the sign or focusing on it for an extended period would likely raise some issues.

DS says that he tries to evaluate the level of risk whenever a producer is relying on FD. For instance, certain celebrity estates are notoriously litigious. The level of distribution of the finished production may sometimes have an

impact on the risk analysis. How widely will the film be exploited? Worldwide? Canada only?

In answer to a question from the moderator, DS says that, in fact, very few claims are made, and they don't usually end up in court. He often finds himself saying to potential claimants, "If you have a problem, sue us". They usually don't.

In response to Dan Henry's comments (see below), DS says that large corporate entities are often reluctant to sue each other over minor infringement issues. Bringing a claim against the CBC is quite different than pursuing a small independent producer. CBC may choose to take a risk and waive E&O coverage, but it is less vulnerable than many other parties. Distribution companies and others may not want to take the same risk.

If the producer gets legal advice that is "too" cautious, they may be receiving the advice from an advisor that does not properly understand the issues. That being said, E&O insurers expect that producer's counsel will be responsible in advising their clients.

Brian Wynn (BW) *is a partner at Gardiner Roberts, and counsel for a major entertainment, sport and recreation insurance underwriter for Premiere Insurance Underwriting Services, one of the five major E&O insurers in Canada (See footnote below). He is one of three or four lawyers in North America who act as a clearance counsel specializing in copyright, trademark infringement, privacy, right of publicity, unfair competition, and defamation matters.*

BW describes the process. He works for an insurance underwriter, and only deals with producers' counsel, not producers. Someone wants E&O insurance, and the producer fills out an application form. BW wants to know if the producer's counsel really knows the production, and understands whether the producer has done their "due diligence" or not.

The process revolves around the relationship between the insurer's counsel and the producer's counsel. This community is not large. There are 3-4 insurers' counsel and 20-30 producers' counsel. We rely on trust. In thirty years, BW only felt once that a lawyer was not straight up with him. That lawyer has had a lot of problem films.

BW's advice is to come early in the game. *DOC Guidelines* may come into play, but if you want to use Elvis footage, his response would be don't try FD, just clear it. (See Steinberg above and Henry below.)

For incidental use, BW says he doesn't worry if he sees a McDonald's sign in the background, unless there are five prostitutes in front of it.

For FD comment and review, BW asks "where's the comment?".

BW tries to be as open and accessible to producers' counsel as possible, but it is about risk. Your deductible is only \$10,000 compared to Hollywood studio deductibles of \$1 million. Studios have in-house counsel, but for independent documentary producers, the insurer has more risk, and needs to be more cautious.

FD is the exception, and E&O is for stuff out of left field, not what you could foresee. If you want insurance for everything, the cost will go up, or insurers will get out of the E&O business if they think the risk is too high.

In response to a question from the audience about using a Sonny and Cher photo, BW says that if the use is not defamatory, the photo is FD to him [given the context explained by the person asking the question]. If it is used for promotion, than it might be considered an endorsement of the film, and that is a problem,

An audience member says he can't afford a lawyer. BW replies that a producer must have a lawyer if he wants E&O. BW can only talk to a lawyer.

In response to an audience question about application of FD to international markets, BW says when he started the only insurers' counsel were in Los Angeles. There was a decision to use Canadian counsel and look at the Canadian context. Canadians are less litigious.²⁶ (See Henry below)

Daniel Henry (DH) *has been employed at CBC since 1978, and is now senior legal counsel. He has reviewed thousands of programs before broadcast, and has directed their defence if they were challenged. He is a past president of the Canadian Media Lawyers' Association, and past Chair of the Media and Communications Law Section of the Canadian Bar Association.*

DH went to law school with Brian Wynn, and he has been at the CBC for 33 years. When he started, CBC broadcast a documentary called *Cruel Camera* about animal mistreatment in Disney or other nature films. CBC wasn't sued, and didn't even get a letter, but NBC wouldn't buy it because they thought CBC was too liberal with FD.

DH says that FD is not an exception. CBC uses FD every day for sports highlights among other things, and DH can count on one hand the number of complaints they've received. They settled music rights for *Fashion File*. In one case, CFTO²⁷ sued and CBC settled, but today he wouldn't settle. That is because since 2004 and the CCH decision, there are now

²⁶ Besides Premiere, we believe the major E&O insurers in Canada are AXIS Insurance Managers, TSW Management Services, Chubb Insurance Company of Canada, and Travelers Canada. They process E&O differently, and some, such as AXIS, use in-house counsel, while others use outside counsel. Counsel might be located in the U.S. (for example, Chubb) or Canada (for example, Premiere, Travelers, and TSW).

²⁷ CFTO-TV are the call letters for CTV's flagship Toronto station.

“user’s rights” in Canada. Even though there is no specific parody defence in the current *Copyright Act*, DH would defend parody for *22 Minutes* or *Royal Air Farce*.

DH says he doesn’t understand why some producers must risk losing their house for clips that are not a FD problem. CBC is self-insured and tries to help, waiving E&O for some items. CBC doesn’t want a threatening letter either, but, in the experience of DH, theoretical risk rarely turns into real risk. Just as it is costly to defend a lawsuit, generally speaking, it doesn’t pay people to sue either.

CBC has used Elvis material under FD, was never sued, and didn’t even receive a threatening letter. Brian Wynn may agree something is FD but nonetheless won’t want to take the risk. Insurers should balance out the risks. In some cases, threatening letters have been settled for baseball tickets.

DH agrees there are claims, but says the problem is with the lawyers. They read law cases, and can see what problems someone can get into. They are overly cautious, sometimes because they don’t actually know, or properly judge, the precedents. *The Michelin Man* decision [cited above] is not a reason for wiping out users’ rights.

DH says that most claims are not for FD, but for defamation. The real danger is with defamation. (See Matthew Davies below saying defamation is a danger for broadcasters, but rarely for documentary producers.)

Concerning Panel comments that using FD material in promotion increases risk, DH says if a Sonny and Cher photo is FD once, than it is FD in promotion as well.

Concerning tee-shirt logos on interviewees (an issue raised in Winnipeg and Halifax), DH says people can wear what they want. Reality is reality.²⁸

In response to an audience question about application of FD to international markets, DH says it is a two way street. American counsel import their concerns here, but we benefit being a backwater. We are less noticed. (See Averich and Wynn above)

²⁸ On the subject of tee-shirt logos, Chubb’s Denver-based counsel Debra Hodgson wrote that documentary producers should “...turn off all TVs and radios while filming. Avoid copyrighted artwork on the wall behind an interview subject. It is best to avoid shots of trademarks and copyrights on T-shirts and baseball caps...get their interview subjects to change out of their Mickey Mouse hats and Spiderman T-shirts, please.” *Op. cit.*

**Edmonton Fair Dealing Panel
March 1, 2011**

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Trevor Hodgson	Paperny Films	Producer	Vancouver
Marlena Wyman	Alberta Archives	AV Archivist	Edmonton
Linda Callaghan	Ackroyd	Producers' Counsel	Edmonton
Peter Kallianiotis	NFB	In-house Counsel	Montreal

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC), moderates the Panel.*

LF explains the FD Panel process and reviews FD as defined in the DOC Guidelines. She introduces the Panelists.

See Winnipeg Panel for a summary of LF's statement on copyright and FD which she repeats at this Panel.

On the question of broadcasters and E&O, LF says that it makes a difference who the broadcaster is. She points to the Ottawa Panel where the CBC was very supportive of FD and willing to accept exclusions, or even waive E&O in some cases. (See Kallianiotis below.)

Trevor Hodgson (TH), *producer and business affairs analyst for Paperny Films, Vancouver; previously analyst at B.C.Film.*

Approximately 20% of Paperny's total production slate consists of pure documentaries. Paperny Films' legal counsel requires E&O clearance on all its films and reviews everything that needs to be cleared. Unless it is in the public domain, a licence fee is paid if required. If they think something is in the public domain, they seek verification because they have been stung in the past.

TH says Paperny keeps an E&O binder for each show, and keeps track of all the material they use. They don't take any chances, so they clear everything and avoid using FD.

TH says he gets E&O for North America, not the world, and therefore is covered for Canada and the U.S. Paperny has been told that North American coverage is sufficient for world exploitation.

As an example, Paperny did a co-pro with the NFB, *Confessions of an Innocent Man*, and used news clips in it. He wonders if organizations that sell stock news footage would try to

use the argument that the value of their stock shots is reduced by FD (hence, creating problems for producers wanting to use the news stock under FD)?

TH has been collecting FD articles such as *Something for Nothing* [April, 2010, *Playback*], and these articles have convinced him not to try FD. He will wait for others to crack the ice, and wait to see the results.

The question of FD may be legal, but what's written in law does not prevent any party from commencing a lawsuit. Paperny has been told that E&O insurers are more afraid of the cost of the legal defence than the cost of the judgment.

On the question of comment and review, TH points to the "long and torturous road" (as quoted in the "*Something for Nothing*" article) that Rezolution Pictures followed with the clips in *Reel Injun*, requiring a comment for each FD clip. He feels this kind of FD requirement may hurt the creative freedom of the director to tell the best story in the best way possible.

On the question of logos, TH says that Global's contract allows them to digitally insert advertising into their films. They haven't done it on any of Paperny's films, but have the option. (See Callaghan and Kallianiotis below)

On the DOC *Guidelines*, TH says they are interesting, but subjective. He is cautiously optimistic and would talk to lawyers and broadcasters about them.

Marlena Wyman (MW), *Audio-visual archivist for 28 years at the Provincial Archives of Alberta, recently retired, and now a visual artist.*

MW retired the day before this Panel and she won't be replaced at this time due to a hiring freeze. Part of her job was to help filmmakers find visual materials. Some of the Alberta Archives collection is Crown copyright, and some of it is donated, or transferred to the Archives.

The Archives has a collection that is restricted by donors in some cases. The Archives abides by those restrictions because they want to reassure current, and potential, donors that their wishes will be respected. Donors don't want their home movies or family photos used in a way that would embarrass them.

The Archives can make one copy for private study, but then the filmmaker must contact the copyright holder. Once the Archives has permission from the copyright holder, it will give the producer permission to use the material.

The rules have recently been changed for Federal Crown copyright. Producers can use this without permission for non-commercial purposes. Filmmakers still need to ask permission for Provincial Crown copyright.

On the question of orphaned works, the Archives won't give permission to use them. However, if the producer has done their due diligence and still can't find the copyright-holder, they can use the material at their own risk.

In 28 years, MW has never had a problem with orphaned works. An occasional letter, but they've never had a claim.

On a question about broadcasters, MW says that broadcasters donate their materials to the Archives, but always keep the copyright. They won't transfer that to the Archives. They don't mind if anyone wants to look at this material, but they don't want it used without their permission. However, once donated, they can not charge a fee to the consumer. The Archives charges a user fee, but that is fairly low.

On the *DOC Guidelines*, MW agrees it would be good to have a document to hand to filmmakers to advise them about FD, but she has questions. What would the limits of public domain be for home movies? What does a work without "original character" really mean?

Linda Callaghan (LC), lawyer at Ackroyd LLP, Edmonton, and for almost 28 years has worked in the entertainment industry, usually represents producers.

LC would like clients to come sooner rather than later. Coming in one week before the air-date to begin clearing a film is too tight for her.

LC likes Trevor's conservative approach. She walks producers through their E&O application. FD is a narrow window because E&O covers more perils than just infringement under the *Copyright Act*. E & O also deals with the *Trademark Act* and personality and privacy rights.

Personality and privacy rights come into play when you show someone's likeness. Famous people protect their image because they can make a living selling their image. Non famous people also have certain rights in relation to the use of their image. FD is a series of specific exceptions to infringement under the *Copyright Act*.

Documentary filmmakers build on copyrighted works to tell stories. But remember documentaries are copyrighted works themselves, and we all need to give and take when buying and selling existing copyrighted works.

On the question of logos, LC says look at your agreements, especially your broadcast license. You may need the broadcaster's permission before putting a logo or product into a show. One broadcaster recently told LC that they won't accept any logos in films they broadcast. If necessary, they will blur them out. It is expensive to do that in post production. (See Hodgson and Kallianiotis)

On the question of comment and review, LC says that it isn't FD if you don't comment on each clip, as *Reel Injun* did.

On the question of the DOC *Guidelines*, LC "loves" the *Guidelines* because it refers to Canadian law, and not American law. She likes the small print, and the *Guidelines* has a lot of that. It will get the discussion started.

Peter Kallianiotis (PK), *NFB in-house counsel for 11 years, works on all phases of production and distribution of films, including intellectual property issues.*

We produce both 100% NFB-funded films and co-productions with independent producers. With co-pros, it is the responsibility of the independent producer to clear rights for the production and to secure E&O insurance.

With NFB productions, the Board self-insures. Copyright obligations, FD, etc., are reviewed at the beginning of the production, and again at the rough cut. Then there is a final assessment to be sure everything is cleared.

In the case of *Reel Injun*, an NFB coproduction with Rezolution Pictures, FD was part of the production. There was no E&O exclusion, despite a large part of the film requiring FD. The lawyer for Rezolution made a point to the insurer that there was criticism for each FD clip. The insurer accepted that these clips were FD, and under FD, no fees had to be paid, not to the actors, music, or anyone.

On the question of broadcasters and E&O, PK said that E&O is boilerplate and the standard contract says everything has to be cleared or the producer indemnifies the broadcaster. Broadcasters won't accept a film without E&O, and once you have an exclusion, they won't accept the film. The Canadian Media Fund and other public agencies want E&O too.

Told by LF that CBC makes E&O exceptions, PK wanted to know the names of films CBC accepted without E&O. Others said Bravo, APTN, and Canal D also waive or accept exclusions to E&O.(See Fitzgibbons)

On a question about FD and foreign markets, PK says FD is different for each jurisdiction. *Reel Injun* FD clips would fall under FU in the US, but you would need a different legal

assessment. FD applies only in Canada and it is always a risk in other jurisdictions. Foreign risk is one reason why insurers are more hesitant to accept FD.

