2004

Light in Custody: Documentary Films, the Teach Act and the DMCA

Gretchen Stoeltje

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj

Part of the Law Commons

Recommended Citation


This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara High Technology Law Journal by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
LIGHT IN CUSTODY: DOCUMENTARY FILMS, THE TEACH ACT AND THE DMCA

Gretchen Stoeltje†

I. INTRODUCTION

Legal issues surrounding the distribution and licensing of independent documentary films in the digital age are just beginning to emerge. At present, most independent documentaries, which are frequently distributed by small, specialized distributors to educational institutions, are sold on VHS analog tape. As distribution via digital formats becomes increasingly affordable and technologically possible, distributors are beginning to convert parts of their collections to DVD and are considering eventually streamed video or downloaded video-on-demand. At the same time, educational institutions are developing new teaching models such as distance learning programs, which require that teaching materials be available in digital form for student access.1 With these new formats come new uses—and misuses—of films. All of these developments raise questions of film licensing which both the larger film industry, of which documentary distributors are a small part, and the law are struggling to address. This comment will focus on independent documentary makers and distributors.

† J.D., Santa Clara University School of Law, 2004; Graduate Certificate, University of California, Santa Cruz (1990); B.A., University of California, Santa Cruz (1989); independent filmmaker and member of New Day Films. I thank my colleagues in the independent film world and especially at New Day Films for asking questions that prompted this writing, for answering endless research queries, and for making amazing films. I am grateful to Vivian Kleiman for her contribution to this piece and for her ongoing participation in this dialogue over the years. Thanks to my mother and step-father, Beverly Stoeltje and Richard Bauman, for reading many drafts and watching many cuts, and for their loving and patient support. My deepest gratitude to Professor Dorothy Glancy without whom this piece would still be only a set of disparate questions. Thank you for the wonderful encouragement, the brilliant inspiration and the timely reminder to channel sixteen.

After the Introduction, Part II of this comment sets the stage for the discussion, describing the present context for distributing educational documentaries. This section provides technical details about current format and licensing practices, a general description of the economics of documentary filmmaking, and the relationship of documentaries to the Fair Use Doctrine. It concludes with a discussion of the most recent technology shift, which produced the new issues that are the main subject of this comment.

Part III describes the new laws and the short and long term licensing questions brought about by new laws and new technologies. Two statutes inform this discussion: the Digital Millennium Copyright Act (DMCA)\(^2\) and the Technology, Education and Copyright Harmonization (TEACH) Act.\(^3\) The most relevant provision of the DMCA is the much-contested anti-circumvention provision (17 U.S.C. § 1201) which both protects and limits rights of documentary film producers. The provision prohibits the unauthorized circumvention of encryption, a kind of copy protection, which producers may build into a digital delivery format on which they are delivering their product. That format might be DVD, streamed video, downloaded video-on-demand, or some other format by which a film (as a digital file) may be distributed. Encryption is designed to prevent access to a digital product, acting as a technological lock one can embed in a digital product to prevent illegal access and, thereafter, reproduction. It is one function of emerging Digital Rights Management Systems that can be used to police licenses using technology.\(^4\) The law protects the interests of a producer against

---

4. According to the United States Patent and Trademark Office (USPTO) in a 2003 report to Congress on technological protection systems for digitized copyrighted works, technological protection systems can be understood as measures that prevent unauthorized access and measures that prevent infringement. In an effort to define the term technological protection system, the report notes: "Although the term technological protection system is not defined in the TEACH Act or in the DMCA, it is generally used in this report to refer to a range of technological methods to control unauthorized access to and copying of digitized copyrighted works."

The report then breaks down these measures into two categories: Core Technologies and Digital Rights Management (DRM) Systems. The Core Technologies it lists are: encryption, a process that "scrambles" data and when successful, prevents unauthorized access to that data; digital watermarking, which embeds data about the origin, and sometimes the recipient, of the copyrighted material, the unauthorized removal of which introduces perceptible distortions in the data; and authentication, used to authenticate the identity of users, and to authenticate the integrity of the digital content.
certain types of conduct by prohibiting access to the encrypted product. If unauthorized access is a violation of the law, then copying of an encrypted file would be impossible. It also severely curtails that same producer's ability to use the copyrighted materials of others in non-infringing ways under the Fair Use Doctrine of the Copyright Act.5

Finally, how to best shape and control licenses in the digital age is complicated by the permissions available to educational institutions to reproduce intellectual property under certain circumstances. The Fair Use Doctrine suggests that educational institutions might be allowed to digitize analog materials not yet available in digital form. More recently, however, the TEACH Act addresses this issue directly. The Act has been described as an effort to "strike a balance between protecting copyrighted works, while permitting educators to use those materials in distance education."6 The statute sets out stringent conditions under which this use may occur, conditions which would seem to favor the copyright holder and protect its future market. But it provides a back door around those requirements with regard to acquiring copyrighted material not yet available in digital form. This situation raises questions that producers and distributors of social issue documentaries may want to consider as they make new licensing decisions.

The subject of Part IV is a set of specific suggestions for approaching licensing, both in the short term, given the new conditions created by the TEACH Act, and in the long term, for

Digital Rights Management Systems are used to help copyright owners control the digital media embodying the copyrighted work, and to prevent piracy through tools that control access, use and tracking. The elements of DRM include: 1) a trusted computer system which can be relied upon to follow and enforce rules governing the access and use of protected digital content; 2) rights models and rights expression language which facilitate transactions involving copyrighted works in the digital environment, such as specifying the types of rights, types of users, extent of rights and associated costs; 3) DRM architecture comprised of the content server (which stores and prepares content for delivery, including encryption and the creation of rights specifications associated with the content), the license server (which specifies rights like "play" or "copy" as well as license terms such as expiration), and the DRM controller on the client end which responds to a user's request to exercise rights, and processes that request according to the terms of the license associated with that content.


digital content delivery defined primarily by the DMCA. Two recent models for licensing copyrighted material in a digital environment have emerged which reveal a spectrum of licensing choices, from extremely permissive to extremely restrictive possibilities. One model is the Creative Commons project, creator and provider of free, customizable, machine-readable licenses. This non-profit organization advocates retaining little or no copyright control, and claims to embody the original spirit and intent of the Founders of the Constitution. A second model is MovieLink, a conglomerate of five Hollywood studios experimenting with downloading feature films directly to personal computers, using highly restrictive licenses whose terms are enforced automatically by the delivery technology. Somewhere in between is a licensing option appropriate for filmmakers who desire copyright protection, but who dislike restrictions on the flow of ideas from which they have traditionally benefited.

II. CONTEXT

A. Distributing Social Issue Documentaries in the Educational Market

A good example of a typical documentary film distributor described in this comment is New Day Films, a for-profit, self-distribution cooperative carrying social issue documentaries. Its market primarily consists of university and public libraries, as well as high schools and community organizations. Though it differs in internal structure from other distributors in that it is a cooperative, other small distributors of independent, social issue documentaries face many of the same issues New Day does.

Like most distributors of its kind, New Day distributes its products on VHS analog tape, and prices them differently according

7. Creative Commons, at http://creativecommons.org.
8. See id.
12. HINDS, supra note 1, at 51-54.
13. To date, three of New Day's members have begun distributing pre-existing titles on DVD. Other distributors give similar numbers for converting titles to DVD: Filmmakers Library makes a title available on DVD upon request of a buyer and charges an additional transfer
to length and other criteria such as subject matter, intended audience, and/or the sales performance of earlier films with similar topics. For example, a documentary running 22 minutes in length might sell to a university library for $185, and $79 to a high school library, while a 74 minute film might sell for $225 at the college level, and $99 to high schools and community centers. While the decision of how much to charge for a given documentary is up to each New Day member/producer, the policy behind pricing differently for university libraries than for high schools is the presumption that high schools typically have much smaller media budgets than do universities. Thus, New Day members who choose to give a price break to such institutions do so in order to give their titles a better chance to reach a younger audience.

