

F U L C R U M M E D I A S E R V I C E S

P.O. Box 177 San Anselmo California 94979.0177 ▲

February 4, 2005

Jule L. Sigall

Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Building
101 Independence Avenue SE
Washington, DC 20540

Dear Jule L. Sigall:

This letter is in response to a call for comments regarding the question of so-called “orphan films,” those films or that footage for which copyright owners cannot be found – and whether the Copyright Office needs to address this matter in some proactive way. I feel I must comment on this issue, but I felt I could not do so without also connecting the issue of orphan films to that of clarifying or reforming how the copyright law addresses Fair Use – as they are related, and cause related problems for filmmakers.

I have worked for some 25 years now as a film researcher, archivist, rights clearance expert, and teacher – primarily involved in historical documentaries, but also providing historically-based footage to feature films and television shows. I was the Series Archivist for the landmark public television series *Vietnam: A Television History* and *Eyes on the Prize*, and have consulted on over a hundred other public television and network television shows including *American Masters*, *The American Experience*, *20/20*, *Bill Moyers’ Journal*, *Daughter From Danang*, and many others. I’ve worked on such feature films as Sean Penn’s *The Indian Runner*, and am currently working on the George Clooney feature *Good Night and Good Luck*, about Edward R. Murrow, which will use a tremendous amount of film and television footage from the 1950s.

Many problems with current copyright laws, including the Fair Use section (and the ever-increasing extensions that Congress grants copyright owners), cause terrible problems for those of us who create documentaries and educational films that make use of historical film footage (such as newsreels, television network news footage, footage originated by corporations or independent entities, etc.). Of course such organizations should have rights over their own material (and license fees collected by them help maintain and preserve the collections and provide cataloguing and access), but the extension of protection over entire lifetimes, and ownership that repeatedly shifts and becomes indeterminable (partly because or if they need not register copyright) is a serious problem. We are reaching a point where soon producing programs such as those mentioned above will become close to impossible.

Having been a film and photo researcher for a quarter century, I have some historical perspective on changes in the industry. As large conglomerates buy up what were once individual collections, some material that should be in the public domain and others that are still under copyright, and that represent our collective history, is treated as “product,” and sometimes

frustratingly random rules for access are applied. This material becomes out of reach for filmmakers' ever-decreasing budgets, or is suddenly put "under wraps" for corporate reasons despite their historical significance, with the effect that such films as *Eyes on the Prize* are rapidly disappearing from PBS and from the curricula of schools around the country and other such films are inhibited in their production. *Eyes*, on which I was so proud to have worked, has vanished from the schools in our country because of issues of copyright renewal and the other burdens of copyright – and has recently become a *cause celebre* in the press.

The orphan films issue is one piece of this intricate problem. I know that in this letter I am touching on more than simply this issue, but it is part of a larger context. If the Copyright Office can begin with orphan films (perhaps by allowing users of orphan films some kind of reasonable "due diligence" guideline, beyond which they are able to use such material with impunity), that would be a good first step toward easing the ever-encroaching restrictions on the ability of compilation documentary filmmakers to do their job. Even more important, it might provide a precedent for other issues – most notably Fair Use.

To give one example, I worked on an Emmy-nominated program entitled *Color Adjustment*, which was produced by the late documentary filmmaker and educator, Marlon T. Riggs. That show traced the portrayal of African-Americans on prime time television in the U.S. from the 1940s through the 1980s. For many of the television shows we used excerpts from (especially from the 1940s and 1950s), tracing copyright through the various changes in ownership was difficult; for some it proved absolutely impossible.