An audience member says that his E&O goes to an American company and is reviewed by a lawyer in New York. Now he thinks that lawyer applies FU and not FD. PK says that their co-producers vet their E&O in Canada. For *Reel Injun*, it was Temple in Toronto.

On a question about internet distribution, PK says that nfb.ca carries mostly 100% NFB productions, and these are cleared with little FD.

On a question about incidental rights, one person asks how Morgan Spurlock could shoot *Super Size Me* without McDonald's closing him down? PK says that is a good question.²⁹

On the question of logos, PK says that the NFB doesn't blur tee shirt logos because that isn't a "use" according to the *Trademark Act*. The NFB doesn't think this is a dilution of their trademark rights.

PK responds to the broadcaster who wants to place a product into a Paperny film (See Hodgson above), that that producer would have to authorize such use. Otherwise, the broadcaster can't do that.

On threatening letters, the NFB hasn't received any threatening letters on copyright.

On ambush interviews, a lawsuit depends on the impact. These are very dangerous for the litigant and the publicity of a lawsuit might easily backfire. The plaintiff needs to carefully consider the consequences of a suit.

On the DOC *Guidelines*, PK says they are interesting. The question is how far insurers and broadcasters will move. PK recommends that DOC continue pressing forward, and show how important this is for documentary filmmakers.

²⁹ According to CSM, there were never any problems with *Super Size Me* because the IP issues were about trademark and not copyright. Spurlock was not "diluting" the brand because he wasn't selling rival burgers under the McDonald's name.

Vancouver Fair Dealing Panel March 2, 2011

Panelists

Lisa Fitzgibbons	DOC	Moderator	Toronto
Michael McNamara	Markham Street	Documentary producer	Toronto
Paula Sawadsky	Found Images Res.	Visual researcher	Vancouver
Doran Chandler	Roberts and Stahl	Producers' Counsel	Vancouver
Matthew Davies	Chubb Insurance	Insurance Underwriter	Toronto

Lisa Fitzgibbons (LF), *Executive Director of the Documentary Organization of Canada (DOC)*, moderates the panel.

LF explains the FD Panel process and reviews fair dealing (FD) as defined in the *DOC Guidelines*. She introduces the Panelists.

See Winnipeg Panel for a summary of LF's statement on copyright and FD which she repeats at this Panel.

In addition, LF says that FD doesn't depend on time of a clip, but the context, such as a long clip used in *Reel Injun* that was FD. There may be alternatives to FD, and something that is confidential wouldn't be protected by FD. FD cannot compete with the original, but that is usually not a concern in documentaries. Due diligence is important and RIP! documented their FD uses in detail. Everyone- researchers, lawyers, insurers, and broadcasters- want to be informed early in the process if the producer plans to use FD.

If anyone wants to know whether FD applies, start by reading DOC's *Guidelines*.

Michael McNamara (MM) *is a veteran writer, director, and producer of many award-winning documentaries, often on pop culture. He founded Markham Street Films in Toronto in 2002 with his partner Judy Holm.*

When anyone makes films about pop culture, the audience needs to see examples on the screen. MM's documentary about Polygram Films, *100 Films and a Funeral*, was based on a book by the CEO of Polygram, Michael Kuhn. He took on Hollywood in the nineties, and almost succeeded until Polygram was closed down by its Dutch owner, Philips. Then the films produced at Polygram were bought by Hollywood, mostly Universal and MGM.

When MM made this film, about five years ago, the lawyers and insurer wanted everything cleared, including every writer and actor. Then MM sold the project to Sundance Channel which is owned by Universal, and MGM decided they wanted to distribute it. Therefore,

MM had a good deal on the rights from those studios, and that made the film financially possible.

However, MM had problems elsewhere. He wanted to show posters of some films now owned, but not originally produced, by Disney. They wanted to know the context and when they were told by MM that they wanted to show these films had been flops, Disney didn't want to be seen in that light. Regardless of money, they wouldn't give MM the rights to the posters.

So MM took an alternative route. He had an artist create new posters in the style of the old posters. Philips was the villain of the film, and MM didn't want to ask them for permission to use any of their trademarks. Again, they had an artist recreate their record labels.

History gets bent and reshaped trying to make documentaries around these copyright restrictions. Today, the clearance culture is less onerous than it was in 2007 because of the work DOC is doing here, and CSM in the U.S.

Markham Street's new film about feminism, *The F-Word*, uses news clips. MM identified the sources and placed them in context to qualify as FD. Unlike five years ago, the lawyers and insurer signed off. This is an indication of the changes in the industry on FD.

MM tries to use the minimal amount of footage to make his point, and no more. In *The F-Word*, they cleared 268 items and had a list of 23 uncleared items.

They used a clip from the Virginia Slims commercial "You've come a long way, baby". The insurer questioned this one FD use because it was 28 seconds and he thought it was too long. In the 70's, commercials were sixty seconds, so this was less than half the original length. Also, many people never saw the original and needed to know what the commercial was about. The insurer was swayed by these arguments, accepted it was FD, and covered this clip in their E&O contract.

On a question about comment and review, MM says he was told 4-5 years ago that FD covered only review at the time of publication of the film, and not years or decades later. That opinion has changed and there is now no time limit on review, but they have made changes in narration at the request of their lawyer.

Doran Chandler says he hasn't heard about a time limit on FD review, but there is a difference between FD used for news and documentaries.

Paula Sawadsky (PS) *has been working in the British Columbia film industry since 1996, and started her company, Found Images Research, in 2003. It is the leading clearance researcher in western Canada, and has cleared footage for hundreds of documentaries, including The Corporation. PS was also on the Ottawa Panel.*

PS finds and clears material, but FD doesn't come up on most projects. She will flag FD opportunities that she sees, and if the producer agrees, they will go to their lawyer.

PS worked on a B.C. NFB production, *Shameless*. It was about stereotypes of the disabled. The producer, Tracey Friesen, wanted to use Hollywood clips to demonstrate these stereotypes. PS contacted the studios and they said everything had to be cleared, including the actors and music. It would have been incredibly expensive.

Then Tracey Friesen heard about the *CCH* Supreme Court case (See Appendix E), and wondered if FD could be used. The NFB lawyers agreed the clips were covered by FD, but asked for additional lines of narration to focus on the critique of the clips. They didn't have to pay anyone anything.

Because they had already contacted the Hollywood studios about using these clips, the NFB wanted to inform the rights-holders that FD was being used. One studio person called Tracey to ask what they were doing, and that was all. Once it was explained, nothing happened. No threatening letters. However, it was a 100% NFB production and the NFB is self-insured. They didn't have to convince an insurer's lawyer, only their own lawyers.

It isn't always so easy. *The Corporation* still couldn't get full E&O for the FD clips even though the lawyer agreed these clips were legally covered by FD. They thought the risk was too great despite the strong legal case. (See PS in Ottawa Panel.)

Considering lawyers' fees, in some cases it is easier and cheaper to pay the license than to try to claim FD. Also, bringing in producers' counsel early saves a lot of research time and makes the researcher's job more efficient. The lawyers explain their approach to copyright, and set the level of diligence the visual researcher will have to adhere to when clearing material.

Aside from FD, incidental use is a very powerful tool. PS is always asked if the producer has to blur a logo or take out background music. Incidental use gives them a lot of leeway there.

On the question of a Getty photo (See Davies), PS asked why would anyone pay Getty if the photo is in the public domain? Michael McNamara says that Getty did preserve it, find the best version, and that work has value, but Getty won't say they have copyright.

On a question about documentation, PS says that they keep a log, and it is a service they offer. Using FD means being especially well organized. A log is a distilled version of evidence kept in folders. Doran Chandler adds that a log helps legal counsel, and saves time and money. Lisa Fitzgibbons says that starting with a log, confidence grows.

Doran Chandler (DC), *former folk-rock band musician, now a lawyer with the Vancouver firm of Roberts and Stahl. Doran provides legal services for the entertainment industry, including financing and IP issues for film, TV, publishing, and music.*

Roberts and Stahl clears a lot of documentaries and reality TV. If they are brought in early, they discuss what works and what doesn't. If a lawyer is not brought in, the insurer normally tells the producer to check with a lawyer to be sure everything is cleared. Then the counsel has to work backwards by reviewing the completed production and trying to determine what requires additional clearances.

DC looks at incidental use and FD, and in many cases makes a judgment call regarding acceptability. With FD, DC starts by trying to clear everything, then looks at the exceptions allowing inclusion of material, including FD. FD is often not a question of what is legally correct, but what risk the insurer's counsel will accept. If the insurer decides they want to exclude a clip from E&O, the producer has to decide to take it out or discuss with the insurer whether a higher deductible or exclusion is possible.

Logos or trademarks are different. There is Canadian case law, and more American case law. Including trademarks may be permissible because you aren't infringing trademarks when you include them. It's a copyright infringement and not a trademark infringement. Is that incidental use, FD, or permissible under copyright?

American FU is a much broader exception than FD. If we can clear FD in Canada that often means it is OK in the U.S. The Chubb lawyer in Colorado [Debra Hodgson] will allow FU, but other issues are more contentious, like title. American counsel are more cautious with a film's title. (See Aske above.)

Matthew Davies (MD) *is Senior Underwriting Specialist- E&O, and Canadian Manager-Professional and Media Liability, for Chubb Insurance Company of Canada. MD began his career as an insurance broker in Montreal in 1988, and joined Chubb's Vancouver office in 1997. He transferred to Chubb's head office in Toronto in 2002 where he is responsible for creating market strategy, risk selection, profitability, underwriting integrity, and client relationships in professional and media liability.*

MD points out that he is not giving legal advice, and can only speak in generalities. He says there are no certainties. Every real insurance claim has to be assessed on the merits of the specific facts that apply to that situation. Nothing that he says should be taken as implying coverage would be triggered. He can only speak hypothetically to illustrate one person's view of the FD argument.

Chubb has been in the media liability business for fifty years. As an underwriter, MD analyzes risk and figures out the economics of risk transfer. Chubb is not an expert on how to make a film nor are they film critics, but they are experts in risk, liability assessment

and pricing the risk at a level that is fair and competitive. Of course, they are in business to make a profit.

MD says Chubb cares about diligence. They want to know how producers go about making themselves more flame proof. That's the key. Insurance should be a contingency plan. It's the producer's risk at the end of the day.

Producers have four ways to protect themselves from risk.

- First is risk avoidance. Just don't use that clip.
- Second is risk reduction. Reduce the severity of the risk by minimizing the clip and/or clearing it.
- Third is risk sharing. Sign contracts with others that indemnify the producer and purchase insurance.
- Fourth is risk retention. This is the risk the producer retains at their peril, such as that portion of the exposure that is below the deductible, the amount of limit selected or being aware that there are exclusions in every insurance policy. Doing something that an insurer isn't comfortable accepting as a risk transfer doesn't mean that the producer shouldn't do it if they are willing to face the cost-benefit of that decision – but the producer must be prepared for that.

It isn't the job of an Insurer to tell you how to make your film. But it is the job of the Insurer to decide how much exposure they are willing to accept from your film.

MD says that if there is a lawsuit against you, things can get ugly because dealing with that legal battle can be all consuming. The insurer will want to know how the producers will defend themselves. No one wants to experience a claim because it will be their life for many years to come and get in the way of what they would otherwise be doing to make a living.

E&O is about a whole range of things besides FD or FU. It covers plagiarism, copyright title, defamation, etc. It is content insurance. FD is one part of the copyright issue, but it doesn't remove the need for clearance of music or title.

The E&O application form can be onerous, but it is designed so MD can figure out what the producer is doing. Use producers' counsel. Producers' and insurers' counsel work together. Doing clearances after the film is in the can may ruin your film if something has to be removed.

Insurance comes with exclusions. Exclusions can be grouped into three general categories – the risk is covered elsewhere (by other insurance available in the market), the risk is uninsurable (such as fines and penalties or the proverbial building that is already on fire) or it is outside of the underwriter's intent to cover (such as a deliberately dishonest or fraudulent act)

Insurers will make a business decision to settle while producers may want to fight for the principle. The insurer may have a contractual right to do that because there is a “hammer clause” in the policy giving them that right. But the nature of the hammer differs with each carrier. Lawyers will say they want to fight for a precedent, but lawyers get paid by the hour. The right decision might be to settle, so the producer can get back to work.

MD knows documentary budgets are tight, but the cheapest premium may not be the best option. Does the policy cover all risks or only named perils? How much leeway does the producer have in controlling the defence? Producers need to ask their Brokers to get them options on both an Occurrence Based and a Claims Made coverage trigger to understand the pros and cons of either approach. There are many questions the producer should consider and while premium may be important, it shouldn't be the only factor that influences the buying decision. A cheaper product may not have the value that other coverage offers for a higher price.

Concerning the DOC *Guidelines*, they are helpful, but they focus on FD from the filmmaker's point of view. They are not a substitute for independent analysis on a case by case basis. More important is a clearance letter from the producer's counsel. MD urges producers to document their production very well, and keep this documentation in a safe place- forever. Having that documentation available may be critical to the defence of the film if it is picked up sometime later in another jurisdiction, like Europe, or goes to a different distribution format, like DVD. Most DVDs have additional footage or content, like the director's commentary, as bonus features that were never in the original release.

Chubb would ask if there is a supportable exception to clearance, and FD is just one example of an exception. MD would consider the opinion of the producer's counsel, and possibly ask Chubb's counsel for a second opinion.

There is no need for an insurer to provide a FD endorsement. If the producer's policy doesn't have a copyright exclusion, then they have FD coverage. The consumer's rights are well protected by the courts in a dispute with an insurer because insurance policies are a contract of adhesion, meaning “take it or leave it”. Consequently, Insurers will likely only deny coverage when they are absolutely confident that they are on solid ground and their position on coverage is supported by the law.

On a question about the number of FD claims, MD says he is sure there are some in Canada, but he brings up an example from the U.S. where there will be millions in defence costs arising out of a case where a tee-shirt used a famous photo on it and there is a dispute about the ownership rights to that photo. In this specific case, the defence is relying, in part, on a FU argument.

