



DANGEROUS DOCUMENTARIES

REDUCING RISK WHEN TELLING
TRUTH TO POWER

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EXECUTIVE SUMMARY

Many of the issues most important for our society to recognize and discuss are also those that powerful people or institutions don't want made public. Non-fiction filmmakers who tell truth to power often face aggressive attack from powerful individuals, governmental bodies, businesses and associations. How are independent makers, often working outside of media institutions for long periods of time, and sometimes untrained in journalistic practices, working with this reality? What are the risks, and can they be mitigated to encourage more and better expression on the important issues of the day?

This report finds that the risks of doing such work are well-established in the investigative journalism community, but not always well known in the documentary film community. It documents attitudes, practices, and problems. It then addresses how makers of such work may best mitigate known risks, and what kinds of support may help them more than they are today. It finally suggests next steps to expand opportunities and share existing knowledge about how to lower risks while telling truth to power.

RESEARCH TEAM

Prof. Patricia Aufderheide was principal investigator, and Center for Media & Social Impact Associate Director Angelica Das was project manager. Graduate fellows Stephanie Brown and Olga Khrustaleva assisted with research. Consultant Deborah Goldman contributed legal research. Legal fellow Anuj Gupta assisted Ms. Goldman with legal research. Graduate fellows Daniela Pérez Frías and Daniel Farber-Ball contributed to production.

DANGEROUS DOCUMENTARIES

Reducing Risk when Telling Truth to Power

February 2015

INTRODUCTION

Documentary makers often produce work that challenges the terms of the status quo, whether through investigative reporting, revealing an underrepresented viewpoint, or signaling an overlooked trend. For instance, FRONTLINE challenges the pharmaceutical industry in *Hunting the Nightmare Bacteria*; in *Hot Coffee*, director Susan Saladoff questions the frivolity of lawsuits and big business' call for tort reform; and Suzan Beraza explores how plastic bags became so ubiquitous in *Bag It*.

Such work is widely recognized as having an important role to play in a democracy. Michael Rabiger, author of the most influential directing textbook for non-fiction filmmakers, writes that "documentary is that rare medium in which the common person takes on large, important issues and shakes up society." Describing the many ways that makers bear witness to often-hidden realities, he writes, "The consequences of all this for democracy, and for a richer and more harmonious tapestry of cultures, are incalculable."¹ Scholar Bill Nichols notes that "documentary film contributes to the formation of popular memory" with "perspectives on and interpretations of historic issues, processes and events."²

That identity is core to the DNA of documentary filmmakers' membership organizations. The International Documentary Association (IDA) describes documentaries as fostering "an informed, compassionate, and connected world."³ The executive director of the Documentary Film Network of Canada, Lucette Lupien, describes documentary as playing "a fundamental role in defending democracy, tolerance and openness to the world."⁴

Many of the issues that are most important for our society to recognize and discuss, however, are also issues that powerful people or institutions don't want made public. Non-fiction filmmakers who take on the task of bringing these issues to light often find themselves facing aggressive attack from individuals, governmental bodies, businesses and associations with substantial connections and resources at their disposal.

Filmmakers who take on such projects run a real risk that one or more of their subjects will attack them, whether it is through surveillance during or after production, litigation or its threat, or through a smear campaign. Director Laura Poitras took the drastic move of relocating to Germany in order to avoid frequent detainment by Homeland Security and ICE when crossing the U.S. border during

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-MICHAEL RABIGER**

1 Rabiger, M. (2004). *Directing the documentary* (4th ed): Focal Press, pp. 4, 15.

2 Nichols, B. (1991). *Representing reality: issues and concepts in documentary*. Bloomington: Indiana University Press.

3 <http://www.documentary.org/about-us>, accessed Nov. 25, 2014.

4 <http://www.obsdoc.ca/recherches.e/cppc/pres/>, accessed Nov. 25, 2014.

productions, including her film about Edward Snowden’s release of classified documents, *Citizenfour*. Fredrik Gertten was handed a lawsuit by Dole Food Company after production on *Bananas!**, *Wal-Mart: The High Cost of Low Price* faced a million-dollar PR assault, and SeaWorld accused *Blackfish* of factual inaccuracy. They face risks even long after their work is completed, as a recent terror attack at a screening of the film *Vessel*, about an abortion doctor who works offshore, shows. And their subjects often share their risks.

This study looks at recent situations where makers of long-form, non-fiction, moving-image work have faced such challenges in order to draw lessons from past experience and learn—from filmmakers and their lawyers, insurers, producers and programmers—what kinds of support are available and what kinds of support are needed.⁵

This study was built on 53 interviews of makers of non-fiction films and TV programs, programmers, funders, lawyers, and insurers, as well as a wide search of literature and participation in public events. Interviews were conducted with the promise of anonymity, if so preferred, under terms approved by the Institutional Review Board of American University; all interviewees also were given an opportunity to make their participation public, once they saw the draft report. Interviewees were chosen through a variety of methods: because of their institutional position, because of a record of production in the area, because of their professional status or involvement with the challenges of making such work.

**DOCUMENTARY
MAKERS’ RISKS
CAN LAST LONG
AFTER THE WORK
IS COMPLETED.**

We look first at the cultural divisions that can keep people who think of themselves first as filmmakers and those who identify as journalists from sharing the same practices or resources. We then look at the challenges facing makers of public affairs documentaries from the subjects of their work, and at the level of risk that our environmental scan suggests. We next consider a range of recommendations for best practices in a risky environment, and finally propose next steps.

FILMMAKER OR JOURNALIST?

We interviewed both people who identify as journalists and those who identify as filmmakers. We could not find any difference in their core missions to explore a subject of public interest honestly and compellingly. However, we did discover cultural differences in training, language and emphasis, which can obscure important common ground. This is of particular importance as news organizations such as Al-Jazeera, CNN, and *The Guardian* have launched documentary series that compete for the same kind of films generally showcased in non-journalistic venues including theaters, HBO, Showtime and public TV film series such as *POV* and *Independent Lens*.

There is no professionalizing credential necessary for either filmmakers or journalists; that is, unlike a nursing or accountancy, you can practice without the credential. People who went to journalism school are no more recognized as journalists than others, and similarly for those who took degrees in film production. Journalism associations and organizations avoid definitions that require professional

⁵ We realize that short-form work is also proliferating, but we believe that this report’s focus on long-form work, largely destined for broadcast with its powerful reach and potential impact, yields results useful to both long-form and short-form makers, and to those working in digital-first as well as traditional venues. Attacks have been focused on the distribution venues with the greatest perceived legitimacy both with viewers and critics, who amplify the impact of the work. As short-form and digital-first strategies grow and as legitimating standards develop, what long-form broadcast makers have learned will be valuable to those working in these emerging forms and venues.

status. For instance, the Society of Professional Journalists (SPJ) simply expects someone conducting journalism to abide by its ethical standards.⁶ According to Mark Bailen of the law firm BakerHostetler, the definition of “journalism” itself has evolved to focus on function rather than association. Suggested qualifications have included whether or not journalism is the person’s primary occupation (and source of income) and whether (referencing a bill to create a federal shield law) the person’s “primary intent [is] to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest”.⁷ Documentary organizations similarly avoid definitions beyond the general description of the activity.

