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Documentary makers rally for fair use

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By Gregg Kilday

LOS ANGELES (Hollywood Reporter) - Five organizations involved in documentary films will next Friday release a manifesto of sorts titled "A Documentary Filmmakers' Statement of Best Practices in Fair Use," which will set out guidelines under which filmmakers can make use of copyrighted material without being subject to often exorbitant licensing fees.

Growing out of a study conducted last year by American University professors Pat Aufderheide and Peter Jaszi, the statement should provoke discussion that will be of far more than just academic interest.

The report comes from the University Film and Video Assn., the Society for Cinema and Media Studies, Arts Engine, the PBS series "P.O.V." and public television's Independent Film Television Service.

Fair-use practices -- which have been upheld by the courts as a way of balancing the extension of copyright protections -- are a matter of established practice in the print media. One publication can quote from another, within reasonable limits, without violating copyright. But in the visual media, the practice of licensing rights has evolved into a complicated morass. Filmmakers, when they want to include a clip from a news broadcast or another film, are often asked to license not just the clip itself but also various underlying rights -- say, for example, the music rights to a tune that happens to be playing in the background when a film crew is shooting in a real-life study.

In their initial study, Aufderheide and Jaszi found that for many filmmakers, licensing rights has become not just an expensive proposition but also an inhibiting one. Citing dozens of examples, they contend, for instance, that the budget of Jonathan Caouette's homemade 2004 documentary "Tarnation" ballooned from \$218 to \$400,000, "using most of the eventual budget to clear rights."

Since rights are often licensed for fixed periods, further problems pop up when they must be renewed. Henry Hampton's "Eyes on the Prize," a study of the civil rights movement, is now out of circulation because it originally purchased five-year licenses and renewing them was prohibitive.

More ominously, the researchers found that problems with right clearances are even leading some filmmakers to self-censorship. Jeffrey Tuchman ("The Man From Hope") said that he had shelved a project on politics and the media because rights issues had become "so extortionate."

The authors concluded, however, that the whole issue of fair use is widely misunderstood in the film arena, and that distributors and networks often reflexively ask for clearances as a condition for releasing or airing a film even though under fair use, the clearances aren't actually necessary.

They did not call for any new legislation -- and even cautioned against challenging established fair use doctrine in court. Instead, they argued that fair use is more available to filmmakers than is generally recognized and so there needs to be an industrywide discussion about fair use practices.

Over the past year, Aufderheide and Jaszi have continued to meet with filmmakers around the country to develop the statement.

"This is designed specifically to be nonconfrontational," Aufderheide says of the statement. "We want to reduce the

level of ambiguity and signal the availability of this right. It's about the reinforcement of the legitimacy of existing law."

After all, the filmmakers whose input helped define the statement are, or aspire to be, copyright-holders themselves. It's in their interest to strike a balance that allows them fair use of existing materials when creating their own original works, while also protecting their work from anyone who might want to make unfair use of them in the future.

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