There is a publicly reported case of plagiarism in Canada that went before the courts. Damages may exceed \$9 million if the defendant loses their appeal of the trial results. Legal fees are in excess of \$4 million. The case revolves around an animation series.

Chubb rarely sees defamation claims for documentaries or films. Newspapers and broadcasters see defamation claims. Intellectual property (IP) exposure provides the vast majority of film claims- copyright infringement, misappropriation of ideas, etc. (See Dan Henry above)

MD says producers also have to think about after-markets like DVD and the internet, and make sure clearance covers these as well as primary markets.

On a question about why use a public domain photo from Getty which costs \$500 rather than the same photo from NARA [the National Archives in Washington] which is free but lower quality, MD says that if money changes hands you may be more easily able to prove you acted in good faith and with diligence because you paid a fee to use the photo or clip.

MD says the credibility of the people the producer hires is important in establishing diligence. Ask about the projects they have done, and check references.

MD will rely on the producer's diligence, the opinion of the producer's counsel, and if necessary, the insurer's counsel. MD wants the producer to be successful, but if the risk is too great, an Insurer might exclude the clip, raise the premium, increase the deductible or simply not insure the project.

On a question, it seems insurers' counsel for Canadian productions are Mark Banty in Montreal, Brian Wynn in Toronto, Bob Stein in New York, and Debra Hodgson in Colorado.

On a question about international markets, MD says the internet means producers have little control where their film will be seen, or where they might get sued. Suppose you were sued in Chile – how would you be able to defend yourself there? Practically speaking, if a producer doesn't have assets in Chile, there is no way to enforce a judgment in Chile, or anywhere the producer doesn't have assets. But that may also mean you might never be able to travel to Chile, if there is a default judgment against you there, without fear of being in trouble with local authorities.

5) Key Points, Interests, and Issues

Digital Revolution

The panels examined the same themes, and often returned to the same issues. In some cases a consensus could be seen developing, and in other cases, there was disagreement or confusion. In this section we will look at the thematic issues discussed, and how they were treated across the panels.

It seemed that the approach towards fair dealing varied depending on the genre of production the panelist was most familiar with. Documentaries are fundamentally different in their application of fair dealing (FD) from drama because the latter can control their production environment and subject matter. Documentaries are also different from the news.

Many panelists indicated that technology, especially the internet, has changed copyright in fundamental ways, including the concentration of copyright holders. There used to be hundreds of rights-holders, but now there are six or seven vertically-integrated corporations holding most music and visual copyright. With such economies of scale, copyright is treated as a profit center by major international corporations which lobby aggressively on behalf of rights-holders over rights-users.

The digital world has collapsed time, globalized risk, and enlarged content from a specific documentary to the add-on interviews or other materials in a DVD. All must be cleared.

Process

Panelists offered their advice and experience about the process producers should follow in clearing copyright. Nearly all agreed that producers should clear rights as much as possible, and rely on FD to the minimum extent possible.

Panelists agreed that it is essential to hire a lawyer experienced in intellectual property law and FD early in the process, especially if the film is controversial. The importance of hiring experienced entertainment counsel knowledgeable about FD was a theme of many Panels.

However, some producers can't afford a lot of lawyering, and a lawyer expert in intellectual property may be hard to find in some regions. It was also apparent that some lawyers are more cautious with FD than other lawyers. The producer should understand where their lawyer sits on this spectrum if they plan to use FD.

Along with an experienced lawyer, an experienced researcher is key to successfully using FD. It is important to hire experienced visual researchers who can locate copyright holders,

negotiate preferred rates, keep a log and documentation binder, and demonstrate that due diligence was consistently followed according to the standards set by counsel. Hiring an experienced visual researcher can help a producer establish due diligence, and reduce costs in clearance expenses.

Producers should clearly state the standard of risk s/he needs to establish so the visual researcher can work to that norm.

If the producer plans to use FD, they should discuss that with the broadcaster as soon as possible, and get them “on board”. This is particularly true if they wish to ask for a waiver of E&O insurance.

Broadcasters are also producers of content themselves, and as such use FD in their own in-house productions. In doing that, they have established their own procedures which they apply as consistently as possible to reduce their risk. The consistent application of similar procedures by independent producers is one option for establishing a credible protocol for due diligence.

Panelists identified problem areas, and producers and researchers find that the identification of legitimate copyright holders, orphaned works, or works in the public domain, is a major problem. Commentary, critique, or review should apply to each FD clip, and identification of the source may be in a sub-title, or in the credits at the end of the film.

There was a consensus that music rights are a special case and should be treated with caution if planning to use FD. A producer needs experienced counsel in this area among all others.

Producers

Producers on Panels tended to be confused about the parameters of FD even though they may use it frequently, and believe it is an essential tool to access content.

Some producers do not want to use FD because they think the due diligence needed will limit their creative freedom. “Clearance culture” is limiting creative choices available to filmmakers. Some producers only use footage they know they can clear, or avoid footage that requires FD to lower international risk. This means some producers tailor their productions to avoid any business practice that might increase their uncertainty.

We heard from other producers that FD, incidental use, and public domain need to be more accessible to documentary producers if they are to examine controversial, social, or historical subjects. They believe they need FD to access material from a rights-holder who fears criticism and hides behind copyright protection.

Producers are being financially squeezed between higher costs for archival footage, and lower fees paid by broadcasters. Therefore, some believe FD is needed to manage their archival costs.

Many producers were confused or unsure :

- what procedures to follow to minimize their FD risk, and demonstrate due diligence to counsel, insurers, and broadcasters;
- how to deal with “mash ups”, both as rights-holders and rights-users;
- if applying FD will cause an exclusion to their E&O policy; or limit selling their production to other markets;
- what is criticism or review under FD, and what is not;
- when incidental use might be deliberate, and whether or not it requires clearance; and
- how to identify the rights holders of “orphaned” works or works in the public domain, nor how to exercise due diligence in locating these rights holders.

Legal

FD is gaining ground within the industry, but there is practically no case law about FD in Canada, and American case law raises concerns that may not be realistic here.

The lack of case law means greater clarity is needed on the circumstances when FD can be applied, and producers must be able to document their clearances and due diligence with intellectual property issues.

There was consensus that context is a critical component in judging the applicability of FD, and that means each case is unique. FD is “irreducibly complex” by its nature, and requires a case by case analysis which is dependent on context. Therefore, there can be little certainty about the law in any particular instance.

Most panelists said that the resolution of these complex issues depended on the relationship between the producers’ counsel and the insurers’ counsel. FD is defined by their understanding of the issues. Some lawyers believe FD is a very limited exception to the *Copyright Act*, and others believe it is an important right that should be used fearlessly, even in promotional material.

In terms of legal risk, the Supreme Court has liberalized the concept of FD in its 2004 copyright decision (*CCH vs Law Society of Upper Canada*), but there appears to be no other relevant case law in Canada. Therefore, there is little guidance in defining FD, or Best Practice to minimize risk when using FD in documentary production.

Throughout the Panels, legal opinions differed. Some lawyers will not touch Elvis even if convinced the material falls within FD, and others believe Elvis is not to be feared if the FD case can be made. Some believe criticism and review applies only to the FD work quoted, and others believe the work cited can be illustrative, similar to a literary quote. There is disagreement over the boundaries of incidental use, such as logos on tee shirts.

Some believe defamation is the greatest peril facing documentary filmmakers, and others believe it is not a significant peril for filmmakers, but is a danger to broadcasters and newspaper publishers.

Insurance

A number of Panelists wanted to be sure that everyone understood that E&O is content insurance that covers a much broader range of perils than copyright or FD alone. Lawyers on these Panels repeatedly pointed out that E&O covers defamation, privacy, trademark infringement, as well as copyright. Therefore, there are risks that must be covered under the E&O policy that are outside the scope of FD as it applies to copyright infringement.

Another point mentioned in various Panels was that broadcasters usually require E&O, but they can self-insure a production. They can waive all or part of this insurance, if they choose to do so, in exceptional or low-risk situations. However, the producer remains at some risk in these cases.

We often heard that the business risk supersedes the legal risk for insurers, and that will usually define their analysis in any particular case. To assess its business risk, the insurer will look at the profile of the film; any controversy it might create; its potential distribution and financial success; and the reputation for litigiousness of the potential claimant.

The insurer must pay for the cost of a legal defence, as well as legal liability, should a claim occur. Insurers define their risk in terms of potential revenues from the Canadian market compared to potential losses, including legal costs for a FD defence, whether it is successful or not. The occasional high profile case claiming millions in damages, more often than not coming out of the U.S., concerns insurers which, by definition, are in a risk-averse industry.

One problem discussed at different panels was the lack of Canadian case law. There appear to be no court decisions in Canada about FD, successful or not. This paucity of

case law adds to the uncertainty for the insurer, and increases their caution in dealing with FD.

On the other hand, the lack of case law also indicates that few litigants are prepared to go to court in Canada.

Panelists explained that the E&O system, as used by Chubb and Premiere, depends on personal trust between producers' counsel and insurers' counsel. Therefore, it was critical that the producer has a strong and forthcoming relationship with his or her counsel from the beginning of the project.

Some Panelists or audience members raised the possibility of establishing a documentary self-insurance fund, similar to that used by professional associations, to reduce the cost of E&O insurance. It was thought that this was financially possible given the evidence at the Panels of the apparently low Canadian risk.

Broadcasters

Broadcasters are the primary market for documentary, and usually require E&O insurance to reduce their risk in broadcasting any film. In certain instances, we learned, they can waive E&O for independent films if they choose to "insure" the film themselves.

Panelists from the public sector (educational broadcasters, CBC, and NFB) had a different standard of FD, based on the legal risk involved. The public sector institutions could take risks that are substantially higher than the business risk assessed by commercial insurers. Producers should be aware of this difference in the risk supported by public or private sectors in broadcasting or distributing independent documentarier.

Independent producers should also keep in mind that broadcasters regularly avail themselves of FD in their in-house productions, and apply their own best practices protocol. Panelists suggested independent producers should be prepared to follow a similar standard.

Foreign

Among Panelists, the biggest source of confusion lay in the use of FD outside Canada. The differences between FU in the United States and FD in Canada add to the complexity for Canadian producers. FU provides a more liberal defence than FD, and it is backed up by case law. However, costs of defence are higher in the U.S. where rights-holders are more litigious.

There is confusion over the implications for FD and E&O insurance coverage in foreign markets. Producers are unsure of the applicability of FD in foreign markets, especially in the U.S. E&O insurers in Canada tend to be subsidiaries of American companies, and some Panelists believe insurers analyze their risks through the American experience which seems riskier than the Canadian experience.

Regardless of the legal case, some producers said they do not want to use FD because they fear it will result in claims which must be defended, possibly in the U.S., and this will result in an increase in their insurance costs on future productions.

DOC Guidelines

DOC initiatives such as the *Guidelines* and the Fair Dealing Road Show were considered by most Panelists as helping build consensus. Some Panelists said they were a good first step in getting the industry to talk about this important element of copyright policy.

In fact, we heard that the DOC *Guidelines* are increasingly seen as an authoritative basis to use FD and establish a Best Practices protocol. They have been positively assessed by Heenan Blaikie, and distributed by the National Film Board to inform independent filmmakers of their rights and obligations under FD.

While the *Guidelines* are helpful, especially to lawyers, we heard that documentary filmmakers need a simple check list, or “toolkit”, that can create a simple FD protocol and take them through their due diligence requirements for FD.

6) Best Practices, Challenges, and Opportunities

Best Practices

Our goal of identifying industry-based Best Practices was difficult to achieve because applying FD is a contextual exercise, and it was agreed that a “cookie-cutter” approach is unrealistic.

Given the vagaries of documentary production, Best Practices might simply not be applicable in some cases. By nature of their process, POV docs cannot know before the very end of the editing stage what archives they will need in the final edit.

Similarly, purchasing E&O early in the production to mitigate risk may not be practical for a producer who needs to synch E&O with the term of a given broadcast licence (usually 5-7 years).

DOC can, however, put forward suggested Best Practices when considering the use of FD. They would include:

- creating a specific log to record all instances of FD material;
- using a recognized visual researcher; and
- engaging a competent and informed media lawyer as soon as possible.

It must be recognized, of course, that the application of these Best Practices will be tempered by a production’s budget, and perhaps by the regional availability of experienced counsel.

A working group comprised of various stakeholder representatives will be struck with the objective of further defining Best Practices in the industry, and establishing a protocol that is broadly accepted by the stakeholders.

The next step will be developing toolkits that can be used by producers to help them through the FD maze as easily as possible.

Challenges

The current financial climate for audio-visual production is so precarious, that an obscure issue such as FD is relegated to the bottom of the priority list. It might prove difficult to get industry-wide participation in developing Best Practices.

However, only a few champions are necessary to focus attention on FD practice. We can see from the Panels that FD is gaining ground in Canada. DOC has allies that can help establish credible practices, such as the Visual Researchers Society of Canada, and public agencies, with whom DOC will seek to align its approach.

Another challenge is the lack of information among stakeholders themselves. They are not uniformly informed about copyright, and even less informed about FD and its importance to the diversity and vitality of documentary.

The financial benefits of a new approach to FD may not benefit all stakeholders equally, and some may prefer the *status quo*. The working group will have to find sufficient benefits for all stakeholders so they will want to buy into a new insurance regime for FD.

This will be a pragmatic exercise will requiring compromise and good will to work successfully. We have seen on the Road Show a willingness to cooperate among all players across the ideological and business divides.

Opportunities

The calibre of Panelists on the Road Show has allowed DOC to develop a high-level “focus group” interested in the application of FD in Canadian documentary production.

The relationships established via the Road Show Panels provide an excellent opportunity to build on this momentum, and keep the dialogue flowing among stakeholders. To that end, DOC will circulate the Report to all of the Panelists and request their feedback.