Furthermore, the common characteristics of ethics codes for journalists appear largely to be shared by filmmakers. A scan of journalistic ethics codes found several principles shared among the journalistic codes:

The journalist serves the public, and is ultimately accountable to the public;
The journalist is truthful both to literal accuracy and in the choices to shape meaning;
The journalist is transparent about process and does not misrepresent him/herself;
The journalist does not fabricate information.
The journalist seeks out all sides to the story and presents the story in a way that allows the viewer to make an informed decision.⁸

Filmmakers of non-fiction, social-issue work generally found the first four of these principles unexceptional, and wholeheartedly agreed; even though filmmakers sometimes found the journalists’ ubiquitous language about serving the public to be less familiar in their cultural context, they understood their work as oriented generally to the public good. Because their work is so often shaped as an essay or revealing of a personal perspective, of theirs or their characters, they found the last point to be a stumbling block. They certainly believe in fairness and accuracy. But filmmakers also believed that their job was often to tell a story from a particular point of view, and to capture the richness of that experience, not to report an issue from different sides.

If filmmakers and journalists were in closer dialogue, they might develop language about the similarities of long-form, point-of-view work to feature articles, op-eds and other forms of essay journalism. (Ethics codes are usually written with the daily reporter in mind.) But such conversations have yet to begin.

The difference highlighted in this last point reflects, we believe, different cultural experiences and training rather than a fundamental disagreement over values and purpose, or even methods. Journalists and non-fiction filmmakers have historically worked in overlapping but different networks.

Their workplaces have often been very different. Journalists typically have trained in traditional journalistic institutions, and even if they operate as freelancers, they generally have discussions with colleagues and editors about expected risk given mission, have access to corporate manuals that provide some guidance, and learn the ways institutions manage those risks. They are not the final arbiters of their work; their editors are. Filmmakers usually work in small production companies or teams; when working in a commercial environment, those teams typically contract with the entertainment unit of a media corporation rather than the journalistic unit. They often get final cut on their work. Their professional discussions have usually been much more about techniques and procedures to most effectively and efficiently tell a compelling story. They often do not have those

6 <http://www.spj.org/ethicscode.asp>, accessed Nov. 25, 2014.

7 <http://cmsimpact.org/blog/media-impact/who-counts-journalist>, accessed Nov. 25, 2014.

8 Aufderheide, P. (2012). Perceived ethical conflicts in US documentary filmmaking: a field report. *New Review of Film and Television Studies*, 10(3), 362-386.

discussions with superiors or get familiarity with an ethics-oriented manual or standard security procedures.

While journalists often define their work by the challenges of reporting, filmmakers often define it by the aesthetic challenges of the craft. This is reflected in language; journalists refer to their subjects as “sources,” while filmmakers often use the word “character.” In reality, of course, reporting and aesthetics are inevitably enmeshed, as makers decide how to tell their researched story.

Journalists often start a project with a topic to research, finding interviewees along the way; filmmakers often develop close relationships with subjects and follow them through a drama or conflict. Thus, their very notions of what access constitutes is different. Journalists often look for representative sources, while filmmakers are looking for good characters. From these different points of access, they may well end up in the same or similar places, but the relationships they build and the promises, implied or explicit, that attach are often different. Journalists often consider their work done when it is published; filmmakers typically are deeply involved not only in the launch of their film but in engaging different networks and publics with it long afterward. These differences then affect judgments on many decisions along the way, such as whether to pay a vulnerable subject for time spent with the maker, or whether to involve oneself in the subject’s life.

The angles of approach can make for different practices. They can also make for mutual suspicion, and lead to false assumptions. Journalists who come from a daily or print background often regard ordinary filmmaking practice as sliding too far into fiction, and treat aesthetic decisions as corruptions rather than as one of many choices. The conventions of textual journalistic narrative have been far more limited than one that uses sound, moving image and text combined. However, the traditional conventions of public affairs documentaries on television—a host, voice-of-god or host narration, b-roll reinforcing narration, essay structure—still influence journalists, even though many public affairs television series are moving away from those conventions. One investigative journalist who makes long-form documentary commented, “I feel like documentary is art in the best moments, but investigative reporting is about the information and what people tell you on camera, so it’s a balancing act.”

Filmmakers often fear that journalists do not understand the long-term relationship with subjects typically engendered in a long-form film project, and sometimes they do not. One interviewee recounted that a film crew recently struggled in a shoot in Pakistan after a team of journalists who had quickly come and gone had alienated key subjects. However, investigative journalists usually also undertake long-term relationships with subjects, and they prioritize their subjects’ safety and welfare. Investigative journalists also struggle with the rules of thumb taught in their professional training because of their commitment to subjects.

Journalists, on the other hand, often suspect that filmmakers do not have the same stern requirements for veracity that they do, although interviewees for this study expressed a shared commitment to verifying for accuracy. Indeed, in an earlier study we found that filmmakers experienced anguish when working

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ARE FAIRNESS AND TRANSPARENCY THE NEW STANDARDS?

for non-journalistic organizations that forced them to violate this ethos.⁹ Similarly, journalists often are concerned that filmmakers may not exercise as rigorous control over factual accuracy, and fear that filmmakers may be swayed by their relationships to avoid hard questions. Yet filmmakers interviewed for this report universally testified to routine fact-checking procedures, and could describe with care the choice of framing and contextualizing in order to offer a perspective that they could stand behind. Several referred to the expectation that they could show their film to any of the parties involved in the story and have it hold up to attack.

Finally, there is acute shared awareness of the need for particular care with accuracy and defensible perspective when boldly asserting and developing a perspective. For instance, Brave New Films makers, who unabashedly make films advocating a position (their latest film is called *War on Whistleblowers: Free Press and the National Security State*), have a meticulous process of fact-checking and carefully plan framing to not only be effective, from their perspective, but also to be justifiable to those who may not agree with that position, and withstand attack. For investigative journalists, such care is of the highest concern when making accusations against powerful government officials and corporate actions, accusations that clearly stake out a position.

In the area where there is the greatest perceived difference in culture between filmmakers and journalists—around objectivity as opposed to acknowledged perspective—there is also an emergent conversation. Journalists have traditionally expected to provide an account that can be justified as balanced. Filmmakers generally expect their work to be seen as fair, but not necessarily balanced; they treasure the emotional power and resonance of a point of view, both of subject and of maker. At the same time, the question of balance has become a contentious point for journalists, as the user-centric environment has forced a closer consideration of the reasons journalists select the stories, interviewees and narrative framework they do.

For some more traditional journalists, an acknowledged point of view is perilously close to advocacy. For others, transparency is a gold standard in the fast-moving world of digital journalism. Articulating the argument, albeit in a contentious way, is controversial journalism scholar Jeff Jarvis, analyzing the changes in journalistic practice. He argues:

Isn't advocacy on behalf of principles and the public the true test of journalism? The choices we make about what to cover and how we cover it and what the public needs to know are acts of advocacy on the public's behalf. Don't we *believe* that we act in their interest? As the late Columbia Journalism Professor James Carey said: "The god term of journalism—the be-all and end-all, the term without which the enterprise fails to make sense, is the public."¹⁰

Less argumentatively, Rabiger—a filmmaker as well as professor and writer--

9 Aufderheide, P., Jaszi, P., & Chandra, M. *Honest Truths: Documentary filmmakers on ethical challenges in their work*. American University, Washington, D.C.: Center for Media & Social Impact, September 2009 and <http://www.cmsimpact.org/making-your-media-matter/documents/best-practices/honest-truths-documentary-filmmakers-ethical-chall>, accessed Nov. 25, 2014.

10 Jarvis, J. (2014). Part 5, What Now for Journalism: A five-part web series (<https://medium.com/p/e7e-d95079a43>).

noted, while stressing the importance of verifying for accuracy, the similarities between the forms, both of which must take responsibility for their purposeful choices: "Like journalism, documentary filmmaking relies on distilling a story from what is remembered or recorded and involves reduction, simplification, rearrangement and re-creation—all hazardous to the truth".¹¹

FRONTLINE takes on this issue head-on, in its extensive journalistic guidelines available online.¹² It articulates its standards with three words: independent, fair and honest. Its extensive elaboration allows its makers to operationalize what each of those words mean, and to make sure they are doing everything they can to offer viewers a responsibly assessed interpretation of an important issue. The public TV production organization Independent Television Service (ITVS) has embraced this standard as well. At the same time, it is worth noting that FRONTLINE's standards are firmly grounded in journalistic tradition. As well, both journalist and filmmaker interviewees noted that guidelines can never be hard-and-fast rules. For instance, FRONTLINE's producers may not pre-screen work for interested parties; in many cases, both journalists and filmmakers have shown work to interested parties with helpful results, and some lawyers encourage this practice, to identify trouble early and minimize later conflict.

