

# COPYRIGHT & CREATIVITY

SEMINAR ON FAIR USE



SUNDAY 21. 11 13.00 - 15.00

EDEN REMBRANDT SQUARE HOTEL, AMSTELSTRAAT 17

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## **COPYRIGHT AND CREATIVITY**

**Documentary filmmakers: Authors and Users**

**A MINI-SEMINAR ON FAIR USE**

**IDFA 2010 Sunday November 21, 1300 - 1500**

**1300 - 1310**

### **Welcome and introduction**

Elisabeth O. Sjaastad, (filmmaker and CEO of FERA - Federation of European Film Directors)

Cay Wesnigk, (filmmaker and Chairman EDN)

**1310 - 1330**

### **Case studies in clearing rights and claiming US fair use**

Jan Dalchow and Morten Daae (documentary filmmakers/producers)

**1330 - 1350**

### **The European "right to quote" – differences in national legislation**

Professor Bernt Hugenholtz (Institute for Information Law, University of Amsterdam)

**1350 - 1410**

### **Access to broadcasters' archives – BBC Creative Archives Pilot**

Dr. Paul Gerhardt (consultant, Archives for Creativity)

**1410 - 1450**

### **Should Europe adopt the American fair use doctrine?**

Panelists debate

Questions from the audience

## COPYRIGHT AND CREATIVITY

### Documentary filmmakers: Authors and Users

#### MINI-SEMINAR ON FAIR USE

#### BACKGROUND

As early as the beginning of the 19th century, authors recognized that it was important for the creative process to be able to build on existing works and borrow from authors before them<sup>1</sup>.

The right to quote is the only mandatory limitation to copyright under the **Berne Convention**. Article 10 (1) of the Convention provides that: 'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries'.

But in today's "culture of clearance" some copyright owners **exercise** their copyright in a way that is not conducive to creativity, and this practice leads some to even question copyright itself. Filmmakers find themselves caught in the middle as they are often both authors and users. And filmmakers want both fair remuneration and respect for moral rights for their own work, and of course, wish the same for the works of others. But they also want creative freedom. How then should these interests be balanced?

In 2005 documentary filmmakers organized and created the Documentary Filmmakers' [Statement of Best Practices in Fair Use](#), which has had a significant effect on fair use practice in documentary film. Since the release of the Statement, PBS, ITVS and IFC use it. Furthermore, four out of seven of the US national errors and omissions insurers now issue fair use coverage routinely.

**Fair use** is a doctrine in the United States Copyright Act that allows limited use of copyrighted material without requiring permission from the rights holders. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and scholarship. It provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test.

However, fair use is decided on a case by case basis, on the entirety of circumstances and the defendant bears the burden to claim and prove that his use was "fair" and not an infringement. The same act done by different means or for a different purpose can gain

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<sup>1</sup> Jules Renouard in *Traité des droits d'auteurs* 1838

or lose fair use status. Even repeating an identical act at a different time can make a difference due to changing social, technological, or other surrounding circumstances.

**Right to quote** is a legal concept in continental Europe which allows for quoting excerpts of copyrighted works, as long as the quotes are within a reasonable limit (defined differently from country to country), clearly marked as quotations and credited to its author. The resulting new work must be more than a collection of quotations, and be an original work in itself.

This mini-seminar intends to review and compare the current legal framework in the United States and Europe and debate what steps should be taken to improve creators' access to existing works so they can make fair and reasonable use of them.

## THE PARTICIPANTS

### Jan Dalchow

Jan Dalchow (born 1968) has worked as a producer, director, editor and sound engineer in Norwegian film and TV production since 1995. He is the founder of the Oslo based production company Dalchows Verden, (Dalchow's World), which works primarily with documentary films. The company channels Jan Dalchow's productions, whose résumé includes award winning films such as "USA vs Al-Arian" (producer), "100% Human" (producer/director), "Precious Moments" (producer/editor/co-director/script) and "Dirty, Sinful Me" (producer/director). Jan is getting ready to release "Living Without Money" (producer).

### Morten Daae

Morten Daae (born 1969) is an art director and copywriter turned producer and editor. Among his previous films are "My daughter the terrorist" (doc, Producer/Co-director/Editor) awarded Best Norwegian Documentary, Gullruten 2009 and "Lapp Hat" (doc, Editor) awarded Best Norwegian Documentary, Volda 2010. He is currently working on three documentaries from Rwanda and Congo for Integritet film.

2012: "The Red Road" (doc, Producer, in pre-production)

2011: "From Oslo to Kigali" (doc, Director, Co-producer, in production)

2010: "Duhuzonye, a Rwandan society of widows"  
(doc, Producer/Editor, in post production)

### Professor Bernt Hugenholtz

Bernt Hugenholtz is Professor of Intellectual Property Law and Director of the Institute for Information Law of the University of Amsterdam (IViR). In 1989 he received his doctor's degree *cum laude* from the University of Amsterdam, where he defended his thesis on copyright protection of works of facts. He has written numerous books, studies and articles on a variety of topics involving copyright, information technology, new media and the Internet. Prof. Hugenholtz has acted as a consultant to the World Intellectual Property Organisation (WIPO), the European Commission, and several national governments. He has been on international missions representing WIPO in China and Indonesia.

## **Dr. Paul Gerhardt**

Paul Gerhardt runs the independent consultancy *Archives for Creativity* (<http://www.archivesforcreativity.com/>), working with cultural organisations, public broadcasters and archives to stimulate the educational and creative use of film, television and sound. His clients include the BBC, Arts Council England, the US Corporation for Public Broadcasting, New Deal of the Mind and Skillset. Paul's career in broadcasting spans the early years of Channel 4 through to senior management at the BBC. He was BBC Controller, Learning, and Head of Commissioning at the BBC/Open University. Paul originated and led the BAFTA award winning BBC Creative Archive project. He is currently the co-chair of the Film and Sound Think Tank for JISC (Joint Information Systems Committee for Higher Education), digital archives consultant for Arts Council England, and consultant producer for *The Nine Muses*, John Akomfrah's archive based feature film.

## **About FERA**

The Federation of European Film Directors (FERA) is an international, non-profit federation of national associations of film and television directors. Established in Venice in 1980 by a small group of far-sighted directors, it has grown to include 39 members from 31 European countries. The current President of FERA is István Szabó (re-elected in 2010).

FERA has through its three decades of experience, its broad base of members and its presence and standing in Brussels a unique network to monitor and communicate how national and European initiatives affect filmmaking on the ground.

<http://www.filmdirectors.eu>

## **About EDN**

European Documentary Network (EDN) is a member-based organisation for professionals working with documentary film and television. Today EDN has 1000 members from more than 60 countries. EDN supports, stimulates and creates networks within the documentary sector in Europe, and provides documentary consulting and informs about possibilities for funding, financing, development, co-production, distribution and collaboration across borders. EDN publishes two indispensable publications [DOX magazine](#) and [The EDN Financing Guide](#).

EDN started in September 1996 as a documentary organisation for filmmakers, producers, production companies, distributors, associations, film institutions & boards, universities, festivals, broadcasters and film & television agencies.

<http://www.edn.dk>