There are many opportunities to keep up information gathering and information dissemination. DOC has participated in a number of events that were unrelated to the Road Show, but that have informed both the larger production community and DOC about these issues.

DOC’s presentation of the *Guidelines* at the Ontario Bar Association in September, 2010, is one such example. So was DOC’s participation at an Insight Conference in November, 2010. More recently, DOC participated on a panel about FD with the Visual Researchers Society of Canada, and will be making a presentation on the Road Show’s findings during the Doc Summit at the time of the Hot Docs Festival in May, 2011.

There is great interest about copyright and FD across the country and there will be more demand for initiatives such as the Road Show. DOC certainly could develop the workshops and toolkit being proposed, but will need financial assistance with their delivery.

7) Recommendations on Next Steps

These recommendations are intended to establish a practical FD regime that reduces uncertainty for all stakeholders, and better manages both legal and business risk. The goal is an appropriate and reliable balance between copyright user rights and holder rights.

- Survey stakeholders, especially broadcasters, entertainment counsel, and insurers, on the number and type of intellectual property complaints they have received about documentaries; how they have been resolved; and whether actual risk in Canada might allow strategies to reduce current E&O insurance costs to producers, e.g. an E&O premium rebate after two years without a complaint.
- In cooperation with all stakeholders, design a producers' tool kit that provides information on FD and E&O insurance for Canada and foreign markets, as well as a protocol to reduce risk in using FD.
- Identify experienced entertainment lawyers across the country, circulate this report and *DOC Guidelines* to them, and hold discussions on creating a reliable FD protocol and producers' tool kit with simple check lists.
- Hold discussions with the E&O insurers' counsel on creating a reliable FD protocol and producers' tool kit that helps them better evaluate the risk in cases of FD.
- Compile a complete list of Canadian intellectual property decisions affecting documentaries, and if possible, their relevance to FD. Incorporate or append these precedents into a new edition of the *Guidelines*, and circulate to documentary stakeholders, including producers, funders, broadcasters, insurers, researchers, and their counsel.
- Develop workshops geared to both novice and veteran producers to educate them about best copyright practice, including the successful application of FD and use of the creative commons option. (See CC explanation in footnote 12.)
- Investigate the possibility of creating an insurance fund to reduce the cost of E&O insurance for DOC members.
- Study the possibility of partnering with the Canadian Intellectual Property Office, ISAN Canada, or others, to develop a practical protocol for identifying copyright owners, and resolving problems with public domain and orphaned works. (See ISAN explanation in footnote 23.)
- Form a working group, representative of the various stakeholders, to review this Report and assess the next steps.

Appendix A

List of Panelists

Winnipeg	Brett Gaylor Claude Forest Marc Le Blanc Devan Towers	Eyesteelfilm Multi-Media Risk TV Ontario Taylor McCaffrey	B.C. Winnipeg Toronto Winnipeg
Montreal	Remy Khouzam Pierre-Olivier Laporte Brian Newman Jean-Pierre Laurendeau	Lussier et Khouzam Ogilvy Renault Sub-Genre Media Canal D	Montreal Montreal New York Montreal
Toronto	Barry Averich Bob Tarantino Robin Smith Debby Schween	Melbar Entertainment Heenan Blaikie KinoSmith APTN	Toronto Toronto Toronto Winnipeg
Halifax	Caroline Martel Elizabeth Klinck Rob Aske Graham Reynolds Andrew Cochran	Artifact Productions E Klinck Research Stewart McKelvey Dalhousie Law School CBC Atlantic Region	Montreal Ontario Halifax Halifax Halifax
Ottawa	Paula Sawadsky Stephen Ellis David Steinberg Brian Wynn Daniel Henry	Found Images Research Knightscope Heenan Blaikie Gardiner Roberts CBC Legal Affairs	Vancouver Toronto Toronto Toronto Toronto
Edmonton	Trevor Hodgson Peter Kallianotis Marlena Wyman Linda Callaghan	Paperny Films NFB Legal Affairs Alberta Provincial Archives Ackroyd	Vancouver Montreal Edmonton Edmonton

Vancouver Michael McNamara
Paul Sawadsky
Doran Chandler
Matthew Davies

Markham Street Films
Found Images Research
Roberts and Stahl
Chubb Insurance

Toronto
Vancouver
Vancouver
Toronto

Appendix B

List of Productions Cited in Panels

RIP! A Remix Manifesto
Reel Injun
One Flew Over the Cuckoo's Nest
Montreal Punk: the First Wave
Outfoxed: Rupert Murdoch's War on Journalism
Posthumous Pickle Party
Expelled: No Intelligence Allowed
Crazy
The People vs George Lucas
Star Wars
Phantom of the Operator
The Corporation
Tank Overhaul
Fashion File
This Hour Has 22 Minutes
Royal Canadian Air Farce
Cruel Camera
Confessions of an Innocent Man
Super Size Me
100 Films and a Funeral
The F-Word: Who Wants to Be a Feminist?
Shameless: The Art of Disability

Appendix C

Road Show Volunteers and Supporters

Volunteers made the DOC Road Show possible. DOC wishes to acknowledge their invaluable help, and thank everyone involved for their contribution, especially the following.

Halifax

Andrew Hicks
Chuck Lapp
Sarah MacLeod
Greg Morris-Poultney
Phil O'Hara
Graham Reynolds
Darrell Varga

Montreal

Roger Bourdeau
Myriam Lysée-Castan
Roxanne Sayegh

Toronto

Allie Caldwell
Adèle Charlebois
Blake Fitzpatrick
Jackie Garrow
Moses Stone
Pierre Tremblay
Ryerson University

Ottawa

Jean-Philippe Lemieux
Jacques Ménard
Micheline Shoebridge
Susan Stranks
Algonquin College

Winnipeg

Kevin Bacon
Josh Marr
Heidi Phillips
Jean de Toit
Kristin Tresoor

Edmonton

Ava Karvonen

Jessica King

Jerry Krepakevich

Signy Olson-Cormack

Lorna Thomas

Crowne Plaza Chateau Lacombe

Vancouver

Julia Ivanova

Leah Mallen

Michaelin McDermott

Nancy Shaw

Adelina Suvagau

Appendix D

Copyright Act, R.S.C. 1985, c. C-42

NB- Selected excerpts from this Act relevant to Fair Dealing.

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Appendix E

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339

NB- Selected excerpts from this Supreme Court decision relevant to Fair Dealing. Emphasis added in bold.

II. Analysis on Appeal

8. Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see ss. 5, 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves. Thorson P. explained it thus in *Moreau v. St. Vincent*, [1950] Ex. C.R. 198, at p. 203:

It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.

It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of “dramatic work” and “computer program” and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (F.C.T.D.), at p. 162; *Grignon v. Roussel* [reflex](#), (1991), 38 C.P.R. (3d) 4 (F.C.T.D.), at p. 7.

9. In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Théberge v. Galerie d’Art du Petit Champlain inc.*, [2002 SCC 34 \(CanLII\)](#), [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990 CanLII 75 \(S.C.C.\)](#), [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, [1979 CanLII 6 \(S.C.C.\)](#), [1980] 1 S.C.R. 357, at p. 373. In interpreting the scope of the *Copyright Act*’s rights and remedies, courts should apply the modern approach to statutory interpretation whereby “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme

of the Act, the object of the Act, and the intention of Parliament”: *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42 \(CanLII\)](#), [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

10. Binnie J. recently explained in *Théberge, supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator . . .

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

11. Canada’s *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator’s copyright and moral rights in works. For example, s. 3 of the Act specifies that only copyright owners have the right to copy or to authorize the copying of their works:

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof . . .

. . .

and to authorize any such acts.

12. Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” More specific examples of how copyright is infringed are set out in s. 27(2) of the Act. **The exceptions to copyright infringement, perhaps more properly understood as users’ rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29 to 29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news**

reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4 to 30 (educational institutions), and ss. 30.1 to 30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.

13. This case requires this Court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorization and the fair dealing exceptions under the Act.

(1) *Are the Publishers' Materials "Original Works" Covered by Copyright?*

(a) The Law

14. Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every original literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary . . . work" as including "every original production in the literary . . . domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

15. There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* [reflex](#), (1995), 62 C.P.R. (3d) 257 (F.C.T.D.). This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. See, for example, *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1997 CanLII 6378 \(F.C.A.\)](#), [1998] 2 F.C. 22 (C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the

product of creativity will be rewarded with copyright protection. It has been suggested that the “creativity” approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist, supra*, at p. 353.

16. I conclude that the correct position falls between these extremes. For a work to be “original” within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce “another” work would be too trivial to merit copyright protection as an “original” work.

17 . In reaching this conclusion, I have had regard to: (1) the plain meaning of “original”; (2) the history of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

(i) *The Plain Meaning of “Original”*

18 . The plain meaning of the word “original” suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. *The Concise Oxford Dictionary* (7th ed. 1982), at p. 720, defines “original” as follows:

1. a. existing from the first, primitive, innate, initial, earliest; . . . 2. that has served as pattern, of which copy or translation has been made, not derivative or dependant, first-hand, not imitative, novel in character or style, inventive, creative, thinking or acting for oneself.

“Original”’s plain meaning implies not just that something is not a copy. It includes, if not creativity per se, at least some sort of intellectual effort. As Professor Gervais has noted,

“[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of ‘originated,’ and fails to reflect the ordinary sense of the word”: D. J. Gervais, “*Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*” (2002), 49 *J. Copyright Soc’y U.S.A.* 949, at p. 961.

(ii) *History of Copyright*

19. The idea of “intellectual creation” was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada’s first *Copyright Act*, adopted in 1924. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), at p. 900. Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have “depart[ed] from the spirit, if not the letter, of the [Berne] Convention” since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection: Ricketson, *supra*, at p. 901.

20. In the international context, France and other continental civilian jurisdictions require more than mere industriousness to find that a work is original. “Under the French law, originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works”: Handa, *supra*, at p. 211. This understanding of originality is reinforced by the expression “*le droit d’auteur*” — literally the “author’s right” — the term used in the French title of the *Copyright Act*. The author must contribute something intellectual to the work, namely skill and judgment, if it is to be considered original.

(iii) *Recent Jurisprudence*

21. Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct, supra*, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: “If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law.” See

also *Édutile Inc. v. Automobile Protection Assn.*, [2000 CanLII 17129 \(F.C.A.\)](#), [2000] 4 F.C. 195 (C.A.), at para. 8, adopting this passage.

22. The United States Supreme Court explicitly rejected the “sweat of the brow” approach to originality in *Feist, supra*. In so doing, O’Connor J. explained at p. 353 that, in her view, the “sweat of the brow” approach was not consistent with the underlying tenets of copyright law:

The “sweat of the brow” doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement — the compiler’s original contributions — to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was “not entitled to take one word of information previously published,” but rather had to “independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information.” . . . “Sweat of the brow” courts thereby eschewed the most fundamental axiom of copyright law — that no one may copyright facts or ideas.

As this Court recognized in *Compo, supra*, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O’Connor J.’s concerns about the “sweat of the brow” doctrine’s improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O’Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist, supra*, at pp. 345 and 358.

(iv) *Purpose of the Copyright Act*

23. As mentioned, in *Théberge, supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, “The Public Domain” (1990), 39 *Emory L.J.* 965, at p. 969, and C. J. Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law” (2002),

28 *Queen's L.J.* 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) *Workable, Yet Fair Standard*

24. Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The “sweat of the brow” approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner’s rights, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) *Conclusion*

25. For these reasons, I conclude that an “original” work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be “original” and covered by copyright, creativity is not required to make a work “original”.

* * * * *

(3) *The Law Society and Fair Dealing*

47. The Great Library provides a custom photocopy service. Upon receiving a request from a lawyer, law student, member of the judiciary or authorized researcher, the Great Library staff photocopies extracts from legal material within its collection and sends it to the requester. The question is whether this service falls within the fair dealing defence under s. 29 of the *Copyright Act* which provides: “Fair dealing for the purpose of research or private study does not infringe copyright.”

(a) *The Law*

48. Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: “User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”

49. As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

50. In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

51 . The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. “Research” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that “[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research.” Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

52 . The *Copyright Act* does not define what will be “fair”; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027:

It is impossible to define what is ‘fair dealing’. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

53. At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard, supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

(i) *The Purpose of the Dealing*

54 . In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See McKeown, *supra*, at p. 23-6. See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) *The Character of the Dealing*

55 . In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. **It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair.** For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) *The Amount of the Dealing*

56. **Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the**

work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) *Alternatives to the Dealing*

57. Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) *The Nature of the Work*

58. The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

(vi) *Effect of the Dealing on the Work*

59. Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. **If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair.** Although the effect of the dealing on

the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), per Robert Walker L.J.

60 . To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. **These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.**

(b) Application of the Law to These Facts

61 . In 1996, the Law Society implemented an “Access to the Law Policy” (“Access Policy”) which governs the Great Library’s custom photocopy service and sets limits on the types of requests that will be honoured:

Access to the Law Policy

The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library’s comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.

Guidelines to Access

1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.

2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

62 . At trial, the Law Society claimed that its custom photocopy service does not infringe copyright because it is a fair dealing within the meaning of s. 29 of the *Copyright Act*. The trial judge held that the fair dealing exception should be strictly construed. He concluded that copying for the custom photocopy service was not for the purpose of either research or study and therefore was not within the ambit of fair dealing. The Court of Appeal rejected the argument that the fair dealing exception should be interpreted restrictively. The majority held that the Law Society could rely on the purposes of its patrons to prove that its dealings were fair. The Court of Appeal concluded, however, that there was not sufficient evidence to determine whether or not the dealings were fair and, consequently, that the fair dealing exception had not been proven.

63 . This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that “[f]air dealing for the purpose of research or private study does not infringe copyright.” The language is general. **“Dealing” connotes not individual acts, but a practice or system. This**

comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

64 . The Law Society’s custom photocopying service is provided for the purpose of research, review and private study. The Law Society’s Access Policy states that “[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism . . . may be provided to users of the Great Library.” When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society’s custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

65. The evidence also establishes that the dealings were fair, having regard to the factors discussed earlier.

(i) *Purpose of the Dealing*

66. The Access Policy and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the *Copyright Act* are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.