Journalists are just beginning the critically important conversation about the implications of taking ownership over their choices of framework and interpretation; filmmakers are only beginning an equally crucial conversation on the justifications and limits of point of view in serving the public.

While cultural differences and real challenges exist in interpreting a mission to be fair while acknowledging perspective, there was, overall, more common ground than differences in practice and mission. Some makers saw no conflict between the two fields. "Documentary is true independent journalism," said filmmaker Brian Knappenberger. He saw himself as a non-fiction filmmaker tackling the same challenge that journalist Finley Peter Dunne put to journalists: "journalism is best when it's comforting the afflicted and afflicting the comfortable." Gregg Leslie of the Reporters Committee for Freedom of the Press commented, "We've always had a broad definition of journalist. Our main concern is distinguishing between journalists and true activists who have a cause and do everything in support of a cause."

We found broad acceptance of fundamental ethical standards and the practices that operationalize them, although the two cultures approached the question of perspective from different angles. For instance, everyone agreed that basic accuracy was critical; everyone routinely put a high priority, sometimes the highest priority, on the safety and reputation of their vulnerable subjects. Everyone agreed that some perspective is not only unavoidable but must be closely analyzed since it will need to be justified when challenged.

In some cases, filmmakers embraced the definition of journalist, particularly after the *Crude* case, in which a filmmaker was subpoenaed for outtakes relating to a court case (see Appendix B), highlighted the value of journalistic shield laws. *The Central Park Five's* David McMahon noted, "We're more aware

**"DOCUMENTARY IS TRUE INDEPENDENT JOURNALISM."
-BRIAN KNAPPENBERGER**

11 Rabiger, M. (2001, Fall). Documentary Filmmakers Decide How to Present Compelling Evidence. *Neiman Reports*. <http://niemanreports.org/articles/documentary-filmmakers-decide-how-to-present-compelling-evidence/>, accessed Nov. 25, 2014.

12 <http://www.pbs.org/wgbh/pages/Frontline/about-us/journalistic-guidelines/>

HOW CAN YOU MINIMIZE RISK IN CONFLICT ZONES?

than ever of the importance of conducting ourselves like journalists and of defending the protections that journalists are afforded." The PBS public affairs documentary series FRONTLINE draws no distinction either. Its producers look for "credible, thoughtful reporting combined with powerful narrative, a good story well told," and call their makers "nonfiction producers."

CHALLENGES FACED

The challenges posed by the task of taking on today's powerful can take place in arenas ranging from the media to the courts to the filmmaker's personal computer. They include journalistic standards, safety and security, public relations, insurance, legal problems, and partnership relations.

Journalistic Standards _____

Whether makers think of themselves as filmmakers or journalists, they typically subscribe to basic tenets of good journalistic practice as identified in the commonly shared ethical principles and also demonstrate that they practice them. For instance, although both journalists and filmmakers have a wide range of ways of verifying accuracy of facts and of keeping records that they have done so, there was consensus that they should and do so verify. Makers also have a range of approaches to interviewing touchy or potentially hostile subjects, and of course it depends on the circumstances. Some wait until all other pieces are in place, while others go to potentially hostile sources at the start and cultivate a relationship, engendering trust that the subject's point of view will be fairly rendered. But there is general agreement that contacting the target of an investigation is a routine part of the job.

But makers, particularly filmmakers, are often unfamiliar with resources providing information on journalistic standards, whether from associations like the Radio Television Digital News Association, the International Federation of Journalists, the Society of Professional Journalists, and the Online News Association; public interest organizations such as the Electronic Frontier Foundation (EFF), the ACLU, and the Electronic Privacy Information Center; or journalism nonprofits such as the The Poynter Institute, the Nieman Journalism Lab, or the Shorenstein Center on Media, Politics, and Public Policy. One filmmaker's comment was typical: "I know about some resources, but it would be good to have a place where the information about all the resources is collected." Makers also often express concern about the lack of a forum to frankly raise troubling questions about journalistic standards and procedures; this is much more commonly expressed among filmmakers.

Safety and Security _____

Makers both in the filmmaking and journalistic cultures worry about the safety and security of themselves and their subjects, as well as the security of the information they gather. Sometimes independent makers find support for safety and security from funders or distributors. More often, as freelancers or independent operators they find themselves improvising, and are poorly supported by organizations they contract with. Makers often share the risks of their subjects in conflict zones. They try to minimize risk while in the field and to keep information secure in an effort to protect themselves and their subjects. Everyone agrees that the state of encryption software is frustrating.

FILMMAKERS CANNOT ALWAYS PROMISE THEIR SUBJECTS SAFETY OR ANONYMITY.

Seasoned makers are familiar with the problems, but people new to the challenge often lack ways of assessing risks to personal safety and security. There is no clearinghouse for information, and no place they can routinely go either to share hard-won knowledge or garner it. Robert Greenwald noted, "Having traveled to Pakistan and Afghanistan, there was no place I could turn for advice or guidance. I spent countless hours reaching out trying to find reliable 'fixers,' and others. Some kind of clearinghouse could literally be life-saving." Sandra Whipham from BRITDOC said, "A lot of independent filmmakers won't even know how to do a risk assessment, and if you are going to a war zone, this risk assessment form can be 30 pages long. They haven't asked, who is going to protect you who is not in the field?" Many makers were also unfamiliar with threat modeling, a basic procedure for assessing risk.¹³

Safety of the filmmaker _____

Makers often find themselves in unsafe situations while filming, whether because of being in a conflict zone, investigating unsavory activity, or reporting from a poorly governed area. Filmmakers and journalists have both died at work; at least a hundred journalists around the world died in 2014 alone.

Veterans approach these challenges in different ways. Generally, they try to make sure they were only taking calculated risks (see Appendix A). They keep lines of communication open with a home base. Some alert human rights and other organizations of their whereabouts and the issues they are investigating and make their contact public, hoping to raise the stakes for doing them harm and to generate publicity should bad things happen. One filmmaker stressed the importance of having a local producer (sometimes called fixers), which many makers use. A few get hostile environment training of the kind that BRITDOC sponsors for its filmmakers who need it. This kind of training is part of the practice for anyone commissioned by a broadcaster in the U.K., but for freelancers, it is expensive as well as lengthy. Makers also make copies of their data and store copies in other places to protect the project should anything happen to them. The most widespread flagged problem was the isolation of the individual producer who was working without an organization for support, training, or production insurance.

Makers also can find themselves at risk after making their films. After he made *Fahrenheit 911*, Michael Moore faced enough death threats to hire bodyguards and take a break from filming for two and a half years.¹⁴ Pamela Yates exercises extra precautions when returning to places where she has made films about mass atrocities and gross injustices.

Safety of the subject _____

Both people who think of themselves as journalists and those who think of themselves as filmmakers have a top-priority concern for the safety of their subjects, though they recognize the limits of their ability to protect them. No one wants to be the agent of another's injury or death. Interviewees put this concern above the value of having a release form in cases where subjects change their minds or were reluctant to go on the record.

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**CORPORATE
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¹³ Electronic Frontier Foundation (2014). *Introduction to Threat Modeling*. <https://ssd.eff.org/en/module/introduction-threat-modeling>, accessed Nov. 25, 2014.

