

INDEPENDENT
ONLINE



Coming into Frame

A conference at Duke Law School looks at how filmmakers and musicians get in trouble with the law

BY FIONA MORGAN

Documentary films are records of our culture, and as they gain popularity, they're also becoming a hybrid of information and entertainment, a viable venue for alternative ideas and cultural criticism. But documenting a culture full of copyrighted images, sounds, words and ideas can be legally treacherous.

April 7, 2004

ARTS FEATURE

Duke Law School added another dimension to the Full Frame Documentary Film Festival by hosting "Framed!" a day-long conference on "how law constructs and constrains culture." It brought faculty at the law school together with filmmakers, entertainment lawyers, academics and others to discuss how legal issues affect the practical and creative concerns of making films and music. The day reached its climax when a musician cursed out a lawyer in the audience.

Chris Hegedus, co-director of *The War Room* and *Startup.com*, showed footage from several of the films she made with her husband and creative partner D.A. Pennebaker, who sat in the audience--along with the couple's attorney.

A clip from *Startup.com* captured the enthusiasm of the dotcom boom by following two entrepreneurs to a fast food restaurant, where one sings along with the Billy Joel song "Piano Man." Hegedus loved the scene, but couldn't afford to license the song. In a scene from the rock tour movie *Depeche Mode 101*, the band changes backstage while listening to a wind-up music box play "London Bridge is Falling Down." But the real music box played "Raindrops Falling on My Head," before the filmmakers changed the sound, and even looped the singer's voice to match the words as he sang along.

Hegedus then showed clips from two earlier films, *Don't Look*

SECTIONS

NEWS & TRIANGLES

FRONT PORCH

COLUMNS

FOOD & WINE

ARTS & ENTERTAINMENT

MUSIC

MOVIES

BEST BETS

CALENDARS

BACKTALK

CLASSIFIEDS

PERSONALS

STAFF

SEARCH

HOME

Back, a documentary about musician Bob Dylan, and *Monterey Pop*, which captures legendary performances by Jimi Hendrix and Janis Joplin. Those clips--particularly the one of Hendrix smashing his guitar--are frequently used without permission by everyone from fellow filmmakers to local TV news stations. And do the filmmakers call their lawyers? Yes indeed.

That's the conundrum: Filmmakers want copyright to protect their work, but they also need a legal framework that doesn't restrict it. "It's complex," Hedgedus said. "All I can say is, there has to be some fairness."

In her mind, it comes down to intention: Hedgedus wasn't trying to use the Billy Joel song, she was trying to capture the reality unfolding in front of her. We are, after all, surrounded by media. When filmmakers use material intentionally, she said, that's when they should ask for permission.

This journalistic ethos was echoed by attorney Eric Saltzman, a board member of Creative Commons, who has made several documentaries about legal issues. "Congress shall make no law ... abridging the freedom of speech, or of the press," he said, quoting a portion of the First Amendment. "But we do use copyright to prohibit filmmakers, who are part of the press, from showing what happens."

A filmmaker deals not only with the law, but with the perception of the law in the mind of studio executives and distributors, who aren't often willing to take risks.

John Sloss knows that reality well. He's a Hollywood attorney who finances, produces, licenses and distributes films. Sloss handled several of Full Frame's recent big hits, including *Capturing the Friedmans*, *Spellbound*, *Bowling for Columbine*, *The Fog of War* and this year's biggest buzz, *Super Size Me*, in which the filmmaker eats nothing but McDonald's food for 30 days in order to demonstrate its health effects. "When you see that film," Sloss said, "you'll shake your head and say, 'How was he able to make that film and how was he able to avoid being sued by half of the Fortune 500 companies?'" Sloss said if they could get an insurance company to give them an Errors and Omissions policy, the film could be released.

But even an E&O policy, as they're called in the biz, can't protect you from everything. In fact, *Super Size Me* entered the Sundance film festival with a policy that protected it from everything *except* claims from McDonald's. Its backers decided to ride out the wave of press attention and controversy--which may have been what ultimately protected the film. Rather than sue, McDonald's announced that it would eliminate its Supersize option, denying the decision had any connection to the film.

