

Fair Use debate in Europe starts in Rome...

*By Chai Locher, Chairman of the Dutch New Film and Television Makers Association*

In October 2007 a meeting took Place in Rome, that potentially could change the History of Copyright in Europe.

The Italian union of documentary makers Doc/it, the IDA (America) and the EBU (Europe) asked European documentary makers, documentary unions and documentary producers to come and talk about the question of copyright and the relation to the practise of documentary making in Europe.

The invitation stated boldly: ' We propose to jointly fight a common battle to introduce in Europe- as well as in the rest of the world- the Best Practices in Fair Use.'

What is this all about, and what is the result of this Rome conference?

Since several year the international documentary world has the distinct impression that documentary makers are severely restricted in their expression because of the increasingly aggressive copyright claims of the major copyright owners. For instance a young documentary maker had to pay 10.000 dollar or get rid of the scene because EMI Music Publishing sued her for the rights on a sms ringtone in the background of this scene.

EMI Music Publishing has the rights on long lists of works of artists like Queen and Pink Floyd. If you plan to make a creative doc about the idols of your youth, or want to make a portrait of the 70's, then you are in for skyhigh budgets for your archive material.

Can the owner of the rights on these images just forbid and impede the use of it like that? Are these images not part of the collective memory because they are part of our very existence? Copyright can never have had the goal of impeding this right to comment on the public space? Is there something as the right on citation, right on comments, right on expression? Not to mention the right on satire and mockery and ridicule.

Are huge companies like Sony allowed to mingle in your documentary, just because something futile like the music of Micheal Jackson?

Ofcourse, we doc makers are protected by copyright, but these extreme uses of copyright increasingly restrict the possiblity of telling stories.

Since several years there is the tendency to find a good solution for all parties concerned. Foremost in the US, where the 'culture of claiming' has reached sometimes grotesque porportions, and where the public domain is more influenced by commercial parties than in Europe.

In 2005 a group of American documentary makers and copyright lawyers started the Fair Use movement, with a Resolution called "*Best Practices in Fair Use*".

That resolution gives a very detailed description of practices in dealing with copyright that work for the daily work of documentary makers. They want to explain what acceptable in their sector and thus fight for the interests of the individual documentary maker.

This model seems to yield fruit: judges use it in their motivations, and recently insurance companies have started to use this Fair Use model in their Error and Omissions/Fair Use articles.

In Europe, though, copyright has slightly different applications than in the US. In the US exists this Fair Use model allready since 150 years. Under certain circumstances you may use works of others without their consent. In Europe the EU in Brussels has

made some rules that the members states have to exercise in the laws in their countries. In those rules are also some articles that gives states a choice to implement them or not. And unfortunately the 'Right on Citation' is one of those optional exceptions. This Right on Citation deals with the conditions when you can use work of others without permission or not. (You can compare the American idea 'Fair Use' with our Dutch idea Right on Citation, but that is much more restricted than Fair Use).

Every documentary maker who wants to have an international release (and who doesn't?) and who needs copyrighted material will fall into the trap of a myriad of rules and regulations. The alternative, clear all the rights, is very time consuming and very expensive.

In the Rome conference the idea of "*Best Practices on Fair Use*" was introduced as a possible solution for all this misery. The meeting brought forward a Resolution that will shortly be made public on an international scale.

This Resolution calls upon all parties concerned to come to one clear solution. From the Draft Resolution:

"(...) We resolve to undertake a European study of untold stories due to the increasing costs and legal uncertainty associated with right clearance and the application of Fair Use; and resolve to initiate a European Best Practices with the aim of both covering Europe, and to overlap the American Best Practices in Fair Use, We call upon all documentary filmmakers, organisations, governments and international institutions to endorse, support and finance our resolve!"

From the start of this declaration it is clear that this resolution covers more than just juridical hassle and administrative lobbies. How many documentary stories are not being told because of the skyhigh costs of archive material?!

In the Netherlands this discussion is coordinated by Marijke Rawie (ExpertDocs), former commissioning editor of AVRO Close Up. She and the other initiators have secured the cooperation of prof. Bernt Hugenholtz, the international expert on copyright.

During the Filmfestival in Berlin next Februari there will be a second meeting to prepare a European Plan of Action, that will be published during the Open Training Session of Discovery Campus Masterschool in Brussels, in March 2008.

Right now where the big parties seem to divide the copyright cake it is of enormous importance that the independent filmmakers think about these subjects. Whether the *Best Practices in Fair Use*-model will be the ultimate model for Europe is still unclear. But it is vital to participate in this debat with all the independent documentary makers through the whole of Europe.

Keep an eye on these developments. Knowledge of your juridical position is needed when you take your work as a documentary maker seriously.

And on top of that: it would not be the first time in history where Rome is the place where it all begins...

Chai Locher, documentary maker in the Netherlands