The terms of a New Day license are typically for the life of the tape, and for projection or playback only. The license is specifically a lease license for the particular cassette copy with provisions against alteration, duplication or reproduction, broadcast, sub-leasing, and other such restrictions.

B. The Economics of Making Social Issue Documentary Films

Though independent filmmakers produce the same kind of product as a Hollywood studio does—a movie one can watch in a

charge (E-mail from Sue Oscar, Filmmakers Library, to Gretchen Stoeltje, author (Apr. 6, 2004, 9:21 AM PST) (on file with author); Frameline has three out of 185 titles available on DVD (E-mail from Maura King, Distribution Associate, Frameline, to Gretchen Stoeltje, author (Apr. 7, 2004, 2:48 PST) (on file with author); Women Make Movies distributes two out of more than 500 titles on DVD (E-mail from Vanessa Domico, Deputy Director, Women Make Movies, to Gretchen Stoeltje, author (Apr. 12, 2004 12:02 PM PST) (on file with author).


theater or on television—these two kinds of films are made differently. Economically, most independent documentaries are produced in an environment much more like the art world than like the larger film industry.  

A comprehensive study on the media arts by the Rand Corporation included documentary films in its list of media arts which have relied in large part on public funding and the non-profit sector for their development. In conjunction with public funding, a kind of private patronage system has developed around the media arts. Individual and corporate sponsors, as well as the federal and state governments, have directly and indirectly supported, and in some instances created, the production and exhibition environments for independent documentary filmmaking.

That patronage has changed and shrunk in recent years, however, resulting in dramatically less direct funding for individual artists. The Rand study concludes that as a result of that decrease, "funding for artists is fragmented and cobbled together from a range of sources. In addition to support from organizations and government, individual artists appear to rely on gifts and loans from friends and family, in-kind contributions, student and bank loans, personal savings, and earnings from non-arts employment." Credit cards and home mortgages are also common sources of financing for documentary films. Because independent documentary filmmaking frequently means working close to the bone, expensive processes like format conversion to DVD take longer for independents to afford, if ever, than they do for larger corporate operations like studios and large feature distributors.

C. Documentaries and Fair Use

The Fair Use Doctrine is a tool much relied upon by documentary filmmakers. Labeled a limitation on exclusive rights in

17. Id.
18. Id. at vii.
19. Id. at 11-16.
20. Id. at 15.
21. Id. at 16.
22. E-mail from Vanessa Domico, Deputy Director, Women Make Movies, to Gretchen Stoeltje, author (Apr. 12, 2004, 12:02 PM PST); E-mail from Maura King, Distribution Associate, Frameline, to Gretchen Stoeltje, author (Apr. 7, 2004, 2:48 PST).
the Copyright Act,\textsuperscript{23} it functions in just that way, providing guidelines for uses in situations where, in balancing the interests of the copyright owner and those of the party wanting to make use of the copyrighted material, the latter interests outweigh the former. That use, which might otherwise be an infringement, is considered non-infringing and fair. This means that the user of the copyrighted work may do so without the permission of the copyright owner, and without compensating the copyright owner. The application of the doctrine is notoriously difficult because the statute seems vague and broad in its description of a fair use, but in essence, it provides four factors, which must all be weighed together in determining whether a use is fair:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{24}

While this might seem to be a surprising restriction on a copyright owner's rights, it is meant to work as a safety valve to free speech: by making certain uses available to the public, the Fair Use Doctrine prevents copyright owners from monopolizing all fixed expression, and keeps the Copyright Act from violating the First Amendment.\textsuperscript{25} How this often works in a documentary context is that the subject of a film calls for the use of pre-existing footage whose copyright is owned by someone other than the producer. In certain circumstances, it can be a fair use when, for example, the footage is used to critique the media itself, and not merely to illustrate a point the film wants to make.

\textsuperscript{24} 17 U.S.C. § 107.
\textsuperscript{25} Copyright as a legal concept contains numerous provisions that restrict the monopoly control granted to copyright owners. These restrictions are vital to maintaining copyright's constitutional purpose and ensuring the law does not infringe on important free speech rights. If copyright is transformed into a technological concept, courts will no longer be in a position to enforce these important limitations on copyright, and copyright owners will be able to use these extralegal protection measures to expand their control over content.

Color Adjustment is one of the best examples of a documentary film that relies on the Fair Use Doctrine for its legal legitimacy, and therefore its lawful distribution. Directed and co-produced by Emmy Award winner Marlon Riggs, Color Adjustment won numerous awards for its critique of the representation of African Americans during 40 years of prime time television. The 90 minute film intercuts interviews with prominent African-American cultural critics, television writers, performers and producers of such television favorites as All in the Family, Good Times, The Jeffersons, Hill Street Blues, and LA Law, with clips from those shows, among many others. In order to effectively question the role these shows played in shaping the American racial consciousness, the filmmakers had to be able to show segments of the programs themselves, especially as contrasted with imagery from the civil rights movement. Original material shot specifically for Color Adjustment comprises about 25 minutes of the footage for the documentary, or less than one third of its total footage. Footage from the television programs makes up the remaining hour, and of that hour, somewhere between 80% and 85% meet the requirements for legal use under the Fair Use Doctrine.

The producers, Marlon Riggs and Vivian Kleiman, carefully researched the copyright laws and developed the project so their use of the footage from the networks and news stations would likely be considered non-infringing under the Fair Use Doctrine. The filmmakers then sought the advice of three lawyers, asking each to view the film at a stage of near-completion, and write a letter stating their professional assessment of the filmmakers’ use of copyrighted footage under the Fair Use Doctrine. The legal assessment was that the producers were not infringing copyrights because their use fell within the scope of Fair Use. Thus, they were prepared with written, legal analyses of the use when they began receiving challenges from

27. Among its most notable awards are the George Foster Peabody Award, International Documentary Association’s Outstanding Achievement Award, and the Organization of American Historians’ Erik Barnouw Award, see California Newsreel web site at http://www.newsreel.org/films/coloradj.htm (last visited Apr. 26, 2004).
28. Id.
30. Id.
31. Id.
some of the copyright owners (networks).\textsuperscript{32} When they received a letter demanding that \textit{Color Adjustment} cease using copyrighted material, the producers sent the letters of assessment the lawyers had prepared even before the film was finished. Though two of these interactions continued for several rounds of correspondence, ultimately no charges were filed against the producers, and the issue was dropped once it became clear \textit{Color Adjustment} made no infringing uses of the copyrighted material in question. Almost all its use of pre-existing material was Fair Use,\textsuperscript{33} and as it was, they still spent close to $100,000.00 on acquired footage.\textsuperscript{34} The budget for the entire film was only $450,000.00. Had the producers been required to pay for use of the footage, it would have been so prohibitively expensive as to make the project impossible.\textsuperscript{35}

This contribution to the dialogue around social issues like race and discrimination is an example of the type of freedom of expression that the Fair Use Doctrine can facilitate. If the ability to access or copy such material is illegal,\textsuperscript{36} producers will be forced to either break the law in order to acquire footage they might have authorization to use under the Fair Use Doctrine, or to ask copyright holders to grant them access to the material. Under current law, such copyright holders are not compelled to make material available, even for a potentially non-infringing use, and certainly not free of charge. Some of the footage the producers of \textit{Color Adjustment} were forced to license was footage they could not find elsewhere than from the copyright owner, even though their use of some of it meets the requirements of Fair Use.\textsuperscript{37} Having to break the law in order to acquire footage to be used lawfully, or else having to pay typically prohibitive prices for a license one would otherwise not be required to do, simply in order to acquire the footage, are conditions that severely discourage the kind of Fair Use uses made in films like \textit{Color Adjustment}. The film is used extensively in classrooms across the

\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} E-mail from Vivian Kleiman, Producer, \textit{Color Adjustment}, to Gretchen Stoeltje, author (July 21, 2003, 10:08 AM PST).
\textsuperscript{35} Telephone Interview with Vivian Kleiman, Producer, \textit{Color Adjustment} (Jan. 21, 2003).
\textsuperscript{36} If the footage is only available in a digital form which is encrypted for copyright protection, circumventing that encryption in order to access or copy that footage is illegal under 17 U.S.C. § 1201 (2000).
\textsuperscript{37} E-mail from Vivian Kleiman, Producer, \textit{Color Adjustment}, to Gretchen Stoeltje, author (July 24, 2003, 12:41 PM PST).
country, from the elementary to university level teaching, and is now considered an important contribution to our collective dialogue on race in America.