¹⁴ Moore, M. (2011). *Here comes trouble: Stories from my life* (1st ed.). New York: Grand Central Pub.

In some cases, though, subjects volunteer for the risk of exposure and may even believe that more exposure might provide more security or a solution. This was the case with Mexican reporters threatened by gangs in *Reportero*, and with subjects in *Give Up Tomorrow*, who hoped that the film might bring attention to an unjust verdict.

In other cases, such as of whistleblowers, preserving anonymity was of great importance. In the case of 1971, about civil disobedience, the subjects expected to become public figures with the release of the journalism (both textual and filmic) about them. But until that moment, guarding their privacy was centrally important. The filmmakers also maintained anonymity of other sources in the film. In dealing with female subjects who have suffered gender-based violence, bullying, or cyberbullying, Nancy Schwartzman is careful to have face-to-face, offline conversations with them, never to show their faces online, and never to use their names, unless given explicit consent.

However, makers also realize the limits of what they can promise to their subjects. One pointed out that some situations are non-negotiable; when you are crossing a border, for instance, you are vulnerable to the demands of the border officials. Makers emphasized the importance of being transparent with subjects about the limits of their abilities to protect them. "People trust us to tell their stories properly, so I want to be really clear about things that I can control and the things I can't control," said Marshall Curry. "I have creative control of my films, so I can promise characters that they will be represented fairly in the final film." But he recalled a circumstance where a subject was in the middle of a legal battle, and a subpoena was a real possibility. "I told him that if I got subpoenaed I'd fight it. But I have small kids, and at that point if I lost I wasn't prepared to go to jail for months and months. So I told him he needed to use his own brain about what he was sharing with me because I couldn't promise 100% control."

Securing information _____

In order to protect subjects and their own projects, filmmakers consider the best ways to secure information, in the areas of communication and storage.

While encryption and anonymization tools exist for communication and for search, they are often difficult to install and master, clumsy, and restrictive. Even makers supported by large organizations find that their organizations do not support or train for use of encryption, and indeed may have massively insecure websites or mobile apps. They may also find themselves in the field without being able to use security that is on their computers, for instance email (although mobile apps such as TextSecure and RedPhone are available). Furthermore, because the adoption of encryption or anonymization software can be detected by surveillance tools, such resorts are widely regarded as flagging yourself for further scrutiny and many subjects refuse to use them. As Edward Snowden and the ACLU's Christopher Soghoian have repeatedly noted, easy-to-use encryption tools need to be developed and become pervasive for security to be routine.

Makers do use encryption for communication and search in specific instances. Far more often, they try to observe good practices while working in the clear.

**SOMETIMES A
SMEAR CAM-
PAIGN CAN
GENERATE
NEEDED
PUBLICITY
FOR THE FILM-
MAKER.**

They try to have conversations face to face where possible. They pay attention to privacy settings online. They delete information where appropriate.

To keep stored information secure, makers use a range of strategies, including keeping records on air-gapped hard drives, installing encryption software on computers, and hand delivering information rather than sending any of it electronically.

Public Relations

Makers of investigative documentaries have often encountered publicity attacks from targets of their attention. For instance, Wal-Mart retaliated with a \$1 million publicity campaign against Brave New Films' *Wal-Mart: The High Cost of Low Price*. Energy companies conducted attacks on Josh Fox's *Gasland*, as documented in his *The Sky Is Pink* and *Gasland 2: Blackfish and Bag It* also faced industry public relations attacks. Campaigns can attempt to discredit the work by attacking facts, challenging premises, discrediting characters or makers. They can challenge directly or pervasively sow doubt. They can go after the makers, their backers, or members of organizations such as film festivals that interact with them. These attacks can drain energy and time from future projects, and cost a lot of money to refute. Often, however, makers have been able to leverage the smear campaigns as well, for publicity, and some smear campaigns may ultimately have harmed the reputation of the corporations leading them.

In the independent film community, a cottage industry has grown up of communication support for independent work, including public relations firms, social media experts, and impact organizers. Each has a role to play in preparing for trouble. However, in some cases the needs may call for experts in crisis communications.

Public relations expert Prof. Darrell Hayes noted that crisis communications is a specialized branch of public relations, focused on a contest for control of message and reputation. He pointed to two main strategies in a smear campaign: to discredit information and discredit where it comes from. In a conflict, "neither side typically lies outright," he said, "but they selectively portray their truth in their own way. You are always working to improve your own credibility and lessen the credibility of the opponent."

In such a conflict, government and corporations are typically at a disadvantage with the general public, he noted: "A filmmaker has a lot of strengths because people are much more comfortable with a filmmaker having a perspective than they do with established power, a corporation or government."

For makers, having a support network already in place, not only of experts in communication but of experts in the area of the film's topic and organizations that are related to it, can be crucial. "The best tool you may have as an independent filmmaker attacked by a company is grassroots organizations," said strategist and professor Caty Borum Chattoo, who was also a producer of *Wal-Mart: The High Cost of Low Price* and other documentaries. "Effective response to a crisis when you are a little guy is all about amassing public support. It's less about textbook crisis communication, and more about how to understand where the grassroots and public support for your film's cause is, and working within that community to balance the media narrative."

**SYMPATHETIC
NON-PROFIT
ORGANIZA-
TIONS CAN BE
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CORPORATE
ATTACKS.**

Most of the time, we found, makers do not prepare a crisis communications strategy or have funds for a counter-campaign. This is also true for investigative journalistic organizations. For example, as recounted in *Big Boys Gone Bananas!**, Dole not only sued over *Bananas!**, a film about Dole's use of dangerous workplace chemicals on banana plantations, but also conducted a public relations campaign to discredit the filmmakers, contacting many reporters and filmmakers and creating a website. Director Fredrik Gertten, based in Sweden, recalls that he spent a good part of every week for months talking with reporters, who often had not seen the film. The team created a website that offered transparency, including litigation documents, but Gertten says that Dole did succeed in casting a shadow on his and the film's reputation, particularly in the U.S., where the film could not initially find a broadcaster.

Although the American Chemistry Council refused to offer an interview for Suzan Beraza's film about the impacts of plastic, *Bag It*, it did react when the film came out. The Council created a website that capitalized on the name of the film and its fans, and attempted to represent the industry as pro-environment, spinning the issue and criticizing parts of the film. Beraza, who had no resources, chose to capitalize on the unwelcome attention by letting film audiences know about the ACC's retaliation. She believes the publicity did not hurt the film in the end, and does not know if it helped, but it took time and resources away from other projects.

The natural gas industry immediately attempted to discredit *Gasland*, as Fox showed in follow-up films, *The Sky Is Pink* and *Gasland 2*. Industry interests paid Google so that the first result of a search for the filmmaker or *Gasland* would be an advertisement against the film. They funded a pro-natural gas film (*Truthland*) and website and argued to the Academy of Motion Picture Arts and Sciences that *Gasland* should not be eligible for an Academy Award. Natural gas industry buses appeared at screenings, filled with protesters. Fox's answer has been to respond vigorously and often sharply and even satirically, to make other films, and to write an open letter to journalists in response to the Academy of Motion Pictures letter.¹⁵ Fox believes the controversy has brought more attention to his film but believes it may have also cast a shadow on his reputation.

In response to *Blackfish*, a film about the problems with keeping killer whales in captivity, SeaWorld retaliated by contacting 50 film critics, accusing a government official who had worked with SeaWorld of ethical violations for "leaking" information to director Gabriela Cowperthwaite, advertising against Cowperthwaite's name with an attack ad, and hosting an anti-film website. Cowperthwaite stands behind the facts as presented in the film and has defended her film in the media, including with a rebuttal of specific charges.¹⁶ She believes that the campaign drew more attention to the film—certainly the film critics were effectively encouraged to watch a documentary they might otherwise not have watched, and found it accurate. The controversy may also

WELL-FUNDED ATTACKS CAN BOOMERANG ON THE COR- PORATION.