Ultimately, whether the issue is orphan films or Fair Use, an independent filmmaker rarely has the resources to fight a potential legal battle, and thus, even if they are sure they have a good Fair Use case for a critical piece of footage, or would like to use a piece of film for which they have not been able to find a copyright holder, they have to decide whether or not to take the risk of being sued, even if they expect to win, and their errors and omissions insurance provider has to let them include the footage or it must be removed. Although I am the first to admit that Fair Use is occasionally abused, it is a critical tool filmmakers have to critique the media, or explain historically how the media presented a particular historical event. However, far too often, potential legal expenses inhibit the best filmmakers from including either an orphan clip (lest someone "come out of the woodwork"), or a clip that has been disallowed by the copyright holder but has overriding Fair Use importance (lest they be sued by the copyright holder who doesn't want to be seen in a bad light), to the detriment of the final product. In the case of Fair Use, because the tests are fairly vague, filmmakers find it hard to interpret their level of risk unless they study case law. Solidification of the terms would clarify the situation for both sides and perhaps allow smarter evaluations of the risk.

Again, an example (that is typical of what happens all the time): I am working with a filmmaker right now who wants to use some critical network news footage in a film for PBS that may not be allowed, simply because a copyright holder may threaten a lawsuit in what is clearly a legitimate Fair Use case – but since the filmmaker cannot afford to fight a lawsuit, they may have to back down and not use a very historically important clip. Since Fair Use is only a defense *if one is sued* and not a defense *against getting sued*, it is often of little use to filmmakers without major financial resources. The filmmaker is licensing much footage from the source, this

is just one piece of footage the source doesn't want the filmmaker to use, because it shows that they knowingly distorted a story – that distortion is critical to the filmmaker's case. The filmmaker is likely to win a lawsuit, but can't afford the risk of one.

More and more discussion in filmmaking circles is also taking place about a desire for some kind of Fair Use protection for so-called "verité filmmaking," as people are increasingly inhibited from filming on location when their camera may accidentally pick up someone wearing a tee-shirt with a copyrighted logo, someone walking by with copyrighted music playing on a "boom-box," a billboard in the background with copyrighted advertising messages on it, or a television set might be seen in the background of a scene, irrelevant to the main action, that has copyrighted programming on it. The list goes on and on, and filmmakers now feel as if they are almost completely unable to film anywhere in our media saturated culture without hidden underlying copyright issues confining their ability to film, even when they have routine releases from their primary subjects and the owners of the locations. Somehow, the copyright law needs to be adjusted, perhaps under the aegis of Fair Use, to address these issues so that documentarians can continue to mirror our world back to us.

For these reasons and more, the Copyright Office should look into how the laws could be adjusted to protect users of orphan films who have done due diligence, as well as those who have legitimate Fair Use claims, so they can exercise that protection without fear. I am not suggesting an atmosphere of irresponsible journalism or violation of the intent of copyright law, as reasonable copyright law benefits everyone, including the filmmakers I am advocating for, but rather I anticipate an atmosphere where journalism of quality and the making of historical documentaries that enrich the public airwaves and the nation's schools can flourish without undue tethering by vague rules or laws that discourage those who would mirror back to us our own civilization and our national historical audiovisual record.

The copyright office has an opportunity to help ensure that historical films such as *Eyes on the Prize*, *Color Adjustment* and many others don't vanish from the airwaves, or, more important, from the nation's classrooms. Several interrelated problems need to be addressed to accomplish this. I've heard complaints from teachers and students alike about this issue, and recent reports about used VHS copies of *Eyes on the Prize* selling on eBay for upwards of \$1500 (and reports in the press about a "day of civil disobedience" next week to show *Eyes* nationwide in violation of its copyright expiration) dramatize how important these issues are to the public and how wide-reaching are their effects. I do urge your office to take action, and would be happy to provide further comments and/or advise in any way that seemed helpful. There is an entire community out here for whom this matter is of grave concern, as I'm sure you will find out.

Best wishes in this endeavor,

A handwritten signature in black ink, appearing to read "Kenn Rabin". The signature is fluid and cursive, with a large initial "K" and "R".

Kenn Rabin

cc: Senator Barbara Boxer, Senator Diane Feinstein, Representative Lynn Woolsey