D. Technology Shift: New Licensing Questions Facing Documentary Filmmakers and Distributors

The shift from analog to digital distribution formats requires new licensing and pricing considerations. Like the last technology shift, from film to videotape, this shift introduces issues of increased duplicability, leading to an increased potential for piracy, an extension in the life of the product, ease of shipping and delivery, and a market drop in pricing as delivery systems become less expensive. A high quality, potentially immortal digital file has a different value and different use applications than does a low quality VHS videotape with an expected life span of 15 years. These differences are discussed in detail below. The questions raised by these differences concern both the short- and the long-term futures of licensing. The long term refers to a time in the future when New Day and its peers are distributing their products in some digital form. The short term refers to an interim period—the present—between a distributor’s ability to provide products in digital form, and a buyer’s need to purchase digital products, resulting in a gap between supply and demand. The specific facts that define that gap follow.

At the moment, educational institutions, libraries and archives who purchase documentaries from distributors like New Day own the films in a non-digital form: VHS analog tape. Primarily for economic reasons, it is not yet feasible for most small distributors to convert an entire collection into digital form. Since the documentaries are not

38. Elementary school children who saw the film wrote letters to the Fed. Communications Comm’n asking them to monitor the representation of children and violence based on what they learned from Color Adjustment about the television representation of blacks. E-mail from Vivian Kleiman, Producer, Color Adjustment, to Gretchen Stoeltje, author (July 21, 2003, 10:08 AM PST).

39. An impressive and provocative and quietly adversarial documentary... examines the relationship of the lighthearted world of video fiction to the grinding realities of a society reluctantly coming to grips with the expansion of civil rights... A unique and thoughtful statement that should be seen by anyone involved in the creation of television.


40. Final Report from the Futures Committee to the Membership of New Day Films (May 22, 2002).
yet available in digital form, some libraries and archives wish to convert the particular VHS copy they own into a digital file. The result is that requests have begun to trickle in from purchasers asking permission from distributors and filmmakers to digitize the VHS copies of the films they have already purchased. These requests arise from two institutional needs: 1) growing on-line classes and distance learning programs whose students cannot gather in one place to screen a film at one time and 2) classes where instructors only use clips of films and would like to compile these clips into digital files for ease of use. Because of the express permission granted to educational institutions in the TEACH Act to do just that (discussed in detail in part III. A. below), one would expect these requests to decrease as these institutions become familiar with the new law which does not require them to seek the permission of the copyright holder. With these short and long term concerns in mind, this comment focuses on the following three questions:

(1) What response, if any, is possible or appropriate by documentary producers and distributors, to the new reproduction and performance privileges granted to educational institutions by the TEACH Act to convert portions of analog versions of their films into digital products?

(2) How much technological control against infringement can or should producers and distributors of independent documentaries build into a digital product?

(3) How can and should producers and distributors of independent documentary films restructure licensing agreements to authorize new uses, and contemplate new misuses, of a digital product?

Digital technology may potentially change the terms and the value of a use license for a documentary. Those changes will depend upon the desires of the copyright holder and the licensor. The

41. Id. at 1–2.

42. In e-mail communication with the New Day membership ranging in date from Apr. 2002 to Dec. 2002, members describe requests they have received from purchasing institutions: e-mail from Susan Stern, producer of Barbie Nation, describing request to digitize clips of a title to stream for use in a distance learning program (Apr. 30, 2002, 4:33 PM PST); e-mail from Robert Richter, producer of Father Roy: Inside the School of Assassins, describing a request to convert to CD a VHS tape of an entire production, and to make 50 copies of that CD for dissemination to students in a distance learning program (Dec. 23, 2002, 2:14 PM).

43. Id.

44. However, such requests have been received as recently as Feb. 19, 2004. E-mail from Susan Stern, New Day Member, to New Day membership (Feb. 19, 2004, 1:41 PM PST).
following are some elements to consider when deciding the terms of a film licensed in a digital format.

1. Duration of License

A videotape has a short life of roughly 15 years, while a digital file is potentially immortal, depending on where it is stored. Videotape is composed of plastic strips coated with tiny particles of metal, which arrange themselves in certain patterns when a recording is made. Over time and with normal use, the plastic stretches, the particles drop off or get rearranged, and the image ultimately degenerates. To the best of our knowledge, digital files retain their quality and remain intact as long as they are stored and accessed on current technology. At the moment, the DVD format looks as though it will dominate the market as the next digital delivery system of choice for moving image products in university libraries. While some institutions are beginning to experiment with streamed and served video, most institutions New Day has spoken with are increasingly purchasing titles on DVD and expect to replace current titles on DVD. Served and streamed video seems like a possibility for the distant rather than the immediate future in the minds of many media librarians. But DVD is an imperfect format as well, fragile, subject to scratches and breakage with normal use. And, like all technologies, DVD is subject to what archivists refer to as "equipment obsolescence" meaning that it becomes impossible to access the material because the equipment required to do so is obsolete.

46. Image archivist Rachael Stoeltje expresses strong reservations about characterizing digital files as immortal because, while a file may theoretically have the potential for immortality, in practice, owners of digital material do not convert their material at the rate technology changes. The result is that many, many digital files are lost due to "equipment obsolescence," or the inability to access material because the necessary technology to do so is no longer available. E-mail from Rachael Stoeltje, Kinsey Institute Film Archivist, Indiana Univ., to Gretchen Stoeltje, author (Jan. 20, 2003, 10:21 AM PST).
47. Fisher, supra note 45.
48. See id.
49. See Stoeltje, supra note 46.
51. See id.
52. See Stoeltje, supra note 46.
53. "Equipment obsolescence is simply the disappearance of the equipment needed to access a particular format." Stoeltje, supra note 46.
Equipment obsolescence ceases to be a problem, however, once a file is read because digital data can be easily transformed into increasingly current digital files. If a file is continually reformatted such that it can be accessed by current technology, that file can be ported around from system to system and played as a digital file direct from a hard drive independent of external equipment like DVD players.

Whatever digital format wins this decade's format war, a "life of the tape" term, commonly used in license agreements for VHS sales may not be appropriate for films distributed digitally if all digital files have the potential for immortality.

2. Increased Risk of Piracy Due to Quality of Product

As a composite analog signal, VHS videotape is one of the lower quality videotape formats to which a movie can be transferred. In contrast, digital video is one of the highest image/sound qualities created. Depending on the original acquisition and production formats, digital video generally yields an objectively higher quality product. It is also one of the easiest and quickest to duplicate, barring technological or legal deterrents. To copy a VHS tape, as most readers are aware, one must connect two separate VCR's, patch them accordingly, and record the recorded material in real time. The image degradation is immediately noticeable in a loss of resolution, color distortion, and an increase in "drop-out," linear glitches, which shoot across or sometimes even seem to be tearing a frame. Sound degenerates as well, becoming "muddier" or less distinct at both the high and low ends of the audio spectrum. Pirating high quality digital versions of movies yields a much higher quality copy, for much less effort expended than does pirating VHS tape.