¹⁵ Fox, J. (2011). Open Letter from Josh Fox in response to Attacks by the Gas Industry. <https://www.facebook.com/notes/lovesocial/open-letter-from-josh-fox-of-gasland-in-response-to-attacks-by-gas-industry/192993240720356>, accessed Nov. 25, 2014.

¹⁶ Renninger, B. J. (2013). SeaWorld Unleashes 8 Assertions About 'Blackfish' and Filmmakers Respond. <http://www.indiewire.com/article/seaworld-unleashes-8-assertions-about-blackfish-and-filmmakers-respond>, accessed Dec. 9, 2014.

have encouraged more SeaWorld whistleblowers; it profoundly affected Sea World's stock prices and may have triggered the resignation of the company's CEO in early 2015. She but was less sure about the effect on potential awards.¹⁷

When Michael Moore decided to make *Sicko*, a consortium of health insurance companies and drug manufacturers spent hundreds of thousands of dollars on what Moore called a "disinformation campaign".¹⁸ Although Moore publicly exposed the campaign and accused its leaders at the time, with his trademark humor and irony, he believes the campaign "was effective and did create the dent they were hoping for."¹⁹

Wal-Mart paid a publicity firm \$1 million to conduct a campaign against *Wal-Mart: The High Cost of Low Price*, and launched the campaign even before the film was out. Workers were filmed knowing they might be fired, which understandably made it harder to make the film. On the film's release, Wal-Mart had an unprecedented two-day press conference at its corporate headquarters, gave reporters a 10-page press kit on purported errors, and launched a counter-film. Brave New Films, without added resources but expecting this campaign, both mobilized a response and enlisted pro-bono support.²⁰ Brave New Films leveraged the film's embattled image, garnering grassroots support for showings in communities around the country. A case study by an association of public relations executives judged Wal-Mart's actions to be detrimental to Wal-Mart's public image, for its lack of transparency and failure to align with espoused company values. Brave New Films won visibility and the legitimacy of being seen as a credible threat.

When Violeta Ayala and Daniel Fallshaw made *Stolen*, revealing modern-day slavery inside a refugee camp in the western Sahara, they engendered the enmity not only of the group controlling the camp, the Polisario, but also the Algerian government, which stakes a claim in the western Sahara. They faced intimidation and harassment, and when U.S. public TV considered the film (and eventually aired it), a U.S. law firm representing Algerian interests sent letters to public TV organizations warning against it. The filmmakers had to hire a lawyer, but they eventually got their film on the air in the U.S. and Australia. It is possible, they say, that the campaign helped promote the film.

When corporate lobbying groups, like the US Chamber of Commerce criticized her film, *Hot Coffee*, about the dangers of so-called tort reform, with a YouTube campaign and web advertising, Susan Saladoff decided simply to ignore the criticisms, and believes that was the right strategy. Ultimately, she believes the attacks helped—"all publicity is good publicity."

In some cases, filmmakers prepare for such attacks with oppositional research and talking points, even conducting sessions where one part of the research team is assigned to attack the project, and others must defend it. In some

**SOMETIMES
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SCENARIOS"
IS A GOOD
IDEA.**

17 Cieply, M. (2014). SeaWorld Questions Ethics of 'Blackfish' Investigator. <http://www.nytimes.com/2014/02/28/business/media/seaworld-questions-ethics-of-blackfish-investigator.html>, accessed Dec. 9, 2014

18 Moore, M. (2011). *Here comes trouble: Stories from my life* (1st ed.). New York: Grand Central Pub.

19 Goodman, A. (2010). The Health Insurance Industry's Vendetta Against Michael Moore. <http://www.commondreams.org/views/2010/11/24/health-insurance-industrys-vendetta-against-michael-moore>, accessed Dec. 9, 2014.

20 Barbaro, M. (2005, Nov. 1). A New Weapon for Wal-Mart: A War Room. *New York Times*. Retrieved from http://www.nytimes.com/2005/11/01/business/01walmart.ready.html?ei=5065&en=2d31fa4e10a14029&ex=1131512400&partner=MYWAY&pagewanted=print&_r=0, Nov. 25, 2014.

cases, programmers help filmmakers do this. More often, makers do not conduct such opposition research, particularly within journalistic organizations. They expect their own research to be sturdy enough to serve well if they need it.

Some outlets strongly support the project with communication materials. Both ITVS and POV produce elaborate press kits and communications strategies, including talking points and even personal contact with station managers in some cases. POV head Simon Kilmurry said that the POV team conducts a half-day meeting in which the staff models “worst-case scenarios,” to prepare a filmmaker for attacks and allow for practice in responding. POV may also get a filmmaker media training, and even do research on filmmakers’ backgrounds, in case an attacker may be able to exploit something in a maker’s past.

A good public relations strategy can help mitigate the negative effects of attacks. Firms driven by a social mandate, such as Spin Project, Spitfire Communications, Hager Sharp, M+R Communications, Fenton Communications, Rally (formerly Griffin Shein in L.A.), and Beekeeper Group may have goals or mission that match a maker’s project. Firms hired to do routine release publicity may or may not have the skillset or be able to accommodate a full-fledged smear campaign. Also a maker may have relationships with non-profits or NGOs that work with public relations firms already, and also may want to partner on hiring a company.

Pro-bono help in public relations may be hard to find. Larger firms occasionally provide pro-bono services to select clients, but they prefer non-controversial charity or nonprofit cases and long-term arrangements. For example, in 2006 Porter Novelli conducted a year-long pro-bono promotional campaign for Freedom From Hunger, a global charity organization fighting hunger and poverty. Smaller firms, especially those catering to small-account independent filmmakers, generally can’t afford to take pro-bono cases.

In many cases, independent filmmakers conduct their counter-campaigns on their own, learning by trial and error, without the benefit of expert advice.

Insurance _____

Interviewees identified two major problems with insurance. The biggest problems makers have with insurance are the expectable obstacles built into the business model—that insurers either do not insure for or charge heavily for high risk. There are many insurance products, including errors and omissions, production, subpoena, and kidnap and rescue insurance, and the same problem applies to them all. Problems are particularly acute internationally. The second problem was underinsurance, either because they could not obtain it, or they did not know they should obtain it.

The good news about insurance is that, since this is not an arena in which statistics are particularly helpful to insurers due to the idiosyncrasies of each situation, insurers do not necessarily penalize filmmakers for previous trouble, if it was not triggered by their behavior. They look closely at the behavior of filmmakers and the nature of each film, and make judgments tailored to the situation. For instance, getting E&O insurance at reasonable rates has not been difficult either for Joe Berlinger or for Fredrik Gertten, although both had to activate their E&O for earlier films.

INSURANCE PROBLEMS CAN DISCOURAGE, DELAY OR CHANGE A PRODUCTION.

However, insurance problems related to risk can be a barrier to production, discourage it, or at least force caution. Typically filmmakers must acquire the insurance themselves; journalists are usually covered by their organizations, and contracted freelancers are often as well. Production insurance may be unavailable entirely to makers who are entering high risk zones, or in some international areas. Filmmaker Katy Chevigny, whose *E-Team* follows representatives of Human Rights Watch as they go to the front lines of claimed human rights abuse, finds it to be almost impossible to get production insurance. "It has become impossible for the small independent production company to purchase production insurance for film crews in war zones and the like. You simply cannot get coverage unless you are part of a very large entity that has a blanket policy (like a large news media organization or a large NGO). This puts indie makers at significantly higher risk with no safety net, unless they are partnering with big media outlets."