(ii) *Character of the Dealing*

67. The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the *Copyright Act*. There is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic is generally a fair dealing.

(iii) *Amount of the Dealing*

68. The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings with the publishers' works are fair. Although the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.

(iv) *Alternatives to the Dealing*

69. It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty percent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

70 . The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act's* balance between owner's rights and user's interests.

(v) *Nature of the Work*

71. I agree with the Court of Appeal that the nature of the works in question — judicial decisions and other works essential to legal research — suggests that the Law Society's dealings were fair. As Linden J.A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained." Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review or use in legal proceedings. This further supports a finding that the dealings were fair.

(vi) *Effect of the Dealing on the Work*

72. Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.

(vii) *Conclusion*

73. The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. **The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright."**

Appendix F

Fair Dealing and Copyright: Guidelines for Documentary Filmmakers



Web PDF available:

<http://docorg.ca/sites/docorg.ca/files/DOC-FairDealing-EN-v2-web.pdf>

May 2010

Summary

Preamble	88
Background	89
Incidental Use and Public Space	90
Fair Dealing	
Is the dealing for a permissible purpose?	91
Is the dealing fair?	93
Where required, has the author and source been mentioned?	96
Guidelines	
The non-deliberate filming of copyrighted material (captured during the process of filming something else)	98
Using copyrighted material when documenting a newsworthy occurrence (whether current or historical)	99
Using a copyrighted material for the purpose of critiquing or reviewing either the composition of the material, or the views expressed in the material	100
Using a copyrighted work for the purpose of criticizing or reviewing different material	102
Conclusion & Additional Considerations	
Use of copyrighted material that does not constitute a substantial part of the material	103
Materials in the public domain	104
Appendix	
Copyright and Fair Dealing: A Summary of the Guidelines for Documentary Filmmakers	106

Preamble

These Guidelines describe the application of fair dealing and copyright to the practices of documentary filmmakers in Canada.³⁰

A recent survey of Canadian documentary filmmakers revealed that copyright clearance costs now make up to 27 per cent of a film's budget.³¹ High costs aside, the requirement that filmmakers secure licenses for **every** use of copyrighted content, no matter how fair or incidental, creates real problems for filmmakers. The irony is that many clearance costs are unnecessary. Much content used by documentary filmmakers qualifies as incidental uses or fair dealings that require no clearance under Canadian copyright law. Both the content and the quality of many Canadian documentary projects suffer needlessly under this "clearance culture".³²

The Supreme Court of Canada understands fair dealing and other defences to liability for copyright infringement as "users' rights" that must be given a fair and balanced reading.³³ The Supreme Court has also indicated that it will look to community practices for guidance on what is fair within a creative community, and for guidance as to the fairness of a system of practices.³⁴ These Guidelines, based on law and guided by industry practice, answer the Supreme Court's invitation to act as an aide for future courts called upon to interpret fair dealing in the documentary context.³⁵

This document discusses four classes of uses that documentary filmmakers agree do not require copyright clearance under Canadian law. Documentary filmmakers share a consensus that these uses are appropriate and legal as incidental uses or fair dealings with copyrighted material.

³⁰ This document is comparable to the American University's Center for Social Media "Documentary Filmmakers' Statement of Best Practices in Fair Use", which clarifies what the American documentary film community regards as a reasonable application of the American "fair use" copyright doctrine ["Statement of Best Practices in Fair Use"]. Available at <http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf>.

³¹ Kirwan Cox, *Censorship by Copyright: Report of the DOC Copyright Survey* (November, 2005), online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/internationalfilm>>.

³² For an extended discussion of the consequences of a "clearance culture" on documentary filmmakers including the role that Errors and Omissions insurers and lawyers, broadcasters, and other gatekeepers play in interpreting copyright law and industry practices, see Laura J. Murray and Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007) at 126-133 [Murray and Trosow]; Howard Knopf, "The Copyright Clearance Culture and Canadian Documentaries: A White Paper on Behalf of the Documentary Organisation of Canada ("DOC")" *Documentary Organisation of Canada* (22 November 2006), online: Documentary Organisation of Canada <http://docorg.ca/files/White%20Paper_HPK_Copyright&Documentaries.pdf>. [Knopf, *DOC White Paper*]; Sheila Curran Bernard and Kenn Rabin, *Archival Storytelling: A Filmmaker's Guide to Finding, Using, and Licensing Third-Party Visuals and Music* (Oxford: Focal Press, 2009) at 220; Nancy Ramsey, "The Hidden Cost of Documentaries" *New York Times* (16 October 2005), online: *New York Times* <<http://www.nytimes.com/2005/10/16/movies/16rams.html>>; and Sean Flynn and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearances Culture for Documentary Filmmakers* (December 2009), online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/internationalfilm>>.

³³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339 at para. 48 [CCH]; *Théberge v. Galerie d'Art du Petit Champlain*, [2002] 2 S.C.R. 336, 2002 SCC 34 [Théberge].

³⁴ *CCH*, *ibid.* at para. 63.

³⁵ The application of these Guidelines is restricted to the documentary context. Other standards of fairness may apply in other creative communities. For example, the system of practices within the news production community may differ from that of the documentary filmmaker community, and both may differ significantly from that of the fictional film community.

Background

The Canadian *Copyright Act*³⁶ balances the public interest in the encouragement and dissemination of works with the private interests of creators in obtaining a just reward for their work.³⁷ In the context of documentary films, two sets of defences to liability for copyright infringement assist documentary filmmakers: (1) the incidental use³⁸ and public space³⁹ exceptions, and (2) the fair dealing defence.⁴⁰

Incidental Use and Public Space

Documentary filmmakers may include all or part of another work in a documentary film where the inclusion is incidental and not deliberate.⁴¹ The Copyright Act provides an explicit exception that relieves documentary filmmakers of the need to clear rights in, for example, logos and trade-marks, music (including mobile phone ring tones), and billboards that might appear in a street scene of a documentary film. This important exception bars in Canada some of the most outrageous clearance demands that have arisen in the United States,⁴² a country whose copyright law lacks a similar explicit exception (although the American *Documentary Filmmakers' Statement of Best Practices in Fair Use* views that such inclusions qualify as fair use).⁴³

Documentary filmmakers can also film buildings and sculptures permanently situated in public. The *Copyright Act* provides an explicit exception that permits documentary filmmakers to film

³⁶ *Copyright Act*, R.S. C. 1985, c. C-42, as amended [*Copyright Act*].

³⁷ *Théberge*, *supra* note 33 at paras. 30 and 123, per Binnie J. (referring to *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 at 200 (T.D.)).

³⁸ *Copyright Act*, *supra* note 36, s. 30.7.

³⁹ *Ibid.*, s. 32.2(1)(b)(ii).

⁴⁰ *Ibid.*, s. 29.

⁴¹ *Ibid.*, s. 30.7. This exception provides that:

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.

⁴² Recently Fox demanded that the online video site, Broadcaster.com, take down three animated clips – called “The OJ Simpsons” – parodying Fox’s animated show, *The Simpsons* (“Fox angry at Simpsons web parody” *BBC News* (14 May 2007), online: *BBC News* <<http://news.bbc.co.uk/2/hi/entertainment/6654087.stm>>). In *Anheuser-Busch Inc v. Balducci Publications* (*Anheuser-Busch Inc v Balducci Publications* 28 F. 3d 769 (1994)), the beer Michelob was represented as an oily product in an advertisement meant to comment on an oil spill. The court found that the First Amendment defence had to yield to Michelob’s rights. In *Starbucks v. Dwyer* (*Starbucks v Dwyer* (2000) *C00 1499*), Starbucks sued Kieron Dwyer for copyright infringement, trade mark infringement, trade mark dilution and unfair competition after the cartoonist created a parody of the Starbucks’ siren logo tagged “consumer whore.” Although the United States District Court for Northern California held that that the corporation was unlikely to succeed on its copyright and trade mark infringement claims because Dwyer’s drawing was likely to be deemed a legitimate parody, the court granted an injunction because it also found that the defendant’s parody tarnished Starbucks’ image, and constituted trade mark dilution. In *Mattel Inc v. Walking Mountain Productions*, 353 F. 3d 792 (2004), Mattel sought legal action against an artist who produced photographs that used Barbie dolls to represent scenes of human interaction.

⁴³ “Statement of Best Practices in Fair Use”, *supra* note 30.

Canadian buildings or publicly situated sculptures, no matter how well known they may be and no matter how prominently they might figure in the scene.⁴⁴

These rights are in addition to, and not substitutions for or limitations of, filmmakers' fair dealing rights.⁴⁵ In other words, use of a copyrighted image might be non-infringing as both a fair dealing with a work and an incidental use of that work.

These rights are useful to documentary filmmakers not only for relieving them of onerous and expensive clearance burdens, but also for relieving them of the obligation to "blur" or edit out uncleared trade-marks, music, statues, and buildings facades. Together, these rights ensure that documentary filmmakers are able to document reality: they reserve public space to the public.

⁴⁴ *Copyright Act*, *supra* note 36, s. 32.2(1)(b)(ii). This exception provides that:

It is not an infringement of copyright [...]

(b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work [...]

(ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building.

See also De Beer, "Fair Dealing for Filmmakers: A Report on User Rights for Documentary Filmmakers in Canada" at 3, online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/filmmakerpapers>>; and Murray and Trosow, *supra* note 32 at 128.

⁴⁵ *CCH*, *supra* note 33 at para. 49, where the Court stated that it is an integral part of the scheme of copyright law that "the s. 29 fair dealing exception is always available." Just as the Great Library at Osgoode Hall would need to turn to the library exception (set out in *Copyright Act*, R.S.C. 1985, c. C-42, s. 30.2, as am.) only if the library was unable to make out the fair dealing exception (set out in *Copyright Act*, R.S.C. 1985, c. C-42, s. 29, as am.), so too do documentary filmmakers have the ability to look to both fair dealing and other user rights to show that they did not infringe copyright.

Fair Dealing

Fair dealing provides a framework that allows for the unlicensed use of copyrighted materials for specific purposes.⁴⁶ The fair dealing test requires a documentary filmmaker to answer three questions positively:

1. Is the dealing for a permissible purpose?
2. Is the dealing fair?
3. Has the filmmaker mentioned the author and source (in the cases of criticism, comment, or news summary)?⁴⁷

1. Is the dealing for a permissible purpose?

The *Copyright Act* permits a fair dealing defence in the case of only five types of dealings: (1) private study, (2) research, (3) criticism, (4) review, and (5) news summary.⁴⁸ If a dealing is not for one of those five purposes, no matter how fair the dealing may otherwise be, then the fair dealing defence is not available.⁴⁹

Documentary films, by their nature, fall squarely within the ambit of many of these purposes. Each of the five categories of dealings is interpreted purposively. “Criticism”, for example, does not mean criticism in the academic or literary sense, but should be interpreted to include critical commentary, challenging viewpoints, and even parody when undertaken with a genuine intent to

⁴⁶ *Copyright Act*, *supra* note 36, ss. 29-29.2 (see note 48, below, and accompanying text).

⁴⁷ *Ibid*, s. 29. The first two elements of this test were first set out in *Zamacois c. Douville*, (1943) Ex. C.R. 208 [Zamacois]. The third element was required by 1997 amendments to the Act that mandate the inclusion of a requirement to mention in the author and source in respect of criticism, review, and news reporting: S.C. 1997. c. 24, s. 18.

⁴⁸ Section 29 of the *Copyright Act* provides in respect of research and private study that:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

Section 29.1 of the *Copyright Act* provides in respect of criticism or review that:

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer’s performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Section 29.2 of the *Copyright Act* provides in respect of news reporting that:

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer’s performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

⁴⁹ Carys Craig, *Fair Dealing and the Purposes of Copyright Protection: An Analysis of Fair Dealing in the Copyright Law of the U.K. and Canada* (LL.M. Thesis, Faculty of Law, Queen’s University, 2000) [Craig, unpublished] at 106; and Daniel Gervais, “Canadian Copyright Law Post-CCH” (2004) 18:2 I.P.J. 131 at 157.

criticize the parodied work.⁵⁰ Similarly, “review” should be interpreted to include not just commentary on artistic merit, but factual review and disclosure of facts and events.⁵¹ “News summary” should extend beyond the evening news and morning paper to benefit documentaries that pull together facts and events.⁵² the Canadian provision is not limited to reporting on *current*

⁵⁰ David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) [Vaver] at 194 (citing *Hager v. ECW Press Ltd.* (1988), 85 C.P.R. (3d) 289 (Fed. T.D.) [*Hager*]) and 195, where Vaver criticizes the decision in *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada)* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin*], calling “disturbing” Michelin’s “assertion that the freedom of expression guarantee” can never override copyright “property”. Vaver argued that genuine parody or satire should not be held infringements in the first place. This view was subsequently vindicated in the Quebec Court of Appeal decision in *Les productions Avanti Ciné Vidéo inc. c. Favreau*, [1999] 177 D.L.R. (4th) 568 (Que. C.A.) [*Favreau*]. See also *Pro Sieben Media A.G. v. Carlton U.K. Television Lts.*, [1999] F.S.R. 610 (C.A.) [*Pro Sieben*]. For more on freedom of expression and Charter implications for copyright and a critique of *Michelin*, see Jane Bailey, “Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Copyright Reform Process” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 125. Following the Supreme Court judgment in *CCH, D’Agostino* argued that it is reasonable to argue that “criticism” could now encompass parody and that “*Michelin’s* restrictive approach thus no longer seems to be good law”: Giuseppina D’Agostino, “Healing Fair Dealing?: A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008) 53 McGill L.J. 309 at 330. More recently the Copyright Board of Canada noted that criticism and review can be private activities, and the preparatory steps to these activities characterized as “research”: see *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)*, [2009] C.B.D. No. 6; C.D.A. no 6. (26 June 2009) Copyright Board, at paras. 91 – 94, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>> [Copyright Board, K-12 (2009)]. See also Cary J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright Law” (2006) 56 *University of Toronto Law Journal* at 97 (where Craig also criticizes the decision in *Michelin*, arguing that by virtue of the private property category and the analogies that this category permits, the nature of copyright is distorted to fit assumptions regarding traditional private property entitlements) [Craig, “Dissolving the Conflict”]; Hugues G. Richard, *Fair Dealing: Criticism, Review and Newspaper summaries* at 4, online: Leger Robic Richard/Robic (1994) <<http://www.robic.ca/publications/Pdf/146-HGR.pdf>> (where, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) [*Hubbard*], Richard states that criticism is not limited to the style or manner of expression of a work, but can extend to the ideas or theories contained therein) [Richard]. Criticism is not confined to literary criticism and one is free to make use of excerpts of a work in order to criticize the views expressed by the author. Richard also states (citing Eaton S. Drone, *A Treaty on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston, Little, Brown & Co. 1879)) that criticism is to be determined by the character of its publication and the purpose which it serves); John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Thomson Canada Limited, 2009) (loose-leaf), at 23-12 (where, citing *Hubbard*), McKeown states that criticism extends to not only the literary style but also to the doctrine or philosophy of the writer as expounded in the literary work in question and that it should be interpreted liberally) [McKeown].