Duplication results in a technological clone, so that the quality of the copy is the same as that of the original. Copying digital video files is essentially the same convenient and simple drag and drop desktop process as copying other digital files. The market for pirated social issue documentary films is probably very small or non-existent. As far as most New Day producers are aware, they have not lost significant revenue to illegal copying of VHS tapes. But University

54. See Stoeltje, supra note 46.
55. See id.
56. E-mail from Heather Weaver, Senior Online Editor, Bay Area Video Coalition, to Gretchen Stoeltje, author (Jan. 17, 2003, 10:52 AM PST).
57. E-mail poll of New Day Films membership, Jan. 6–15, 2003.
librarians have mentioned that professors might be making illegal copies of tapes, especially as their institutions experience budget decreases for media purchases. Furthermore, depending on the legal and technological knowledge of the archivists in charge of a collection, digital conditions may enable infringement, willful or negligent.

3. Economics

While the monetary value of a documentary license would seem to be increasing because of improvements in the life and quality of the product some librarians have advised that New Day should not expect to be able to charge more for a new license, regardless of the difference in quality. Media librarians indicated that New Day prices are already expensive, and they would not be able to pay more for New Day films in digital forms than New Day currently charges for analog copies and analog licenses. Therefore documentaries need to be available at prices their purchasers can afford, and distributors need to find a solution to this emerging economic problem. How to manage that issue is the subject of Part V of this comment.

III. NEW ISSUES ARISING FROM NEW LAWS

A. The TEACH Act

On Nov. 2, 2002, Congress resolved the questions from institutions about authorizing the digitization of portions of documentaries on analog tape for purposes of Distance Learning programs. The TEACH Act, whose very name embodies the tension it attempts to resolve (Technology, Education and Copyright Harmonization) is primarily a revision of § 110(2), and also § 112(f) and § 802(c) of the Copyright Act, facilitating educator use of copyrighted materials for purposes of distance learning. The Act provides that by complying with some very rigorous requirements,
§ 110. Limitations on exclusive rights: Exemption of certain performances and displays.

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if—

(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission;

(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—

(i) students officially enrolled in the course for which the transmission is made; or

(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

(D) the transmitting body or institution—

(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

(ii) in the case of digital transmissions—

(I) applies technological measures that reasonably prevent—

(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

(bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

The TEACH Act further added this definition at the end of Section 110:

In paragraph (2), the term "mediated instructional activities" with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to
accredited, nonprofit, educational institutions may, without infringing copyright, use certain copyrighted works without permission from or paying royalties to, the copyright owners. It also specifies exactly which types of works may be used, and which may not. The changes the Act made to § 112(f) apply to New Day's short-term distribution questions about digitizing parts of analog copies of films. This revision expressly describes the limited conditions under which analog materials may be digitized, and they are:

1. when no digital version is available to the institution or

the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

For purposes of paragraph (2), accreditation—

(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.


64. The amended section is as follows:

(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if —

(A) no digital version of the work is available to the institution; or

(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).

(2) the digital version of the work available is subject to technological protection measures, the circumvention of which would violate Section 1201.

The amount that may be digitized is determined by § 110(2) which allows for the performance of copyrighted works in "reasonable and limited portions." This would suggest that the digitization of clips of films for purposes of Distance Learning will be permitted under the TEACH Act, without seeking authorization from the copyright holder.\(^65\)

**B. The Digital Millennium Copyright Act**

The Digital Millennium Copyright Act of 1998 (the DMCA) is a statute designed to protect copyright owners in the digital age. It tries to accommodate and foresee legal implications of new digital

\(^65\) It is also likely that 17 U.S.C. § 107, the Fair Use Doctrine, would provide authority for digitizing analog works for educational purposes. Though there is no exact case on point, the House Report accompanying the 1976 Copyright Act contains numerous discussion points which might support such reproduction as a non-infringing, fair use. Referring to the new clause in the statute's first sentence, the report notes "[t]he newly added reference to 'multiple copies for classroom use' is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of the class." H.R. REP. NO. 94-1476, at 5679 (1976). Though this passage refers to the reproduction of printed material, and though the 1976 Copyright Act, of which § 107 is a product, was passed before the full blown emergence of digital technology, indeed even of the analog format VHS videotape, the lawmakers contemplated such technological changes and made an express effort to write a statute that would be applicable to changing technological conditions: "[T]here is no disposition to freeze the doctrine in the statute, especially during a period of rapid, technological change." H.R. REP. NO. 94-1476, at 5680 (1976).

Furthermore, House Conference Report No. 107-685, to accompany consideration of the passage of the 21st Century Dep't of Just. Appropriations Authorization Act, of which the TEACH Act was a part, reconfirms the relevance of Fair Use to distance education. Citing the Copyright Register's Report, the Conference report notes:

Fair Use is a critical part of the distance education landscape. Not only instructional performances and displays, but also other educational uses, such as the provision of supplementary materials or student downloading of course materials, will continue to be subject to the fair use doctrine. Fair use could apply as well to instructional transmissions not covered by the changes to section 110(2) recommended above. Thus, for example, the performance of more than a limited portion of a dramatic work in a distance education program might qualify as a fair use in appropriate circumstances . . . . The Register's Report also recommends that the legislative history of legislation implementing its distance education requirements make certain points about fair use. Specifically, this legislation is enacted in recognition of the following:

- a. The fair use doctrine is technologically neutral and applies to activities in the digital environment; and
- b. The lack of established guidelines for any particular type of use does not mean that fair use is inapplicable . . . .

technologies. According to Glynn S. Lunney, Jr., the DMCA is "driven by the widespread dispersion of the ability to make near-perfect and inexpensive copies [and] aims to replace copyright's traditional approach of direct legal action against each individual infringer with a technological lock effective against all would-be infringers." Lunney is referring to the protection of encrypted work that the law ensures in its anti-circumvention provisions. These provisions, found in § 1201 of Title 17, expressly prohibit the unauthorized access of digital material by criminalizing the circumvention of encryption technologies. Though there is no express prohibition against individual copying of encrypted files, there is an implied one: after all, if you can't access it, how can you copy it? Encryption together with the anti-circumvention provisions of the DMCA would seem to provide the answer to the question of copyright protection of digital materials. The grant of the right to control access to copyrighted work together with the means to technologically police the license looks like an attractive option, especially for independent filmmakers who typically do not have the time or resources to pursue legal action against infringement.

However, the DMCA has many challengers who question its constitutionality on grounds that it creates extralegal protection to copyright holders, wrongly limits the rights of non-infringing users, and stifles the creativity the Constitution purports to promote. The law has been described as the latest in a series of laws designed to transform copyright from a legal to a technological concept, which has the effect of privatizing copyright. The shift to policing content use through technology instead of the legal system affects the ability of non-copyright owners to use the copyrighted content in non-infringing ways. The Fair Use Doctrine, for example, may allow

67. Id. at 819.
70. "The Congress shall have Power ...To promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." U.S. CONST. art. I, § 8, cl. 8.
71. See Jackson, supra note 25, at 609.
filmmakers to make unauthorized use of copyrighted work in the creation of new creative content. A documentary filmmaker seeking to view and acquire another filmmaker's footage for a new documentary film in which the use of the footage would satisfy current Fair Use requirements would not be able to legally access the footage if it is only available to her in digital form and encrypted. The reason for this is that the DMCA prohibits the unauthorized circumvention of encryption technologies in order to access encrypted work. Thus such legal uses under the Fair Use Doctrine are severely limited by the DMCA's protection of technological control over content. Faced with this scenario, filmmakers will be forced to locate the copyright holder and request source material from them directly. This route is currently unnecessary because material is still available in other formats and from other sources. However, when the moment arrives in which most material is only available in digital formats and encrypted, it will be logistically difficult and time consuming to secure the material without breaking the law. It also means risking a denial of this legal use due to the copyright holder's lack of cooperation, which might take the form of a simple refusal to provide material or even a lawsuit over a potentially non-infringing use.