Asked to identify its makers' problems with E&O, ITVS staffers could only find one example, but it was illustrative of the problem for makers who take on expectable but high risk:

Several E&O insurers refused to provide coverage or refused to provide coverage without exclusions responding to a litigious character in the film (who had already sued characters in the film). The filmmakers worked with a broker and legal team for nine months in a process to secure their E&O policy. One insurer offered to sit with the filmmakers and go through the film to suggest edits, which made the filmmakers, their legal team and ITVS uneasy. Ultimately, as the film was being completed for its festival premiere, the filmmaker and legal team suggested minor, reasonable changes to the program that did not alter the structure, but did impact an aspect of their storytelling. The filmmakers returned to the edit room to make the changes without knowing if it would suit the insurer's requirements. Ultimately, this resulted in a reasonably-priced, exclusion-free E&O Policy but with a \$25,000 deductible per event (ITVS typically requires filmmakers to secure policies with \$10,000 deductibles per event).

As well, usually makers who got their own insurance found it challenging to get errors and omissions insurance as early as would be ideal. Contracting for insurance early protects filmmakers from problems while still in production, but it is usually difficult to get that insurance without having substantial amounts of completed work to show an insurer, who needs to make a case-by-case call.

Interviewees also found that they or colleagues were not sufficiently covered by insurance when they expected they would be. For instance, in some cases people were covered for the legal costs of a subpoena challenge, but not for documentation and preparation costs. In some cases, interviewees cautioned that freelancers or contract workers might not be covered under an organization's insurance unless they asked to be.

Legal Issues _____

Interviewees told us much more about fear and concern than about actual problems. Investigative journalists are more familiar both with threats and actual lawsuits, and also more protected by journalistic organizations.

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ProPublica, to take one example of investigative reporting institutions, has been sued for defamation three times, one still in process. In the first case, the court dismissed the plaintiff's claim, and in the second, the plaintiff withdrew the claim.²¹ ProPublica has in-house counsel, and prepares for these possibilities with meticulous research and well-kept records, as well as pre-publication legal review in almost all cases.

Filmmakers by contrast were typically not informed about either the range of legal information available to them, which can help them prevent trouble, or the range of laws protecting journalists in different states in the U.S. Both shield laws and anti-SLAPP (Strategic Lawsuit Against Public Participation) laws exist in many U.S. states, but they differ from state to state. Internationally the problem of lack of knowledge about the law is larger still. Rather, we saw among filmmakers a general alarm over recent lawsuits and the federal government's harsh line on whistleblowers as harbingers of more legal trouble for makers of investigative work, and a wish to find a safe haven in some kind of legal defense fund. Filmmakers also told us about colleagues who had not undertaken work, for fear of litigation.

Occasionally, filmmakers receive a cease-and-desist letter or subpoena, or a lawsuit is threatened or filed. We found that these problems were rare, but are highly publicized. But even the threat of litigation can freeze a distribution deal. "Every filmmaker is competing with many other very competent filmmakers for a limited number of high profile broadcast slots and distribution opportunities," ITVS staffers noted. "If an equally good film does not have legal risk associated with its distribution (or, has sorted out its legal risks prior to broadcast), that film may have an advantage over a film with unresolved legal issues. Even slight disruptions and unresolved issues can have a big impact on distribution."

Recent cases we found were varied and idiosyncratic:

In two cases—*Crude* and *The Central Park Five*—makers whose subjects were in the midst of an ongoing legal case found themselves subject to subpoenas. Joe Berlinger was forced eventually to provide some material from his film *Crude*, in part because he was not found to be operating as an independent journalist. Benefiting from this knowledge and operating in New York state, which has a shield law for journalists, Florentine Films, maker of *The Central Park Five*, successfully resisted the subpoena from the City of New York for notes affecting the suit of its subjects against the city.

In one case, *Bananas!**, Dole sued the filmmakers for defamation, and threatened others, such as board members of a film festival that had accepted the film, with similar litigation. Dole withdrew its charges eventually, in part reacting to a Swedish boycott of Dole products; indeed, it was not clear that the lawsuit was in good faith. It may have been launched with the goal of delaying the film's release to avoid affecting another Dole lawsuit.

In the case of *Venus and Serena*, the U.S. Tennis Association charged the makers with copyright infringement, a charge that was voluntarily

dismissed with prejudice against the plaintiffs (meaning they could not file again). Other fair use cases were similarly summarily settled, including one in which Yoko Ono asked for an injunction against the film *Expelled!*

Filmmakers and journalists usually did not depend on pro-bono lawyering to defend them, although they may have availed themselves of pro-bono services before that point. Once filmmakers found themselves in crisis, they hired lawyers, usually from law firms approved by their E&O insurance. Journalists often depended on their organization's counsel's decisions on how to handle the situation.

In general, little free legal support is publicly available, appropriate and timely for independent makers for a lawsuit, although pro-bono services exist for other support. Makers have sometimes been able to cobble together pro-bono support services from interested law firms. Doing so depends to some extent on personal relationships and the maker's reputation. As well some legal clinics offer free services for copyright permissions, and the Reporters Committee for Freedom of the Press has a legal hotline for questions as well as web-based and topical advice and information. SPJ has a tiny legal defense fund, which caps out at \$5,000 per user. The Reporters Committee for Freedom of the Press, the ACLU, EFF and IDA have also participated with amicus (friend of the court) briefs in litigation. Occasionally organizations take on legal defense, typically within boundaries that match the organization's focus.

While interviewees did not tell us any stories about legal problems internationally, one did caution that anyone working internationally or in a co-production can face international charges; for instance, Britain has libel laws that are much more plaintiff-friendly than in the U.S. Currently, errors and omissions insurance issued in the U.S. is typically issued world-wide.

Partners _____

The biggest problems, makers agreed, came at the beginning and end of the work-problems such as funding and distribution. Those problems are related indirectly to the threat of blowback.

Producers of works that challenge the powerful are, by definition, bucking the system. At the outset, it is hard to find funders who want to, or can afford to support work that challenges the status quo or today's powerful. Foundation funders often shy away from something that board members can label controversial, advocacy or propaganda, even if it is accurate, verified and responsible. Board members may also have ties to the powerful. Broadcasters and cablecasters, who fund some productions, have concerns about such work that range from advertisers to ratings to members to political consequences to personal ties. In short, the network of relationships that produces and funds media is closely intertwined with other networks of power.

Given these realities, private funders that have distinguished themselves by funding courageous and sometimes confrontational work, such as the John D. and Catherine T. MacArthur Foundation, the Ford Foundation, Chicken & Egg Pictures, BRITDOCS, Sundance Documentary Fund, and others, including many family and community foundations, sometimes find themselves besieged by requests that far exceed their capacity to fund, given the expectable conflicts and lack of interest in funding media elsewhere. The publicly-funded

THE NETWORK THAT PRODUCES AND FUNDS MEDIA IS CLOSELY INTERTWINED WITH OTHER NETWORKS OF POWER.

production entity Independent Television Service, which is focused on diverse, innovative programming, must reject 98% of applicants.

At distribution, makers told us, the same concerns reappear. Broadcasters often are not interested in work that challenges the powerful and entrenched; for many, it is simply not part of the business plan. Many broadcasters handle documentaries through entertainment divisions, so the window of opportunity is not big. Public television local stations sometimes balk at showing challenging work even when it has been thoroughly vetted by PBS and producers. Also, those outlets that will consider such work either for funding or acquisition, makers said, often want to change work to appear more even-tempered or even-handed, even if the work makes responsible, accurate and verified charges.