⁵¹ Vaver, *ibid.* at 191, where (citing *Allen v. Toronto Star Newspaper Ltd* (1997), 36 O.R. (3d) [Allen]. Vaver states that it is possible to deal fairly with “even a whole work, sound recording, performance or broadcast.” See also 194, where Vaver explicitly states that review “may also include surveying past events or facts”. The court in *Pro Sieben*, *ibid.* at 614, acknowledged that review may also extend to the ideas found in a work and its social or moral implications.. See also, McKeown, *ibid.*, at 23-12 where he states that the word “review” should be liberally interpreted.

⁵² Vaver, *supra* note 50 at 193, where Vaver states that news reporting, which is the current interpretation of the expression “newspaper summary”, can occur in “any medium”, cover various “range of formats” and may apply to “all forms of news” not just current events. Similarly, the UK Court’s analysis of “reporting current events” in *Pro Sieben*, *supra* note 50, did not hinge on any medium or format of delivery in particular, but solely on whether the content or subject matter was objectively factual in nature. See also, McKeown, *supra* note 50 at 23-13, where (citing *Allen*, *ibid.*) McKeown states that newspaper summary now extends to all media. See also, Richard, *supra*

events, as it is in such jurisdictions as the United Kingdom⁵³ and New Zealand.⁵⁴ The emphasis should be on the expression's factual or historical nature, not the timeliness of the statement.

“Research” and “private study” are private activities that assist filmmakers in the *preparation* of their films, but do not excuse the need to clear rights in anticipation of distribution and public performance.⁵⁵

2. Is the dealing fair?

The heart of the defence of fair dealing is the fairness of the treatment of the work. The Supreme Court of Canada has set out a non-exhaustive list of six factors that are to be considered by the courts in determining the fairness of a given dealing.⁵⁶ These factors will be tailored to the facts of a case, and in some circumstances it will not be necessary to apply all six.

(1) **The Purpose of the Dealing:** Courts will make an objective assessment of the filmmaker's real purpose or motive in using a copyrighted work, not their subjective belief.⁵⁷

note 50 at 6 where Richard states the definition of a summary as a short statement of the essential points of a matter, which may support the view that news summary for fair dealing purposes should not be limited to current evening news and morning paper as long as it is a short account of a matter.

⁵³ *Copyright, Designs and Patents Act 1988* (c. 48) s. 30. In *The Newspaper Licensing Agency Ltd. v. Marks & Spencer plc*, [1999] R.P.C. 536 (Ch D) [*Marks & Spencer*], Lightman J. expressed that “news” is broader than “current events” as it extends to the reporting of past events not previously known and of matters of a historical interest. For a summary of the jurisprudential history interpreting “current events” in the UK, see Craig, unpublished, *supra* note 49 at 50-54.

⁵⁴ *Copyright Act 1994* No 143 (as at 1 December 2008), Public Act, s. 42.

⁵⁵ A recent decision of the Copyright Board (Copyright Board, *K-12* (2009), *supra* note 50) at paragraph 89 states that: “Research occurs provided that effort is put into finding, regardless of its nature or intensity.” The same decision also pointed out that over a century ago the British Court set out that studying copyrighted material in a classroom environment does not fall under the ambit of private study. It is worth noting, nevertheless, that the Court in *CCH*, *supra* note 33 at 51 stated that “research” as a term “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained,” and that it is not limited to private or non-commercial contexts in order to qualify as fair dealing. Factual, editorial, film and other third party material research by filmmakers for the purpose of building a story and selecting potential film clips to use in the final edit of a film is nonetheless research within the meaning of s.29 and may be relied on in *preparation* toward a final film edit.

⁵⁶ *CCH*, *supra* note 33 at paras. 53-60. Other unnamed factors could also be used to assess the fairness of a dealing – D’Agostino, *supra* note 50.

⁵⁷ The purpose of the dealing will tend to be fair if it is for one of the allowable purposes under the *Act*: research, private study, criticism, review or news reporting. “These allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.” *CCH*, *supra* note 33 at para. 54 (referring to *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.) as well as to *McKeown*, *supra* note 50 at 23-26). See also Copyright Board, *K-12* (2009), *supra* note 50 at para. 117, where the Board held that: “A single copy made for the use of the person making it, whether or not it was at his or her request, falls under the exception as long as it is made for a purpose that qualifies for the exception, even if it is made for other purposes as well. Such is also the case for single or multiple copies made for third parties at their request, as long they are made for an allowable purpose, even if they are made for other purposes as well.” See also, *CCH*, *supra* note 33 at para 54, where the Court states: “... these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”

(2) **The Character of the Dealing:** Courts will examine how a copyrighted work is dealt with.⁵⁸ The custom or practice in a particular trade or industry may assist in determining whether or not the character of the dealing is fair.⁵⁹ These Guidelines seek to set out accepted practices within the documentary community with a view to providing courts with guidance in just this inquiry.

(3) **The Amount of the Dealing:** Courts will examine both the amount of the dealing and the importance of the copied selection to the work allegedly infringed.⁶⁰ Even an entire work may be fairly copied in some cases.⁶¹ This is particularly true for artistic works such as paintings and photographs, which are not usually dealt with other than as entire works.

⁵⁸ See Copyright Board, *K-12* (2009), *supra* note 50 at para. 99, where the Board, discussing the analysis of the “character of the dealing”, provides that the following would be deemed as being less fair: making several copies instead of just one; keeping a copy rather than destroying it after use. In the United States, the character of the use is determined in part by a consideration of whether it is *transformative*. A work is considered transformative if it is not simply a gratuitous re-hashing of the original; if it “adds something new, with a further purpose of different character, altering the original work with new expression, meaning, or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁹ *CCH*, *supra* note 33 at para. 55 (referring to *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.) [*Sillitoe*]). For a discussion of the utility of industry best practices or guidelines to determine fairness with regards to fair dealing, see D’Agostino, *supra* note 50 at 334, 354-359, 361-362.

⁶⁰ *CCH*, *ibid.* at 56 (referring to *Hubbard*, *supra* note 50); see also Vaver, *supra* note 50 at 191 and Copyright Board, *K-12* (2009), *supra* note 50 at para. 102, where the Board, citing *CCH*, states that: “...repeated requests within a short timeframe for multiple excerpts from the same work could be unfair.” In other words, even if the dealing is justifiable in a single instance, it may be found to be unfair if the dealing is repetitive. The same decision goes on to affirm at para. 103 that: “...single copies made for the use of the person making the copies and single or multiple copies made for a third party (*i.e.*, a student) at his or her request tend to be fair.” The amount of a dealing is not determined by a formula but is rather an exercise of judgment. While duration matters, context is determinative. In *Time Warner Entertainment Co. v. Channel Four Television Corp.* (1993), 28 I.P.R. 456 (C.A.) [*Channel Four*] a 30-minute documentary’s use of twelve and a half minutes worth of clips (twelve extracts) from the film “A Clockwork Orange” was not deemed to be unreasonable or gratuitous. While acknowledging the concern that a substantial use of clips may in fact compete with the original film, the court ultimately concluded that “serious criticism of a film requires that you spend sufficient time showing the film itself” (at 9-10). Of note: the clips were accompanied by voice-overs and narration, and were interspersed with comments and critiques by those interviewed for the programme (at 10).” See also *Hubbard*, *supra* note 50 at 1027, where the Court stated that: “After all is said and done, it must be matter of impression.”

⁶¹ *CCH*; *supra* note 33 at para. 56 (“It may be possible to deal fairly with a whole work.”); Copyright Board, *K-12* (2009), *supra* note 50 at para. 102 (“The reproduction of an entire work may be fair.”). However, the reproduction of an entire work is contingent on the purpose. As Theresa Scassa notes, “It might be fair dealing to copy an entire journal article for the purpose of research, but not to copy the entirety of another work in a different context.” Theresa Scassa, “Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*” (2004) 3 C.J.L.T. 89 at 95 [Scassa]. See also Sunny Handa, *Copyright Law in Canada* (Toronto: Butterworths, 2001) at 299, where, criticizing *Zamacois*, *supra* note 47, for its proposition that the copying of an entire work can never be considered fair, Handa had also stated before *CCH* that it is reasonable to expect that a more balanced approach will be adopted in Canada. See also at 291, where (citing *Allen*, *supra* note 51) Handa states that the proper test for fair dealing is not simply a mechanical test, measuring the extent of copying involved; rather, it is to be a purposive enquiry. See also at 301 and 305 where Handa states that fair dealing may allow the copying of an entire work under certain circumstances and that fair dealing is an evolving concept and therefore rules that hold that no copying of an entire work can be fair must be revisited. See also *Tom Hopkins International Inc. v. Wall & Redekop Reality Ltd.*, 1 C.P.R. (3d) 348 at 352-53, (1984), where the Court stated that fair dealing may allow the copying of an entire work under certain circumstances.

(4) **Alternatives to the Dealing:** Courts will consider whether there is a non-copyrighted equivalent of a work that could have been used, and whether the dealing was reasonably necessary to achieve the (new) work's purpose.⁶² For example, the court might consider whether a given criticism would be equally as effective if it did not reproduce a copyrighted work.⁶³

(5) **The Nature of the Work:** It is more difficult to deal fairly with confidential or unpublished content than with published material.⁶⁴ One can deal fairly with an unpublished work where doing so, for example, serves the goals of freedom of expression generally: the advancement of knowledge or the pursuit of truth.⁶⁵

⁶² *CCH*; *supra* note 33 at para. 57; see also Copyright Board, *K-12* (2009), *supra* note 50 at para. 105. The Supreme Court goes on to add (at para. 106) that it would: "...not be reasonable to require that students do all their research or private study on site. Similarly, it is not reasonable for students to use only those works that are in the public domain... What captivates younger generations is not always what entranced baby boomers." This analysis tends to justify as fair space- and time-shifting activities undertaken in furtherance of a recognized category of dealing. The Supreme Court does not expand, however, on what an "equivalent" to a work constitutes, "such that copying the work would cease to be fair dealing because of the existence of the unprotected 'equivalent'": Scassa, *ibid.* at 95. As D'Agostino notes, the Court did, however, focus "more on the ease of access to the works than on the actual availability of noncopyrighted works": D'Agostino, *supra* note 50 at 322.

⁶³ See also Copyright Board, *K-12* (2009), *supra* note 21 at para. 91, which adds that a: "...copy is not made for the purpose of criticism unless it is incorporated into the criticism itself. It would be possible, however, to claim that the copy supplied to the person intending to engage in criticism is made for the purpose of research that may or may not lead to criticism."

⁶⁴ *CCH*, *supra* note 33. at para. 58 (referring to *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at 264). The Court in *Channel Four*, *supra* note 60, concluded that once a work is published, or in the context of film, distributed widely and available in the public sphere for consumption, it must be considered "fair game" to criticism or review. See also, Handa, *supra* note 61 at 307, where (citing *Harper & Row Publishers v. Naion Enterprises*, (1985) 471 U.S. 539) Handa states that the court did not create an absolute privacy-based rule that would disallow publication in every case where unpublished works are concerned.

⁶⁵ See, e.g., *Lion Laboratories Ltd. v. Evans* [1984] W.L.R. 539 (C.A.) [*Lion Laboratories*] where the reproduction of copyrighted information about malfunctioning breathalyzer machines was held to be justified despite the material's confidential nature and the fact that it was protected by copyright. The Court concluded its dissemination was in the public interest. Interestingly, the court did not rely upon the fair dealing defense to reach this conclusion, but instead borrowed from the law of confidences to apply a "public interest" defense. See also Copyright Board, *K-12* (2009), *supra* note 50 at para. 108, where the Board, when comparing the relative public interest concerns raised by access to classroom material and access to legal resources, distinguished between the two by noting that classroom material was created by using private resources, rather than the decisions of the Supreme Court that are compiled by private publishers but are created using public resources. As well, the Board noted that while there is "rarely an alternative to the most recent judgment of the Supreme Court; a textbook can always be replaced with other teaching support resources." See also Sheldon Burshtein, "Supreme Court of Canada Speaks on Copyright" *The Licensing Journal* (November/December 2004) 1 at 5: "If a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work, one of the goals of copyright law." [Burshtein]. See also Handa, *supra* note 61 at 307, where Handa states that the Court unequivocally stated that fair use must be applied in context of the stated goals of copyright law. The Court takes into consideration those aspects of liberty and freedom as well. See also, Craig, unpublished, *supra* note 49 at 75, where Craig also emphasizes that the right of free expression is essential for the working of a parliamentary democracy such as ours, for the search for truth, and for achieving personal fulfillment.