Furthermore, related anti-circumvention provisions discourage the development of new technologies and have been enforced by courts in the last three years. In two highly controversial cases, *Universal Studios v. Reimerdes* and *RealNetworks, Inc. v. Streambox, Inc.*, the defendants were all found to be in violation of the DMCA's anti-circumvention provisions, not because they themselves infringed on copyrighted material, but for facilitating alleged infringement by others, by developing and distributing anti-circumvention

---

72. See discussion infra Part II.C.
74. Producer Vivian Kleiman notes that for *Color Adjustment*, footage was acquired by "taping re-runs, the network of hoarders and dealers and traders of old TV shows, home video sellers, and even blockbuster video. We would try for 'best possible format' but VHS was used as source in several cases." E-mail from Vivian Kleiman, Producer, to Gretchen Stoeltje, author (July 21, 2003, 1:08 PM EDT) (on file with author).
technologies.\textsuperscript{77} The legal problem with these holdings is their potential for discouraging future development of technology.\textsuperscript{78} If technologists begin self-censoring their creative endeavors for fear of prosecution, we, the public and the market, will suffer a substantial decline of intellectual property. This potential effect discourages invention and authorship for the enrichment of the public, frustrates Congress’s constitutional duty to “promote the Progress of Science and useful Arts,”\textsuperscript{79} and weakens our technology market and the advancement of culture in general.

Whether encryption can be an effective, actual deterrent against unauthorized copying is unclear. According to several engineers at Microsoft,\textsuperscript{80} writing in 2002, encryption may never be fully successful. These authors theorize that hackers will always be able to invent technology to get around encryption, and spread that technology widely to average users. In that case, encryption may not literally protect the work, but only create a new form of liability for those who are able to get around it. Essentially then, because it is backed by a law, encryption may only provide a new basis for a law suit.

C. Short Term

Since the passage of the TEACH Act, there is no question that libraries now have the express statutory permission to make digital clips from analog tapes. An immediate legal issue is what recourse, if any, documentary filmmakers have to prevent these library-digitized files from representing the works forever. The requirements of the TEACH Act are so numerous and complex that it seems unlikely that a file could escape and multiply, a scenario commonly referred to as downstream copying. A list of selected requirements includes:

\begin{itemize}
  \item[(1)] Institutional policy makers must provide copyright information to faculty, staff and students, and must make content available only to enrolled students;
  \item[(2)] Information technology officials must apply technological means to prevent retention of the files by
\end{itemize}

\textsuperscript{77} See infra note 78.

\textsuperscript{78} “The provision was enacted to prohibit hackers from obtaining digital quality works and pirating them for profit. Once in force, the provision accomplished that goal while contemporaneously revealing its flaw: stifling technological creativity.” Brannan, supra note 69, at 276.

\textsuperscript{79} U.S. CONST. art. I, § 8, cl. 8.

receivers, and must not themselves tamper with any restrictive codes or other embedded management systems built into the product;

(3) Instructors must make use only of material directly related to the class, and that material must conform to enumerated lists of allowed material; instructors must also oversee the performance or display of that material.\(^8\)

But what is not clear is what duty the TEACH Act imposes on educators to producers and distributors of content who have simply not yet transferred their work to a digital format. As explained above, the Act allows digitization of limited amounts of analog content. It also allows limited long-term retention of those copies, which they may retrieve "for future uses consistent with the new law."\(^8\) Thus it is possible that an institution will essentially replace tapes with these digitized clips. There is no express requirement that they re-purchase those works which they have digitized, and replace the files, should those works become available in a digital form in the future.

Furthermore, the second condition allowing for digitization of analog materials, found in \(\text{§} \) 112(f)(2)(B), creates another long term problem for copyright owners whose market is primarily educational. The provision authorizes an institution to digitize analog versions of works if "the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use to section 110(2)."\(^8\) This means that even when documentary filmmakers are able to deliver their work digitally, and choose to do so using technological copyright protection tools, an institution may digitize parts of that documentary from an analog version. The institution may not even be required to purchase the digital version. If it can ascertain before purchasing the product that it is encrypted

---

81. See CREWS, supra note 6, at 5–9.

82. Id. at 8; See also H.R. CONF. REP. NO. 107-685, at 231 (2002) ("The material to be performed or displayed may, under the amendments made by the Act to section 112 and with certain limitations set forth therein, remain on the server of the institution or government body for the duration of its use in one or more courses . . . .")

83. For an exhaustive analysis of the meaning of “available” as used in the statute, see Tomas A. Lipinski, Legal Reform in an Electronic Age: Analysis and Critique of the Construction of S. 487, The Technology, Education and Copyright Harmonization (TEACH) Act of 2001, 2003 BYU EDUC. & L.J. 95, 159–61 (concluding that “available” is not the same as saying “purchased,” “licensed” or “in the possession of” but rather available in the marketplace, and that the technological protection requirement allowing digitization of analog copies can be triggered by an institution’s ascertaining that the digital copy available to it is technologically protected, not necessarily by purchasing it).
against unlawful copying, it may, without infringing copyright, digitize the analog version since the digital version available to it for purchase is protected, thereby satisfying a condition under the statute for lawful digitization. For documentary producers and distributors whose only real market is the educational market, this provision presents a difficult choice: distribute without any copy protection, or distribute with protection and risk having the analog version of a film copied by institutions, potentially eliminating the demand for future purchases of the film altogether. There are two potential harms from this scenario.

1. Economic Harm from Loss of Future Digital Licenses

Depending on each distributor’s decision regarding the pricing of digitally distributed documentaries, there is possible economic harm from this permitted digitization. If, when the distributor of a product begins to license films digitally at higher costs than she did the analog version, and the institution has no need of the digital version because it simply continues using the clip it originally digitized, then the distributor loses the sale of the more valuable license. Since the institutions are not required to re-purchase that product in digital form when it becomes available as such, the institution undercuts the copyright holder’s future sales in a digital product. The extent of this harm will be measured by each distributor’s valuation of a digitally licensed vs. analog licensed films—if there is no price difference, there is no loss. If there is a price difference then, the loss is the difference between what the institution paid for an analog film and what it would have paid for a digital version.

There are works excluded from the range of permitted materials under the TEACH Act, and one category is: “work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.” According to Kenneth Crews, this limitation is meant to protect the market for educational materials that are available in digital forms. However,
the statute is silent as to what duty, if any, institutions owe copyright holders whose work will be available in digital form but is not yet. Furthermore, if those digital products which are available to institutions are encrypted against unauthorized copying, the institutions will be allowed to digitize the analog copies of the work.

2. Harm from Violation of Filmmaker’s (would-be) Moral Right

The second type of harm is to an artist’s moral right, a natural right arising from a conception of the work as an extension of the author’s self. In the case of a documentary film, a digitized version of a VHS copy of a film could look and sound different enough from the original, high quality master tape, so a director would not want to claim it as his or her work. This might be true even if the work is converted using the highest quality conversion process possible. The TEACH Act does not specify the exact process an institution must use in order to convert an analog videotape into a digital file. For example, although it is highly unlikely that an informed instructor or librarian would authorize such compromising conversion techniques as shooting the video off a monitor using a digital camera, the statute and its accompanying documents do not prohibit this, nor any other, method.