This makes the choices to carry such work, as happens on some public television strands such as *POV*, *Independent Lens* and *FRONTLINE*, on commercial cable channels such as HBO, CNN, ESPN and Al-Jazeera, and to showcase it, as sometimes happens on PBS's *NewsHour*, and at the *New York Times* through its Op-Doc series, all the more impressive and that real estate all the more precious.

Makers of long-form non-fiction storytelling on social issues strongly believe there is a problem with both programmers and distributors, as well as with co-producers at times, who have a resistance to hard-hitting material. This is impossible to substantiate since distributors do not discuss why they did not carry something, and it is also subject to interpretation. We present here some comments by producers. They also of course have arguments only with those relatively rare entities willing to consider taking on risky films, and which do carry other risky films. One producer believed that a film that involving the pharmaceutical industry was rejected by public TV and cable because of its target. The *New York Times* dropped an Op-Doc based on James Spione's *Silenced* (about government whistleblowers), producer Daniel Chalfen believes, because the filmmaker would not make changes to align with the newspaper's editorial stance. Marty Syjuco and Michael Collins' *Give Up Tomorrow*, about a miscarriage of justice in the Philippines, has not been shown on Filipino television; the filmmakers believe it is because Filipino media has close relationships with the powerful people and entities that the film challenges.

Programmers and distributors were even more cautious than makers, who were reluctant themselves, about discussing this issue. All the programmers were painfully aware of the delicate negotiations they perform as intermediaries themselves in a media ecology. Without discussing specifics, programmers told us as well of the challenges of working within that larger ecology, which harshly constrains their own options. They noted the need to negotiate to get partners to support programs and to get signoffs from different parts of a corporate structure.

IN SUM: ASSESSING AND MANAGING RISK TODAY

Generally, we found that while trouble is occasional, risk is real and largely predictable. Much of it can be managed, given knowledge, infrastructure and resources; indeed, it has been managed in journalism consistently over many decades, including by makers of long-form public affairs documentaries on television. We spoke to makers of hard-hitting work who have succeeded. They told us, however, that they know people not so experienced or expert, who find it hard to assess risk and may avoid even undertaking such work. We heard that some people are intimidated in the field by threats and harassment, and others abandon work out of caution.

We found litigation to be extremely sparse. In the vast majority of situations, neither litigation nor threat of litigation ensues. Litigation costs have largely been covered by insurance, although for makers running small shoestring businesses added dollar costs for uninsured elements in litigation are anything but incidental and time costs are high.

Makers found insurers sympathetic to their situations, but also careful to calculate and charge for their own risks. High risk projects operated in some cases without insurance coverage or without enough coverage. Insurers understandably wanted a high deductible or exclusion in cases where a high risk was already known—for instance, activity in a war zone, or an announced threat to sue by one of the film’s subjects. Training and experience can mitigate costs, because insurers assess risk at a lower level for both. Makers sometimes regretted not having purchased, or in some cases, even known about some kinds of insurance. Makers did not, however, find that previous trouble impaired their ability to get insurance for a different project.

Makers told us about inadequate tools for securely guarding communication and information storage, and about inadequate training, support, and institutional practices to make security a priority in the workplace. They also told us about challenges in managing physical security in dangerous areas. Both of these problems are known risks, both to the makers and to their subjects. The problems with limitations of security software, business models for security systems, and security practices have been a constant topic of conversation since the Snowden revelations, and Snowden himself constantly discusses these problems in public speeches. These problems are large, growing, and universally shared, not only among non-fiction filmmakers and journalists but among their subjects and indeed the general population.

Makers reported problems with managing public image in the face of well-funded counter-attacks in the media and in public relations. Their biggest problems were in dedicating large amounts of staff time to unfamiliar problems; lacking resources to hire experts in strategic communication, they both conducted campaigns themselves and took valuable time away from distribution, promotion, research or production. But even so, makers also often reported a positive boost in publicity for their projects from the attacks.

So it seems that risks while real are also to some extent familiar ones to

**RISK IS REAL
AND CAN BE
MANAGED.**

WHAT TOOLS EXIST TODAY TO HELP MAKERS LOWER RISK?

investigative journalism, and that most work is executed without encountering a bruising experience with litigation or smear campaigns. But the interviewees also told us that many newer entrants into production, including veteran filmmakers with little investigative journalistic experience, lacked good ways to do risk assessment in several areas. We also noted that it is easy to generalize anecdotes erroneously into a perception of industry trends, particularly around litigation.

The knowledge to do better risk assessment, to obtain tools (albeit clumsy) to manage security, and to develop production practices to minimize risk exists. Some of it is available for free and online. Some of it is available for hire, from programmers, lawyers and insurers.

RECOMMENDED PRACTICES

To mitigate the genuine risks that exist, what can makers do? We discuss below some of the most commonly volunteered advice from our interviewees and literature search.

Journalistic Standards

Makers telling truth to power need both to observe and be seen observing journalistic standards, whether they think of themselves as journalists or filmmakers. Observing those standards won't stop the attacks, or attempts to discredit the work, but doing so removes some easy targets, and it accords with basic values shared throughout this community. If necessary, both filmmakers and journalists can consult journalistic textbooks such as *Elements of Journalism*, *Principles of American Journalism*, *The New Ethics of Journalism* and *News Reporting and Writing*.²²

In production, makers can benefit from common advice for investigative journalists. One point interviewees made consistently is this: *Always keep in mind that the more controversial your work, the higher the expectation will be for ethics and editorial standards.* Gregg Leslie, Legal Defense Director for Reporters Committee for Freedom of the Press, noted, "Because most journalists won't go to law school and study the law thoroughly, the best thing that they can do is act as ethically and as purely as possible because that counts in the law—your motive. It doesn't solve a legal issue, but it has a lot to do with whether you'll prevail in a legal issue."

Specific advice we heard includes (subject to the refrain, "don't turn guidelines into rules"):

- Verify facts and document their verification. (Recommendations for exactly how to do this varied widely, from hiring an independent fact checker to keeping a research log and keying it to assertions in the work.)
- Be consistent in your practices.

22 Craft, S., & Davis, C. N. (2013). *Principles of American journalism : an introduction*. New York: Routledge; Kovach, B., & Rosenstiel, T. (2007). *The elements of journalism : what newspeople should know and the public should expect*, 1st rev. ed. (New York: Three Rivers Press); McBride, K., & Rosenstiel, T. (2014), *The New Ethics of Journalism: Principles for the 21st Century* (New York: Sage, 2014); The Missouri Group (2013). *News reporting and writing* (11th ed.). Boston: Bedford/St. Martin's.

**“THE MORE
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-GREGG
LESLIE**

- Analyze your own bias, articulate it, and challenge it yourself in your research. That doesn't mean you need to lay all this out in the final work, but the effort will pay off in production.
- Don't be afraid to interview subjects on “the other side” of the story, if it fits with the kind of story being told. Reach out at the right time and learn as much as you can; pledge and honor the pledge to represent their view fairly.
- Make sure your sources are legitimate; for instance, if you quote from a document, make sure you've read or seen the original document.
- Back up and keep copies, securely.
- Don't lie to subjects about what you are doing, or misrepresent your project; it can haunt you later.
- Do as much face-to-face as you can, not only for security but to learn as much as you can. Electronic communication only can communicate so much.
- Expect attacks and actively research what kinds of attacks are likely; consider them in constructing your work.
- Watch out for conflicts of interest, including with funders.
- If it's appropriate for the topic, consider having a board of advisors on the topic. They can be valuable spokespeople if needed.
- If you're working with organizations invested in the issue you're researching, make sure you can show that they do not control your work. Consider having a memorandum of understanding as a record of the appropriate distance between you.

