

## “FOUND FOOTAGE”—PROTECT A FILMMAKER’S RIGHTS TO USE

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Many filmmakers use “found footage” that was created by someone else. Examples are historical or commercial film clips, lost or neglected or archived film, source material of unknown or amateur origin, professional outtakes or discarded film, video or DVDs. New meaning is created by editing and arranging or by adding inserts, voice-over or other sound and other materials.

How does the filmmaker protect his or her copyright in film incorporating such materials?

Filmmakers generally recognize the need to obtain permission to use copyrighted clips, just as with popular music, artwork or celebrity images to avoid infringement claims and litigation. Less obvious is the need to use found footage “lawfully” as an essential step in securing the filmmaker’s copyright in the resulting film.

In copyright terms, a film that recasts, transforms or adapts found footage is not only an “audiovisual work” or “motion picture” but also a “derivative work.” Section 103(a) of the Copyright Act of 1976 provides that protection for a work employing preexisting material in which copyright subsists “does not extend to any part of the work in which such material has been used unlawfully.” Thus, if unlicensed copyrighted footage pervades the resulting film, the effect would be to deny copyright to the resulting film entirely. If the preexisting work comprises only a segment of the resulting work, that portion of the resulting film would be denied copyright.

Care should be taken to obtain a license broad enough to both create the derivative work and to exploit it. For example, if consent to use the found footage is limited in time, the owner may have sufficient time to create the new film, but not enough to exploit it. Print and distribution after license expiration would be precluded. If license is limited to a full-length feature, expansion to other works or media (such as a multi-episode television series) would be precluded.

Obtain licenses necessary for *all* of the underlying material. If found footage incorporates music, is based on a book or screenplay or displays images of recognizable

individuals, additional licenses may be required. It is ordinarily not sufficient to rely solely on a license from the original filmmaker.

What if it is not possible to determine whether the footage is copyrighted? Documenting reasonable efforts to determine copyright status and to identify copyright owners may be sufficient to establish innocent infringement or deter a finding of willful infringement and enhanced damages.

In some circumstances, use may be “lawful” even if unlicensed. The footage may have entered the “public domain” either because its copyright term expired or the material was “published” (that is, offered to the public for sale or lease) without copyright notice or with defective notice. The copyright owner may have abandoned copyright in the found footage if the copyright holder intended to abandon the copyright *and* affirmatively acted to abandon the copyright. Also, use of “found footage” to create a parody or political statement might constitute a “fair use” of the footage. Each circumstance may involve factual determinations that cannot be made conclusively without court action. Consequently, the reality for the filmmaker is that use of found film may necessarily involve a degree of risk of copyright infringement.