The legal protection filmmakers would most benefit from in order to prevent such alteration to their work is an artist’s right of attribution, granting them the right to claim authorship in works they have made, or in works to which changes have been made which have the artist’s approval, and the right of integrity, or the right to insist that the work not be mutilated or distorted. These rights provide

---

...educational materials or to all materials having educational value. The exclusion is limited to materials whose primary market is “mediated instructional activities,” i.e., materials performed or displayed as an integral part of the class experience, analogous to the type of performance or display that would take place in the classroom setting.” At the same time, the reference to “digital networks” is intended to limit the exclusion to materials whose primary market is the digital network environment, not instructional materials developed and marketed for use in the physical classroom.

Id. at 8. Thus it is not at all clear that the Act intends to protect future markets for documentary films which arguably fall into the unprotected categories of “materials having educational value” or “instructional materials developed and marketed for use in the physical classroom.”

86. Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the
protections against plagiarism, against being associated with mutilated or altered versions of their work, which they have not authorized, and against the mutilation or alteration itself. While such protection is granted to authors of certain enumerated works of visual art under the Visual Artist Rights Act of 1990, the Act expressly excludes motion pictures from its class of protected art. Under current law, the right to disclaim a work, or to pursue a remedy for harm to a filmmaker’s reputation as a result of being associated with an inferior version of his or her work is not available to filmmakers.

At the moment, the gap between the institutional need to convert its library to digital formats and a documentary filmmaker’s ability to provide her films in digital formats has been filled by Congress. It is now legally permissible for librarians to reproduce clips from these films digitally from VHS sources without the filmmaker’s permission. Without an agreement from those institutions to replace that work with higher quality work when it becomes available, filmmakers face

right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.


87. See id.


89. “Only the author of a work of visual art has the rights conferred by subsection (a) in that work.” 17 U.S.C. § 106A(b). Films are excluded from the class of protected art. That class is called “a work of visual art” and is defined by the Copyright Act in the following way: A “work of visual art” is—(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include—(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii).


90. Recent efforts to seek protection for a right of attribution under the Lanham Act have failed. See Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041, 2047–49 (2003) (holding that the Lanham Act was intended to protect consumers from misleading designations of origin, not to protect creativity or originality, and determining the actual originators of the ideas expressed in the book and the television series would pose serious practical problems).
the possibility that viewers will experience audiovisual work that no longer adequately resembles the original documentary work. Depending on the economic value difference between an analog and a digital version of the work, a filmmaker may also suffer economic loss of future license sales of the films as digital products.

D. Long Term

In the long term, when documentary filmmakers are distributing their work digitally, the DMCA and all its implications begin to have more significant effects on licensing and pricing decisions for these filmmakers. Eventually, when the costs of converting analog works to digital formats decrease sufficiently that low-budget, independent filmmakers can afford to do so, they will have to decide the kinds of use licenses to create, how to police them (either contractually only or technologically, using Digital Rights Management tools, or a combination of both), and what to charge for them. Delivery formats will determine in some part the license form. For example, an unencrypted DVD sold to an educational institution, authorizing performance rights for non-commercial purposes, would sell with a different set of terms, and most likely, for much more money than, a pay-per-view, one-time download or streamed video with built-in license policing technology. How filmmakers and distributors choose to license their work potentially embodies legal conflicts between how much technological copyright protection they want—and can afford—for their own work, and how much access they want to provide other users of their works for non-infringing purposes.

The second question independent documentary filmmakers must ask themselves in shaping new licenses is whether they want to seek copyright protection from the same legal mechanism that would restrict their legal use of one of the most important creative documentary tools: the Fair Use of the copyrighted materials of others. The DMCA also threatens to inhibit the development of media technology of which filmmakers have always been great beneficiaries. This form of protection, therefore, puts filmmakers in the position of imposing restrictions on their work that might similarly hamper their own future projects. It may also leave them vulnerable to lawsuits from other would-be Fair Users who might

91. See discussion infra Part II.F.
92. See discussion infra Part II.C, II.F.
93. See discussion infra III.B.
94. MCCARTHY & ONDAATJE, supra note 16, at 20, 40.
have a legal claim to use their work in non-infringing ways. The gains of accepting § 1201’s protection, technologically policed anti-piracy protection, therefore, may not be worth the costs to creative integrity and the loss of crucial materials.

The DMCA forces filmmakers to weigh their interest in copyright protection with their interest in access to visual culture. The relevance of this issue to the legal community is that the question facing filmmakers indicates yet another stress point in the battle between copyright owners and the public domain created by the DMCA. In this case, filmmakers are both creators and users of visual culture. Their ability to access that culture will have legal and economic effects on the future quality and proliferation of independent documentaries.

The TEACH Act further complicates the decision filmmakers must make with regard to copyright protection. While the Act protects the market for educational materials distributed digitally, it also allows digitization of analog work when a digital copy is encoded with technological protection measures. Therefore, a filmmaker’s choice to take advantage of technological protections may result in increased digitization of their analog products, which might in turn decrease sales of future licenses for the film as a digital product.

IV. PROPOSAL

A. Emerging Licensing Models

Two current licensing models have recently emerged for digitally distributing media. The more restrictive model is MovieLink, a recently launched online movie rental service; the more permissive model is the Creative Commons, “a non-profit dedicated to promoting the creative reuse of intellectual works.”

1. The MovieLink Approach

MovieLink is a joint venture comprised of Hollywood studios MGM, Paramount Pictures, Sony Pictures Entertainment, Universal and Warner Bros. It aims to grow the home video-on-demand market for Internet movie rentals. For a fee of $2.99 to $4.99, private individuals may download first-run and classic titles for viewing on


the PC onto which it was downloaded.\footnote{97} The downloaded movie or file survives on the system for either 30 days or 24 hours from the time the "Play" button is hit, whichever comes first.\footnote{98} This term of the license is enforced technologically by the MovieLink Manager Software, the Digital Rights Management system created to police the license.\footnote{99} This means that at the end of 30 days, or 24 hours after the viewer first hits Play, the file will be deleted from the hard drive onto which it was downloaded. The license also prohibits copying or moving the file from its originally stored location on the same hard drive,\footnote{100} as well as any attempt to circumvent any of the Digital Rights Management or other security related tools incorporated into the software.\footnote{101}

There are several limitations to this service keeping it from immediately replacing other home viewing systems like pay-per-view cable:

(1) time: with a cable modem, the download takes 17 minutes; with a digital subscriber line, the download takes about an hour and a half;\footnote{102}

(2) space: digital video files take up a significant amount of hard drive space which is more or less an issue depending on how much ROM a target computer has;

(3) quality of viewing experience: the current viewing environment raises the question whether viewers want to watch movies on their computer screens.

Josh Bernoff, an analyst with Forrest Research, says that there is a market for video on demand, not over the Internet, but rather on cable boxes: "The desire to deliver movies down to the computer is targeting a niche market, and it's just the wrong place to watch TV."\footnote{103} Factors influencing the relative attractiveness of this delivery option to consumers are: 1) the image quality of one's computer screen; 2) whether that computer is connected to a sophisticated sound system; and 3) where the screen is located relative to where the viewer sits for the duration of the film.


\footnote{98} Id.

\footnote{99} MovieLink Terms of Use, supra note 10, at ¶ 4(b).

\footnote{100} Id.

\footnote{101} Id. at ¶ 4(c)(xvii).

\footnote{102} Olsen, supra note 97.

\footnote{103} Olsen, supra note 96.
But MovieLink seems to have no illusions about the limitations of its present application and considers its recent launch simply a long-term investment, a contribution, according to CEO Jim Ramos, to “the development of consumer behavior to view paid-for (downloadable) movies over (Internet Protocol) [which] takes infrastructure and marketing investment, (as well as) a large penetration of the existing broadband market.” The bright future in which they are investing is one some believe awaits on-demand Internet entertainment once viewers can download films and view them through a television.