How does the commercial success of documentaries affect the argument of protected speech? The second half of the conference put that question in an interesting context by looking at the field of music, in which financial concerns and artistic expression have created a treacherous legal environment for musicians.

"Great composers steal," said Anthony Kelley, quoting Igor Stravinsky. A composer and assistant professor of music at Duke, Kelley used a keyboard and his laptop computer to play selections that illustrated how musically similar, yet stylistically distinct, songs can be. "Twinkle Twinkle, Little Star" sounds a lot like the melody of "What a Wonderful World." "You probably could find a doppelganger for any tune," he said. Classical music is rife with appropriation. Jazz artists quote each other all the time--appropriating material and then making something new of it is the "creative ideal" of jazz, Kelley said.

The conference's most exciting moment took place when Mark Hosler, a founding member of the band Negativland, presented the history of the group's famous fight with the band U2 and Top 40 radio announcer Casey Kasem. The band had come across outtakes of Kasem's radio show in which he went ballistic with frustration, cursing out an engineer and making negative comments about U2, whose song "I Still Haven't Found What I'm Looking For" he was meant to introduce. In 1991, Negativland produced a single that mixed a distorted version of the U2 song with Kasem's expletive-laden remarks. Taking the joke a bit further, they designed the album cover to look like a tweaked copy of the Irish band's logo. American music stores didn't get the joke and the album was widely received as a new U2 release. A \$70,000 lawsuit followed, which Negativland fought for four years.

Hosler tracked the copy of the single that had been sent to U2 to a record store in Athens, Ga., and concluded that it landed in the hands of someone connected to the band R.E.M., whose general counsel Bertis Downs was in the audience at the Duke conference.

"Was it you?" Hosler asked from the podium.

Downs threw up his hands, saying "Guilty."

"Well fuck you," Hosler said to laughter from the audience. "You ruined by life."

"I was confused," Downs said. He sent a copy of the single to U2 because "they were my friends. I'd do it again." Then he added, "I use your book on Fair Use in my entertainment law course."

A red-faced Hosler said the lawsuit had given Negativland the

opportunity to draw public attention to the media saturation and copyright issues that their music had always addressed. "We've never had a hit single, but we've had a hit lawsuit." *Negativland* has not been sued since.

Whitney Broussard, an entertainment lawyer whose firm represents Ludacris, Wyclef Jean, Third Eye Blind and India.Arie, had some unexpected things to say about making the law more fair for artists. "We shouldn't necessarily be thinking about what artists want; we should be asking what's best. If artists were allowed to write their own copyright law, there'd be some crazy stuff out there."

Broussard, whose large sideburns and ponytail set him apart from the other lawyers, took a philosophical approach toward the issues. "One thing they could do that would make music really fun again is to make all music illegal," he said.

As the crowd dispersed, David Lange, a Duke Law professor who has blazed trails in this arena of intellectual property law, said he would like to feature more contrary, pro-protectionist points of view in next year's conference, in order to broaden the debate.

Meanwhile, Hosler and Downs got acquainted. It was weird, they agreed, that 10 years after the notorious lawsuit, they would meet at a conference at Duke Law School, one on a panel and the other a professor, the whole controversy now a subject of academic discussion.

Downs then went to the lobby to purchase a copy of the *Negativland* book, asking Hosler, "Will you sign my book?" Hosler consented, writing, "Dear Bertis, Thanks for the good times!"

To watch a Web cast of the Framed! conference, or to find out about a two-minute film contest, visit the Center for the Study of the Public Domain online: www.law.duke.edu/cspd/contest/ ■

RECENTLY:

- **To remain an artist** - Celebrating young artists--and art teachers--in honor of Youth Art Month - Dawn Dreyer (March 31, 2004)
- **Movie diva** - Laura Boyes puts a lifetime passion for film into her selections for "Rediscovering Classics" series - Madelyn Rosenberg (March 24, 2004)
- **Actors unite to teach *A Lesson*** - The Justice Theater Project brings Gaines' novel to a unique stage - Patrick O'Neill (March 17, 2004)