(6) **Effect of the Dealing on the Work:** A reproduced work that substitutes for, or competes with, the market of the original work is less likely to be held to be fair.⁶⁶

This short discussion of the factors a court will consider in assessing the fairness of a dealing is far from complete. However, filmmakers should appreciate that neither demand for payment, nor the availability of a license, nor the failure to acquire a license, has any bearing on the fairness of the dealing or the applicability of the defence.⁶⁷ Each case depends on its own particular facts.

3. Where required, has the author and source been mentioned?

When engaging in fair dealing for purposes of criticism, review or news reporting (but not for private study or research), the **Copyright Act** imposes the additional requirement to “mention” the source and (if given in the source) the author of the work.⁶⁸ Again, no matter how fair the dealing, if the filmmaker neglects to mention the source and author, then the defence is unavailable to those engaged in criticism, review or news summary.⁶⁹

The use of credits at the end of documentary films, or onscreen captions, should satisfy this obligation. Oral attribution through voiceovers also likely fulfils this requirement. However, it is not clear what other kinds of attribution satisfy the requirement to “mention” source and author.⁷⁰ On the one hand, the Act’s use of a casual term (“mention”) signals that it requires something less than academic standards of attribution.⁷¹ On the other hand, at least one court has held that a parody does not intrinsically “mention” its target despite having successfully conjured up that target.⁷²

⁶⁶ *CCH*, *supra* note 33. at para. 72 and 59 (referring to *Pro Sieben*, *supra* note 50, *per* Robert Walker L.J.). See also Copyright Board, *K-12* (2009), *supra* note 50 at para. 113, where the Board, in its assessment of the “[e]ffect of the dealing on the work,” noted that: “... a systematic practice that competes with the market of the original must not be permitted, regardless of whether downstream dealings fall under the fair dealing exception.” However, see Burshtein, *ibid.* at 5: “While the effect of the dealing on the work is another factor warranting consideration, it is neither the only factor nor the most important factor”; and D’Agostino, *supra* note 50 at 323: “In underscoring that the market factor ‘is neither the only factor nor the most important factor,’ the Court seemed to suggest that this factor is less important than the others.” See also Handa, *supra* note 61 at 299, where (citing *Zamacois*, *supra* note 47) Handa had also stated before *CCH* that the likelihood of competition between the two works would have to be considered to determine whether a dealing with a particular work is fair; see also at 291.

⁶⁷ *CCH*, *supra* note 33 at para. 70:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests.

⁶⁸ *Copyright Act*, *supra* note 36, ss. 29.1 – 29.2.

⁶⁹ *Michelin*, *supra* note 50; *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, 2001 BCSC 156, [2001] B.C.W.L.D. 404, 85 B.C.L.R. (3d) 302, [2001] 4 W.W.R. 95, 10 C.P.R. (4th) 423, [2001] B.C.J. No. 151 [BCAA].

⁷⁰ *Vaver*, *supra* note 50 at 197; *Michelin*, *ibid.* at 383. In *Pro Sieben*, *supra* note 50 at 618, the Court found that an on-screen title mentioning the name of the programme an interview excerpt was taken from along with the on-screen logo of the television company that owned the programme – in this case the revolving number “7” logo included on all Pro Sieben programming – was sufficient to credit both the source and author of the work.

⁷¹ *Vaver*, *ibid.* See also Richard, *supra* note 50 at 8, where he suggests that a fair interpretation of the word “source” should include the name of the author and title, or any other useful description of the work.

⁷² *Michelin*, *supra* note 50 at 383; Normand Tamaro, *The 2009 Annotated Copyright Act* (Toronto: Thomson Canada Limited 2008) at 537 [Tamaro].

Further, it is not clear how a simple photograph or musical work can “mention” an author or source. Elsewhere, documentary filmmakers have called for the repeal of this requirement.⁷³ Until such time as it is repealed, however, documentary filmmakers should be vigilant with their credits and captions.

⁷³ Knopf, *DOC White Paper*, *supra* note 32.

Guidelines

These Guidelines are organized around four classes of dealings that documentary filmmakers regularly engage and regard as legal, fair, and not requiring clearance. These Guidelines offer, for each class of dealing, (1) a description of the dealing followed by (2) an outline of the principles that support the legality of the dealing and (3) a discussion of the Guideline's applicable limitations. These Guidelines will also comment on the differences between American "fair use" and Canadian "fair dealing" where doing so will help clarify the nature of the dealing, legal principle, or limitation at issue.

Documentary filmmakers may encounter situations other than those addressed in these Guidelines which might also qualify as fair dealings with copyrighted materials. In every case, a documentary filmmaker must carefully consider the facts of the dealing to determine whether the dealing ultimately falls within the ambit of an exception to copyright infringement.

One: The non-deliberate filming of copyrighted material (captured during the process of filming something else)

Description: It is typical for documentary filmmakers to unintentionally capture copyrighted content in the background of what is being filmed (**e.g.**, posters on the wall, cell phone ring tones, the playing of a song on a stereo/radio, the playing of a movie/television program, etc.). In many cases it is difficult, if not impossible, to avoid capturing copyright-protected materials when filming. Eliminating these materials from a film (**e.g.**, asking a subject to turn off a radio, remove a poster from his wall, etc.) forces the filmmakers to alter the reality being documented.

Principle: The filming of these materials should be recognized as an "incidental inclusion" of copyrighted material, and thus an exception to copyright infringement under the *Copyright Act*.⁷⁴ This exception will apply to these practices where two conditions are met: the inclusion of the copyrighted work must be (1) *incidental*, and (2) not *deliberate*. Courts have interpreted "incidental" to mean an activity that is "casual, inessential, subordinate to a principal activity, or merely background".⁷⁵ This definition encompasses materials that appear in the background of a documentary, are of limited importance, and not the main focus of a film or subject of a scene. The Supreme Court of Canada has defined the term "deliberate" in the criminal law context to mean "considered, not impulsive", and that is a reasonable interpretation of the *Copyright Act's* use of the term.⁷⁶ The "deliberateness" requirement applies to the inclusion of content, not the setting.⁷⁷ One might deliberately select a specific setting for a scene – say, Yonge Street at midday

⁷⁴ *Copyright Act*, *supra* note 36 at s. 30.7.

⁷⁵ *IPC Magazines Ltd v. MGN Ltd.*, [1998] F.S.R. 431 at 441 (Ch.); Vaver, *supra* note 50 at 180. See also, Handa, *supra* note 61 at 284, where he observes that a person may include a work in another work, provided that it is done incidentally and not deliberately.

⁷⁶ *More v. R.*, 1 C.R. 98, [1963] S.C.R. 522, [1963] 3 C.C.C. 289, 41 D.L.R. (2d) 380 at 35.

⁷⁷ Section 30.7 of the *Copyright Act*, *supra* note 36, stipulates that the work itself must not be deliberately included in another work or subject matter. Similarly, deliberateness or a deliberate inclusion is defined by the UK broadcaster, Channel 4, as content specifically added to or included in the final edit (i.e. is traced to decisions made in the edit suite). "Independent Producer Handbook: Channel 4 and Five" *Channel 4 Television* (2008), online: Independent Producer Handbook Homepage <<http://www.independentproducerhandbook.co.uk>> at 87.

– without also having deliberately selected the logos and billboards that will inevitably be included in the scene. Considered purposively, the intent of the exception is to prevent copyright from having oppressive effects: where incidentally included work merely occupies the background and is not the subject of the film or scene, the exception will apply; where the included work functions as an essential and important feature of the film or scene, stepping out of the background to serve as subject, the exception has no application.⁷⁸

Limitations:

- The inclusion of copyrighted material (other than buildings and sculptures) must be both incidental, and not deliberate.⁷⁹
- Canadian documentary filmmakers should also be aware that the United States does not have comparable “incidental use” or “public space” provisions in its **Copyright Act**. Instead, filmmakers should rely on the fair use defence under US law. See the **Documentary Filmmakers’ Statement of Best Practices in Fair Use** for its discussion of this practice.⁸⁰

Two: Using copyrighted material when documenting a newsworthy occurrence (whether current or historical)

Description: Documentaries frequently detail newsworthy events. Factually accurate documentaries often need to include copyrighted materials such as segments from an infamous speech, or scenes that appeared on news broadcasts during an historic or newsworthy event. Many documentaries tell important parts of Canadian history, and serve an important role in educating the public about current affairs and historical events. In order to accurately detail these newsworthy events, it is necessary that documentary filmmakers be able to make use of copyrighted materials that are essential to recounting them.

Principle: The use of copyrighted materials in this fashion should generally be considered fair dealing for purposes of news reporting where the filmmaker meets the additional requirement of mentioning the source and (if available) the author of the material.⁸¹ “News reporting” is a general category of fair dealing. What qualifies as “news” extends beyond what might appear on the 6:00 o’clock evening news: depiction of current affairs, public interest stories, and investigative journalism also qualify as “news reporting” for the purposes of fair dealing.⁸² Determination of the reach of this branch of the fair dealing exception is a question of judgment, which must take into

⁷⁸ Elizabeth F. Judge and Daniel Gervais, *Intellectual Property: The Law in Canada* (Toronto: Carswell, 2005) at 98; Knopf, *DOC White Paper*, *supra* note 32 at 20-21; and Vaver, *supra* note 50 at 180.

⁷⁹ See discussion above.

⁸⁰ “Statement of Best Practices in Fair Use”, *supra* note 30 at 5.

⁸¹ *Copyright Act*, *supra* note 36 at s. 29.2.

⁸² *Fraser v. Evans*, [1969] 1 Q.B. 349 (C.A.) (reproduction of information obtained in preparation for a governmental report); *Allen*, *supra* note 51 (photographic reproduction of a magazine cover featuring Sheila Copps was held to qualify as newspaper summary under s. 27(2)(a) (now s.29.2) of the *Copyright Act*). For exploration of the scope of “news” reporting, see *Marks & Spencer*, *supra* note 53.

account the public interest.⁸³ Fair dealings for the purposes of “news reporting” obviously include those cases in which the reproduced content is the subject of the reporting, but also include historical and other content relevant to the subject of the reporting. The content itself need not be the subject of the reporting, so long as the purpose of its reproduction is to aid in the presentation of the reporting.⁸⁴

Limitations: In addition to heeding the six factors of “fairness”, documentary filmmakers are best positioned to assert a claim of fair dealing for purposes of news reporting where:⁸⁵

- The dealing reports news in a manner that has relevance for contemporary Canadians; dealings with content for the purpose of purely recounting history are better defended as fair dealings for the purposes of review or criticism (see Guideline Three, below).⁸⁶
- The copyrighted materials are (objectively) reproduced for purposes of news reporting, as opposed to gaining a competitive advantage over the copyright holder.
- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned. Source citation is not a condition of fair use in the United States.
- The use of the material in the documentary is not such as to substitute for the market of the original copyrighted work.

Three: Using a copyrighted material for the purpose of critiquing or reviewing either the composition of the material, or the views expressed in the material

Description: Documentary filmmakers often make use of clips from a film, quotations from a literary work, *etc.*, in order to engage in a critical analysis of either the composition of a given work (*e.g.*, film clips that illustrate the shoddy editing of a movie) or the views expressed within that work (*e.g.*, making use of segments of a copyrighted work in order to criticize its homophobic/misogynist overtones).⁸⁷ Film makers may also reproduce content for the simple

⁸³ Vaver, *supra* note 50 at 188-190. See also *Lion Laboratories*, *supra* note 65. For an extended discussion on the public interest in copyright law, see Handa, *supra* note 61 at 318, where Handa states that the common law defense of public interest may be applied to balance the public interest aspect of copyright law with the economic rights claim of the author although this is a peculiar result in the context of copyright proceedings. See also at 308 where Handa states that a public interest concern is not a licence to infringe a work and that the public interest concept in copyright law is a complex concept. It is not to be used liberally as a copyright override wherever there is a public interest concern. See also, Craig, “Dissolving the Conflict”, *supra* note 50 at 111, where Craig states that the copyright owner’s rights exist only through that public interest and cannot be justified in spite of it. See also at 112, where Craig states that copyright must not be private property because characterizing it as private property pits the copyright system against freedom of expression and copyright ought not to be so characterized. Conceptualizing copyright as inherently in conflict with free expression undermines copyright’s own rationales and threatens its internal coherence. To conclude that copyright trumps free expression is to deprive copyright of its justification and to render incoherent a public interest based theory of copyright.

⁸⁴ Allen, *supra* note 51.

⁸⁵ Vaver, *supra* note 50 at 191-194.

⁸⁶ *Ibid.* at 194.

⁸⁷ Hubbard, *supra* note 50; and Hager, *supra* note 50.

purposes of reviewing what was said or done in that content (*e.g.*, reproducing an interview clip to establish that an individual stated a certain position).⁸⁸

Principle: The use of copyrighted content in this fashion qualifies as fair dealing for the purposes of criticism or review so long as the dealing is fair and the film maker mentions the source and author of the copyrighted work. The courts have interpreted “criticism” to involve critical assessment, analyzing and judging merit or quality.⁸⁹ Criticism in this sense is equally available to one who criticizes the merit, form or structure of a work – in the sense of literary or film criticism – and to one who criticizes the ideas expressed in a work.⁹⁰ “Review” similarly includes dealings that survey or portray past events or facts.⁹¹

Recent case law suggests that parody, when it comments bitinglly on its target, may amount to criticism that qualifies as fair dealing.⁹² A critique does not have to be serious or learned; critique may also be humorous or funny by virtue of amplification, deformation or exaggeration of a subject work.⁹³ Nor do criticisms need be communicated to the public in order to qualify for the defence.⁹⁴ However, copying a work with the intent of profiting from its popularity does not amount to criticism supporting a parody defence.⁹⁵ Filmmakers should be aware that the “parody defence” has never been successfully applied in Canada. American law, in contrast, recognizes parody and satire as forms of criticism that may qualify as “fair use” of copyrighted material.⁹⁶

Limitations: To support the claim that a use of this kind is fair, a documentary filmmaker should adhere to the six “fairness factors,” and be able to show that:

- The criticism or review of a copyrighted work is (objectively) more than simply a condensed version of the copyrighted work.⁹⁷

⁸⁸ In addition, Copyright Board, *K-12* (2009), *supra* note 50 at para. 92, clarifies that section 29.1 of the *Copyright Act* “applies solely to the dealing carried out in the context of criticism itself.” This point is illustrated by considering a music columnist who copies an entire album, or a number of individual works, and then criticizes a single song. The copies of the other songs that were not criticized, while not justifiable via s. 29.1, could be said to have been made: “for the purpose of research – research in contemplation of criticism.”