2. The Creative Commons Approach

At the other end of the ideological spectrum is the Creative Commons, a non-profit organization based at Stanford University and brainchild of Stanford Law Professor Lawrence Lessig. Inspired by the open-source and free software movements, Creative Commons has created machine-readable copyright licenses, available free of charge. These licenses are designed so that a copyright holder can customize the legal terms of disseminating their creative work—for free—according to their particular needs, within the scope of copyright law. Thus, explains Lessig,

[M]any copyright owners are willing to share their works with others without charging a fee. Public exposure benefits both the copyright owners and the users and creators who want access to existing works. But how can a creator describe the terms on which he or she is sharing a creative work? That’s where the creative commons licenses come in.

The procedure for using such a license is completely executed over the Internet and can be accessed by anyone with a current enough computer. For example, a filmmaker who would like to make her film available to others free of charge for non-commercial use can go to the Creative Commons web site, download the licensing software, and customize the use license according to her desires (within the legal baseline defined by Copyright law). This mix-and-match process creates the terms of the license from available permissions, prohibitions and requirements legally granted to

104. Id.
105. Id.
106. Press Release, Creative Commons, supra note 95.
107. Id.
copyright holders to control. Thus, a filmmaker can permit an educator to show her film in the classroom (a non-commercial use), requiring that her authorship of it must be recognized (an attribution requirement), and prohibiting the creation of derivative works without her further permission. The Creative Commons web site provides a clear and concise explanation of this customizing process:

Choosing a License

Offering your work under a Creative Commons license does not mean giving up your copyright. It means offering some of your rights to any taker, and only on certain conditions. What conditions? Our site will let you mix and match such conditions from the list of options below. There are a total of eleven Creative Commons licenses to choose from.

Attribution. You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give you credit.

Noncommercial. You let others copy, distribute, display, and perform your work — and derivative works based upon it — but for noncommercial purposes only.

No Derivative Works. You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

Share Alike. You allow others to distribute derivative works only under a license identical to the license that governs your work.

---

108. Licenses Explained, Creative Commons, at http://creativecommons.org/learn/licenses (last visited Jan. 8, 2003).

109.

Example: Jane publishes her photograph with an Attribution license, because she wants the world to use her pictures provided they give her credit. Bob finds her photograph online and wants to display it on the front page of his website. Bob puts Jane’s picture on his site, and clearly indicates Jane’s authorship.

Id. 109.

110. “Example: Gus publishes his photograph with a Noncommercial license. Camille incorporates a piece of Gus’s image into a collage poster. Camille is not allowed to sell her collage poster without Gus’s permission.” Id.

111. “Example: Sara licenses a recording of her song with a No Derivative Works license. Joe would like to cut Sara’s track and mix it with his own to produce an entirely new song. Joe cannot do this without Jane’s permission (unless his song amounts to fair use).” Id.
Note: A license cannot feature both the Share Alike and No Derivative Works options. The Share Alike requirement applies only to derivative works.\textsuperscript{112}

3. Comparison

The biggest differences between the MovieLink license and the Creative Commons licenses are their relationships to copyright law, to rights management, and to income. MovieLink takes advantage of Copyright's fullest protection including the DMCA's enforcement of anti-circumvention technologies, which help to control and define viewer use. These types of technological protection systems, including Digital Rights Management tools and encryption, are incompatible with the terms of the Creative Commons license:

If a person uses DRM tools to restrict any of the rights granted in the license, that person violates the license. All of our licenses prohibit licensees from "distributing the Work with any technological measures that control access or use of the Work in a manner inconsistent with the terms of this License Agreement."\textsuperscript{113}

Ideologically, the reasoning behind this legal distinction is that Creative Commons wants to promote increased use of intellectual property between users, to the extent desired by the copyright holder. The goal of this approach is to encourage a healthy flow of intellectual property, rather than to restrict it, which they maintain technological mechanisms like Digital Rights Management systems achieve.\textsuperscript{114}

\textsuperscript{112.} Example: Gus's online photo is licensed under the Noncommercial and Share Alike terms. Camille is an amateur collage artist, and she takes Gus's photo and puts it into one of her collages. This Share Alike language requires Camille to make her collage available on a Noncommercial plus Share Alike license. It makes her offer her work back to the world on the same terms Gus gave her.

\textit{Id.}

\textsuperscript{113.} Frequently Asked Questions, Creative Commons, \textit{at} http://creativecommons.org/faq (last visited Jan. 8, 2003).

\textsuperscript{114.} \textit{[W]e prefer to describe the technical aspect of our work as digital rights description. Whereas digital rights management tools try to prevent certain uses of copyright works and restrict your rights, we're trying to promote certain uses and grant you rights. Instead of having software say, "No, you cannot modify this file," we want it to say something more like "The author will let you modify this file, but in return, give her credit."}

\textit{Id.}
MovieLink and the Creative Commons differ functionally in several significant ways. But together they create a spectrum of options for licensing in the digital age that can also be used for the distribution of documentary films. Somewhere between the two models, filmmakers who both want to be paid for their work as well as enrich the public domain may find a solution.

B. Suggestions for the Short Term

For the interim period described above, purchasers who are no longer required to secure copyright owners' permission to digitize clips from VHS copies of work they have already licensed, might still be encouraged to do so under new license agreements with the copyright holders. Whether the law of Contracts and the terms of a license trump express exemptions in the Copyright Law is currently governed by ProCD, Inc. v. Zeidenberg. The court in that case found that, under section 301(a) of the Copyright Act, in order for a contract to be preempted by copyright law, the rights created by that contract must be "equivalent to any of the exclusive rights within the general scope of copyright." After finding that, by its very nature, a contract does not create equivalent rights to those within the general scope of copyright, the court concluded that a contract will therefore not necessarily be preempted by copyright law. Its terms, in other words, might be enforced. This unwillingness to preempt license terms with copyright law is further evidenced in

115. Creative Commons is working to help artists license works free of charge whereas MovieLink charges for their product. MovieLink maintains a database of licensed content and acts as a distributor of that content, as well as the creator of the license for that distribution; Creative Commons only creates and provides licenses for others to use in distributing their work.
116. See discussion infra Part III.C.
117. 86 F.3d 1447 (7th Cir. 1996).
118. Preemption with respect to other laws: (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
119. ProCD, 86 F.3d at 1454.
120. Id.
121. Id. at 1454–55.
Congress' rejection, in an earlier version of the DMCA, of an addition to section 301 which would have expressly overridden the terms of any non-negotiable license which restricted any of the limitations specified in sections 107 through 114, 117 and 118. This means that there is no express provision stating that §112(f) of the Copyright Act will preempt a licensing term. In fact, the effort to codify that specific idea failed. The House Conference Report accompanying the TEACH Act addresses this issue, declaring that the Act itself does not change the issue as it stands. "It is the view of the committee that nothing in this Act is intended to affect in any way the relationship between express copyright exemptions and license restrictions."

The report by the Register of Copyrights to Congress on Digital Distance Education, which preceded the passage of the TEACH Act, grappled extensively with how to balance the competing interests of copyright owners, who wanted to meet the needs of Distance Educators with continued licensing, and educators, who wanted to change the law to create express exemptions to eliminate the need for licensing. In a section summarizing these interests and the possibility of creating a mutually beneficial solution, the report notes:

As indicated above, no consensus or clarity emerged as to the extent to which the availability of licenses should be considered in assessing eligibility for any exemption. As a general rule, educators and libraries focused on the need for an exemption regardless of whether licensing was possible. On the other side, copyright owners indicated that licensing was generally appropriate. Few took an intermediate position on this issue or addressed the specific question of the relationship between licensing options and eligibility for exemptions.