⁸⁹ *Ibid.* at 194. With respect to its “ordinary meaning”, *The Oxford English Dictionary*, online edition, defines “criticism” as “the action of criticizing, or passing judgment upon the qualities or merits of anything; *esp.* the passing of unfavourable judgment; fault-finding, censure” online: *Oxford English Dictionary* <<http://www.oed.com/>> [OED].

⁹⁰ *BCAA*, *supra* note 69. In the UK context the court in *Channel Four*, *supra* note 50 at 12, affirmed that “criticism” is to be construed expansively. The criticism need not be directed at a specific work or to the style of the work; it can also be directed at the thought and philosophy behind the work. See also *Hubbard*, *supra* note 50.

⁹¹ *Vaver*, *supra* note 50 at 194. With respect to the “ordinary meaning” of “review”, *The Oxford English Dictionary*, online ed. defines “review” as “to survey; to take a survey of” and “to look back upon; to regard or survey in retrospection”; *OED supra* note 89.

⁹² *Favreau*, *supra* note 50.

⁹³ *Ibid.* at para. 69; *Tamaro*, *supra* note 72 at 545.

⁹⁴ Copyright Board, *K-12* (2009), *supra* note 50 at para. 93.

⁹⁵ *Ibid.* at para. 6.

⁹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994). See also *Vaver*, *supra* note 50. For contrast to this American approach, see *Handa*, *supra* note 61 at 289, where (citing *Michelin*, *supra* note 50) he observes that Canadian courts have consistently interpreted the scope of the five listed fair dealing purposes narrowly.

⁹⁷ *R. v. James Lorimer & Co. Ltd.*, [1984] 1 F.C. 1065 at 1077 [*Lorimer*]. See also *Handa*, *supra* note 61 at 300, where (citing *Breen v. Hancock House Publishers Ltd.*, [1985] 6 C.I.P.R. (3d) 433 (F.C.T.D.)) *Handa* asserts that merely

- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned. Note that this requirement is absent from US law.⁹⁸
- The criticism or review does not take the original work's place in the market. The more that a work encroaches upon the market of a copyrighted work, the less likely it is to be deemed to be fair.⁹⁹ This does not mean that a work can never fairly undermine the original work's market; for example, a critical review of a movie might keep consumers from viewing that movie (the original work) but this does not make the dealing unfair.¹⁰⁰
- If a parody, the parody offers genuine commentary on or critique through humorous amplification, deformation or exaggeration of its target. The parody must be genuinely critical and not a parasite on the popularity of the target.¹⁰¹

Four: Using a copyrighted work for the purpose of criticizing or reviewing different material

Description: A documentary filmmaker's purpose in making a given film may be to criticize or review its subject matter. This subject matter may be another film or other copyright protected work, or it may be the actions or ideas of another individual or group. The filmmaker may pursue that purpose through the reproduction of content that is not the subject of the criticism or review. Typically, filmmakers do so for the purposes of contrast, clarification, illustration or explication. For example, in criticizing a particular special effect, a documentary filmmaker might make use of clips from several copyrighted works that contain superior effects. Similarly, a filmmaker may use clips from a film to criticizing a film distributor's decision to stop exhibiting a film. In all of these cases, the filmmaker criticizes or reviews the film's subject matter through contrast, clarification, illustration or explication of the actions, style, philosophy, or viewpoint of another subject.

summarizing a work without the addition of some further comment does not constitute a fair dealing. See also Richard, *supra* note 50 at 4, where he states that fair dealing for purpose of review requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author's name. See also at 5, where Richard states that to reproduce in totality an article from a literary journal for the purpose of reviewing it has been held not to be fair dealing.

⁹⁸ Vaver, *supra* note 50 at 191.

⁹⁹ *CCH*, *supra* note 33 at para. 59. See also Handa, *supra* note 61 at 291, where Handa states that the Court also considers the nature of the dealing and what impact it would have on the market for the plaintiff's work, and at 299, where (citing *Allen*, *supra* note 51) Handa states that "in considering whether a dealing with a particular work is fair, it would have to be considered whether any competition is likely to exist between the two works." See also at 314, where Handa states that because untouched markets are always potentially within the contemplation of the rights holder, a court will be more interested in the effect of the copying on existing markets.

¹⁰⁰ Vaver, *supra* note 50 at 199. See also see Burshtein, *supra* note 66 at 5: "While the effect of the dealing on the work is another factor warranting consideration, it is neither the only factor nor the most important factor." See also Handa, *supra* note 61 at 299, where Handa states because the fundamental goal of copyright is to promote further creation and to disseminate information, under the fair dealing doctrine, a party, other than the original work's copyright holder, who is willing to disseminate a work must not be absolutely prevented from doing so if the copyright holder has not done so. Handa also states that it is reasonable to expect that a more balanced approach will be adopted in Canada.

¹⁰¹ *Favreau*, *supra* note 50.

Principle: Fair dealing for the purpose of criticism or review does not require that the dealing relate specifically to the copied work.¹⁰² A documentary filmmaker may therefore criticize a given work by quoting both from that work and from additional works, without infringing copyright in any of them. As a result, provided the filmmaker mentions the author and source, a filmmaker may rely on fair dealing to quote from other works for illustrative or comparative purposes in furtherance of criticism and review. Documentary filmmakers can similarly make use of a copyrighted work in furtherance of criticism or review of an individual's or group's philosophy, style, views or actions.¹⁰³

Limitations: In addition to adhering to the six "fairness" factors, a documentary filmmaker must ensure that:

- The criticism or review of a copyrighted work is (objectively) more than simply a condensed version of the copyrighted work.¹⁰⁴
- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned.¹⁰⁵ Note that this requirement is absent from US law.¹⁰⁶
- The criticism or review does not take the original work's place in the market. The more that a work encroaches upon the market of a copyrighted work, the less likely it is to be deemed to be fair.¹⁰⁷

Conclusion & Additional Considerations

The four dealings outlined in these Guidelines do not exhaust the scope of situations that do not require copyright clearance. In addition to uses that qualify as fair dealings and incidental inclusions, other dealings with content do not require copyright clearance. These include the use of an insubstantial part of a copyrighted material, and the use of materials in the public domain.

Use of Copyrighted Material that Does Not Constitute a Substantial Part of the Material

¹⁰² *Hubbard, supra* note 50.

¹⁰³ *Ibid.* Megaw L.J. writes at 98:

Counsel for the plaintiffs did not suggest that "criticism" in this subsection was confined to what I would call literary criticism; that is to say, criticism of the style – the literary style – of the work in question. But if it is not confined to that, it must surely then cover criticism of the ideas, the thoughts, expressed by the work in question - the subject-matter of the work.

See also McKeown, *supra* note 50 at 23-13, where McKeown states that the fair dealing for the purpose of criticism is not so limited.

¹⁰⁴ *Sillitoe, supra* note 59; *Lorimer, supra* note 97. See also, Richard, *supra* note 50 at 4, where Richard states that review requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author's name.

¹⁰⁵ *Copyright Act, supra* note 36 at s. 29.1.

¹⁰⁶ "Statement of Best Practices in Fair Use", *supra* note 30; Tamaro, *supra* note 72 at 539.

¹⁰⁷ Tamaro, *supra* note 72 at 540; *Zamacois, supra* note 47; *Hager, supra* note 50.

Under the Canadian *Copyright Act*, a copyright owner has the exclusive right to reproduce any substantial part of his work. Therefore, if a documentary filmmaker's use of a copyrighted material does not amount to a substantial part of the work from which it was taken, it will not infringe copyright, and there is no need to rely on the fair dealing or incidental use provisions in the *Copyright Act*.¹⁰⁸ The term "substantial part" refers to both a quantitative and a qualitative element. That is, there is no strict percentage that needs to be shown to demonstrate the use of a "substantial part" of a work; even a quantitatively small portion of the work that represents an essential part of a work, or its core, may be considered to be a substantial part.¹⁰⁹

Materials in the Public Domain

A documentary filmmaker can also make use of materials for which the term of copyright has expired. The *Act* provides that the term for which copyright subsists, except as otherwise expressly provided for in the Act, is the life of the author, the remainder of the calendar year in which the author dies, and a period of 50 years following the end of that calendar year.¹¹⁰ For example, the term of copyright for an author who died on 1 January, 1989, will expire immediately after midnight on 31 December, 2039. Some works have terms other than the general. In Canada, photographs are subject to the general term unless the author was deemed at law to be a corporation, in which case the term of protection extends from the date of the making of the negative or initial photograph to end of that year, plus an additional 50 years.¹¹¹ Films that lack a dramatic character (e.g., journalism, home movies, etc.) are protected for a straight fifty-year period

¹⁰⁸ *Copyright Act*, *supra* note 36 at s. 3 (1); *Application by John E. Marriott, Canmore, Alberta, for the reproduction of the quotation from the book entitled "The Banff-Jasper Highway", written by Mabel Bertha Williams* (11 June 2007), Copyright Board of Canada Decision 2007-UO/TI-22, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/unlocatable-introuvables/other-autre/7-b.pdf>>. Also see *CCH*, *supra* note 33 at para 56.

¹⁰⁹ *Vaver*, *supra* note 50 at 145, (courts often determine whether a taking is substantial by looking at what the ordinary buyer or user would think and whether a distinctive part of the original work has been used); *Jarvis v. A & M Records Inc.*, 827 F. Supp. 282 (D.N.J. 1993); *G. Ricordi & Co. (London) Ltd. v. Clayton & Waller Ltd.* (1930), [1928-1935] MacG. Cop. Cas. 154 (Ch.); and "Is Fair Use Fair Dealing?" *Copyright and New Media Law Newsletter* Vol. 4 (2000), Issue 4 at 3 (substantiality "depends on the nature of reproduction and is also a matter of degree, in terms of both the quality and quantity of the work used.") See also, *Handa*, *supra* note 61 at 304, where (citing *University of London Press Ltd. v. University Tutorial Press Ltd.* (1916), 2 Ch. 601) *Handa* states that when the defendants do not add sufficiently to the copied work and the original product was not simply collateral to the infringing product, but it was its very essence the court found an infringement. See also at 314, where (citing *Sega Enterprises Ltd. v. Accolade Inc.* (1992), 24 U.S.P.Q.2d 1561) *Handa* states that, notwithstanding that entire works were copied, the purpose of copying the entire work was incidental to its desired use, and, since the desired use was not directed at copying the work; the fact that the entire work was copied was "of very little weight".

¹¹⁰ *Copyright Act*, *supra* note 36 at s. 6. For an extended discussion of the value of the public domain and its role in achieving the public interest purpose of copyright law in fostering innovation and creativity, and in the dissemination, access to and use of copyrighted (and expressive) works, see: *Bailey*, *supra* note 50; Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437; Carys Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" (2005) 2 *University of Ottawa Law & Technology Journal* 425; and David Fewer, "Constitutionalizing Copyright" (1997) 55(2) *U.T. Fac. L. Rev.* 175.

¹¹¹ *Copyright Act*, *supra* note 36 at s. 10.

running from when the film was made. If, however, the film was first published during this period, the copyright is prolonged to fifty years from the end of the calendar year of the first publication.¹¹²

Filmmakers should be aware that copyright terms are not uniform worldwide. Europe and the United States both recently increased their standard terms of protection to 70 years past the author's death. In each case, a filmmaker must abide by the laws in force in the country.¹¹³

¹¹² *Ibid.* at s. 11.1.

¹¹³ For the applicable American law, see: *Copyright Act* s. 101, 17 U.S.C s302(a) (1976). A European Union directive mandates all member countries to extend the copyrights of an author to 70 years past her death, see EC, *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*, [1993] O.J.L 290/9, art.1(1).

Appendix

Copyright and Fair Dealing: A Summary of the Guidelines for Documentary Filmmakers

Clearance of a clip will not be required where:

- The dealing involves the incidental and non-deliberate inclusion of a work (whether audio or visual) in the background of a film.
- The dealing involves a reproduction of a building or sculpture permanently situated in public in a film.
- The dealing involves a work that is in the public domain.
- The dealing involves a non-substantial part of a work.

Clearance will not be required where the fair dealing defense applies:

- The dealing is for a purpose falling within one of the five eligible categories of dealings; and
- The dealing is fair; and
- In the case of dealings for purposes of news reporting, criticism and review, one mentions the source and the author (if given in the source).

Categories of dealings that qualify for the fair dealing defense include:

- Research
- Private study
- Criticism, either of the work itself or of another subject. Criticism can include parody where the parody involves *bona fide* criticism (although this point remains controversial under Canadian law).
- Review
- News reporting

The “fairness” of a dealing depends upon the circumstances.

Courts will have regard to the following criteria:

- The purpose of the dealing.
- The character of the dealing: the custom or practice in a particular trade or industry may assist in determining whether or not the character of the dealing is fair.
- The amount of the dealing: fairer dealings tend to copy less, although it is possible to fairly copy an entire (*e.g.*, artistic works and photographs).
- Alternatives to the dealing: Was it necessary to copy the work to achieve the filmmaker’s purpose?

- The nature of the work: Courts frown on dealings with unpublished content, but even confidential documents may be fairly dealt with where doing so serves the goals of freedom of expression.
- The Effect of the Dealing on the Work: A film that substitutes for the market of the original work is less likely to be fair. The availability of a license is irrelevant to the question of the fairness of the dealing.

The Requirement to Mention Author and Source

The requirement to “mention” the source and the author (if given in the source) may be met by an appropriate credit.