The above text seems to invite suggestions for some compromise solution between both extremes. Following are the terms of one such possible solution. Those purchasers who want digitized versions of films before filmmakers themselves can provide them must:

(1) professionally digitize the clip in question at their own expense;

---

125. Id. at 128-29.
126. Id. at 139.
(2) provide the copy protection to the file required by the TEACH Act in a best effort to prevent downstream copying by recipients of the files;

(3) promise to buy a digital version of the documentary from the distributor when it is available, at a reduced rate reflecting the difference between an analog and a digital license for the film, and the out of pocket expenses incurred by the purchaser to digitize the clip from the analog version; and

(4) promise to destroy the file created from the VHS upon receipt of a new, digital version.

This solution fills the immediate needs of the institution to provide digital media for current teaching use, and helps prevent the film from falling out of use in particular classes because of downtime in its availability. It also provides a guarantee to the maker that, when available, they will be compensated for the value of the new use license, which the purchaser is already enjoying at the price of the old license. The discount of the digital version to the purchaser reflects the fact that the purchaser was required to cover the conversion cost of the product for the interim period but not discriminated against in relation to first-time purchasers buying digital products. What purchasers are paying for when they finally license a digital version of the work, then, is a replacement version, from the distributor, of much higher technical quality (created and shipped at the distributor's expense), for the licensed work whose new use terms they already enjoy.

Raymond Nimmer explains that "the general rationale for enforcing contracts rests in sustaining a market economy and in the basic theme of U.S. law that agreements between and among parties should be enforced in the absence of abuse,"127 and where "there are not clearly overriding public policies against a particular contractual term."128 The terms suggested above support a functioning market economy by getting educators the product they need when they need it, as well as the interests of filmmakers and distributors who should not be forced to give away that product due to a loophole in the statute. They also reflect the desire on the part of many filmmakers to control the quality of the work attached to their name. These economic and artistic interests are assumed to be furthered by

128. Id. at 126.
licensing arrangements which "preserv[e] and protect[ ] the right- 
owner's control of its property in order to enhance incentives 
encouraging the creation of the informational asset. Both patent and 
copyright law are grounded in a policy to enhance this incentive." 129

C. Suggestions for the Long Term

Licensing of documentaries delivered digitally could involve a 
creative blend of restrictive as well as permissive terms which each 

distributor or maker can configure. Specifically, filmmakers and 
distributors can combine restrictive licenses for certain time periods 
or for certain versions of a product, with more permissive licenses for 
the same product during different time periods, or for different 
versions of the product. There might be numerous ways to combine 
these strategies, but the approach suggested here is reflected in the 
Creative Commons response to the question: "If I choose the 
noncommercial license option, can I still make money from my 
licensed works?"

Absolutely. The "noncommercial use" condition applies only to 
others who use your work, not to you (the copyright holder). 
When other people use or trade or copy your work, they cannot do 
so for "monetary compensation or financial gain," unless they get 
your permission.

One of our central goals is to encourage people to experiment with 
new ways to promote and market their work. In fact, we designed 
the noncommercial license option to be a tool to help people make 
money from their work, by allowing them to maximize the 
distribution of their works while keeping control of the commercial 
aspects of their copyright.

Take this example: You license your photograph with a 
noncommercial license and post it on your website. An editor at 
Spectacle, a for-profit magazine, comes across your photo and 
wants to use it for the next issue's cover. Under the 
noncommercial term, the editor could copy your photograph and 
show it to her friends and co-workers, but she would have to strike 
a separate deal with you (for money, if you're smart) to use it for 
the magazine. 130

129. Id. at 127.
130. Licenses Explained, Creative Commons, supra note 108.
Another example offered in conversation by Creative Commons Executive Director Glenn Otis Brown131 is a musician who might want to license an alternate version of a popular song, perhaps an acoustic version of a well-known electric song, for non-commercial purposes free of charge, with the idea that giving away the free acoustic version would generate more sales for the more popular electric version.

A real and recent example of this creative blend of licensing choices is Cory Doctorow's new novel Down and Out in the Magic Kingdom, published in hard copy by science fiction publisher Tor Books and simultaneously posted for free, using a Creative Commons license, over the Internet.132 Doctorow cites the difficulty of exposure and lack of publishers' promotional resources for first-time novelists as reasons why he chose to make his novel available for free. He hopes that the increased readership resulting from the free license will generate sales for the hard copy as well as help to boost his reputation, a long-term investment in his professional future.133

Documentary filmmakers can learn from these strategies. Conveying some rights to a short version of a film for a certain period of time for free could work as a marketing or promotional tool to support the sale of the complete work. Such a strategy can also work towards some reconciliation between the protection filmmakers need and the continued exchange in intellectual property they currently enjoy. One strategy to consider would be for filmmakers to distribute their films digitally under fairly restrictive licensing terms, controlled by Digital Rights Management technology, for its expected most profitable period, for example its first five years in distribution. Taking into account the permission granted to institutions by the TEACH Act to digitize analog copies of work protected by copy protection mechanisms, filmmakers might want to consider distributing a film on DVD, for example, with an embedded one-time copy limitation so that an institution would not be able to copy from

131. Interview with Glenn Otis Brown, Executive Director, Creative Commons, Stanford University, in Palo Alto, Cal. (Jan. 3, 2003).
133. Brown, supra note 132.
the analog version, but would also not be able to make multiple copies from the original purchased from the distributor. After this initial income-generating period, the film could be made available, in its original or perhaps shortened form, free of charge for non-commercial purposes, under a license like those created by the Creative Commons. This would mean that universities who wanted to use it right away would be able to do so for a fee, but after that could keep using it, or some form of it, for free. For example, perhaps in its free form it would only be available as a streamed clip which could not be saved or copied, thus reducing the chances of piracy, and again, increasing an interest in the sale of the entire work. Or perhaps this free clip could precede the release of the film and accompany the initial profit-making distribution effort, acting as an advertisement for the whole film. The possible combinations for the ways products can be given away in the service of creating more sales and more viewings are many: free vs. for sale, alternate cut vs. original cut, clip vs. entire length, for sale initially/free later. These strategies can be applied to choices for one work, but they can also be applied to many works by one director, or many titles in one collection. One intangible value of continued use of films is name recognition, of both the title and the filmmaker. While that is harder to put a monetary value on than actual sales, it does contribute to the ongoing career and future work of filmmakers and their distributors. Thus, in the name of enlightened self-interest, filmmakers' decisions to provide freer access to their works, in some form, at some point in time, may not only contribute to an open flow of trade in intellectual property which restrictive licensing alone would jeopardize, but it may also act as marketing for those works, as well as keep the filmmaker's name alive.

V. CONCLUSION

While the anti-circumvention provisions of the DMCA provide what seems like necessary protection to independent documentary filmmakers, they also inhibit their use rights of other works under the Fair Use Doctrine of the Copyright Act, upon which they often rely in making new work. Choosing technological copyright protection may also work against copyright holders like social issue documentarians whose work is marketed primarily in the educational market because it triggers the ability of institutions to digitize clips

from analog versions of the work, possibly decreasing future licenses of the work in digital forms. Therefore, in considering licensing options for digital distribution, filmmakers and distributors of educational documentaries must decide where they stand with regard to the current scope of copyright protection. Their legal choices are many, from very restrictive to completely permissive with regard to their own work. Because they find themselves on both sides of the Fair Use question, they face the possibility of both benefiting from the full scope of copyright protection while at the same time, by the same statutory provision losing access to important creative tools currently available to them under law. They also risk a potential loss to reputation from low-quality, unauthorized and uncompensated substitute uses of their work authorized by the TEACH Act. What is at stake are filmmakers' copyright protection, their ability to keep using others' copyrighted work for non-infringing purposes, their ability to continue controlling the quality of their work, and a possible loss of income from their work. In deciding how to license, the economic as well as the inter-industry relational benefits of claiming more or less legal protection in a media field which both creates and takes liberally from visual culture must be weighed. Fortunately, copyright holders have a fair amount of flexibility in controlling their products and can use a combination of both restrictive and permissive licenses that will continue to produce revenue, as well as contribute to an enriched public discourse.