Makers telling truth to power need to pay special attention to the formulation of their problem, tone, implications of framing, editing choices and choices of image and sound. Understanding the implications of form helps makers use it effectively to keep good faith with the viewer, and removes easy targets for attacks. Paying attention to the implications of form doesn't, however, mean pulling your punches, but rather owning your choices and avoiding painful regret later. Common advice includes:

- Watch out for potentially misleading words, images, or juxtapositions.
- Avoid cheap shots; they can boomerang on you, both with viewers and in court, with defamation suits.
- Music is perhaps the most powerful cue for emotion in the filmmaker's toolkit; make sure it's matched to purpose, that it doesn't discredit the argument, and that it respects the viewer.
- Consider risks of misinterpretation when you use stock footage.

Transparency at the right time can help makers, although makers need to balance that with other risks. Transparency with subjects can short-circuit potentially expensive complaints. Some lawyers advise that once the film is finished and insured, you should give potential troublemakers access to the film if they request it. (Arrange a screening, they say, but do not give them a copy of the film or a chance to copy it.) If they have legitimate grievances—if you do have facts wrong, or are violating a character's legitimate privacy rights—it's better to sort them out early. You don't want to draw your exhibitors into costly, time-consuming, disruptive litigation. If they have grievances that are

WELL- CONSIDERED TRANSPAR- ENCY CAN BUILD TRUST.

not supported by the law, it's also better to know about them early, and be able to manage the problems with your public relations people. Exhibitors and broadcasters are stretched thin across many different films, and litigation for a single film can impact many other films.

At the same time, lawyers note, transparency needs to be thought through, possibly with a legal expert. For instance, you should demonstrate independence in your decision to act on any feedback, as otherwise it could undermine your case for independent status. And independent decision-making that goes against an angry subject's charge of defamation could add fuel to a charge of "actual malice," showing that a filmmaker acted in "reckless disregard" of the truth.

Overall, well-considered transparency can build trust. Transparency with distributors can help them provide support so that the work can be better launched. Transparency with viewers can increase trust; viewers who can consult underlying data, get FAQs from a website, and see complete interviews online can be reassured of your viewpoint.

Safety and Security _____

Makers need to keep themselves and their subjects safe, often by paying close attention to security in communication, and also protect the information itself as the project comes together. Experts suggest:

- Conduct a threat assessment (see resources in Appendix A). Evaluate risks and possible outcomes before starting the work. Consider who and what needs to be protected, and what resources and methods might be used to access or attack them.
- Take conflict zone and harsh environment trainings. Expect to pay (currently about \$2,500), although there are some free resources for freelancers, and to spend a few days doing so.
- Protect your subjects as you do yourself, and be honest with them about the limits of your ability to do so.
- Find local allies, good local partners, and local producers.
- Consider, if appropriate, registering with your national embassy or consulate when you arrive.
- Always let someone know what you are doing and where you are exactly. Inform this person (an editor, friend, family member - ideally some organization that could help) of every step you make.
- Learn basic encryption software and techniques, and try to normalize its use so that your use doesn't stick out under surveillance when you need it.
- Store information securely, and make backups of everything. Consider having mirror drives.
- Consider whether deleting information would be beneficial. (There are many opinions on whether this is a good idea.) If so, delete thoughtfully and in a timely, routine way. Have a policy; definitely don't delete anything if even the threat of litigation arises, much less a subpoena; that could be illegal.
- Make sure your funders have secure practices on their end, if you are

sharing information with them.

- Recognize the limits and problems with secure information, and be aware of ways to protect communication without encryption. This may include face-to-face meetings, establishing multiple lines of inquiry to provide plausible deniability for yourself and your sources, having multiple sources, and having cover stories with some plausible backup information.

Public Relations _____

Public relations needs to be part of the plan from the start of the project. It involves knowing well how you are framing the issue and how that framing is supported and can be attacked, developing an advisory group and building relationships with issue organizations that can support you, having supporting materials available, and of course doing solid research on the entities likely to counter your claims.

Specific advice from public relations experts:

- Have a crisis management plan in place ahead of time with steps to take, channels to use, key contact and resource information and pre-drafted statements. Key areas to consider include public relations, legal, security, operations, finance, and human resources. During the crisis, the three key tenets are (1) be quick, (2) be accurate, and (3) be consistent.
- Before you release the film into the world, line up experts who don't know you, who aren't involved in the film, but who will probably agree with your point of view. Make a list of academics or other experts, send them a copy of the film, and ask them what they think, or draw on your advisory board. You can give a list of names from this group to news outlets as experts who can comment on your content.
- Go through all the questions you think critics can lob at you and your project; develop answers, both for you and your team. Do you have vulnerabilities in your personal history that can be exploited to discredit your work? Get ready to have them be used against you, and know what you'll say—and use to prove what you say.
- Don't let your emotions get the better of you, no matter what they're saying about you. Keep on top of the conversation as much as possible and respond with facts, not denials. Leverage passion strategically; don't let them get under your skin.
- If you're dealing with a large-scale smear campaign, you may want a good crisis publicist—an entirely different skillset from your regular publicist. You may be able to find a public relations firm or specialist who is willing to help out at a discounted rate. Try to find a firm whose mission and/or expertise matches your case there.
- If you are working with partner organizations, or know of organizations who share your cause, reach out to them about teaming up on a media strategy. They may also be interested in teaming up to work with a public relations consultant.
- Join journalistic and filmmaker organizations that can support you, before you get attacked.

**PUBLIC
RELATIONS
NEEDS TO BE
PART OF THE
PLANNING.**

MAKE SURE YOU GET ALL THE KINDS OF INSURANCE YOU'LL NEED.

Insurance _____

Insurers explained that it is important to understand the nature of E&O insurance. Getting insurance for a film isn't like auto insurance—submitting a claim on one film won't count against someone on a subsequent project. However, it will be considered in reviewing the next project. They will consider the size of settlement, the nature of the action brought, and how egregious the maker's alleged error was. They also want to know if the action was limited to the original project and the likelihood of it repeating. They look at details; every E&O case is distinctive and based on the circumstances. Then they combine that with assessment of the current project, including the content and genre, amount of research done, whether the maker seems to be approaching this in a spirit of fairness and honesty, the likelihood of being sued for this project (including how litigious the subject of the film is), and anything else relevant to the particular project. They want to see some version of the film and opinion letters from a lawyer on copyright clearances and fair use claims.

They also look for patterns of behavior in the maker's career, to see if makers have engaged in any systemic bad behavior (a history of not doing due diligence, using other's works without getting a fair use opinion or seeking licenses, for example). Losing a lawsuit, for example, may be an indicator of bad behavior, or it may not be.

Considering all this, insurance brokers suggest:

- Get insurance as soon as possible in the project; if you seek it after problems surface, you run the risk that insurance deductibles will be higher or that conflict may be excluded from coverage altogether. This can get complicated and hurt distribution deals. However, filmmakers note that it's hard to get insurance earlier than fine-cut stage, in practice.
- If you are touching on ongoing litigation, or something that may be litigated in the future, consider subpoena insurance. This typically is not covered by errors and omissions policies automatically, but can be purchased as an add-on. Make sure it covers both the cost of complying with the subpoena and the cost of fighting it.
- Work with a broker to analyze risk factors; insurers analyze risk for a living, and brokers can be excellent allies. Level with them about your concerns, so they can help strategize.
- Your insurance coverage is usually worldwide; just make sure it is.
- If you're working for someone else, make sure you're covered under the insurance policy or policies, or added as an "additional named insured," and if you are, check the amount you're covered for, to avoid underinsurance.

Legal Issues _____

It is important to have legal advice throughout the process of making an investigative film. Lawyers can be useful sounding boards, help limit liability, and ensure that you get the full benefit of the law. Getting pro bono services is unlikely in the case of litigation. Firms are also hesitant to commit to pro bono representation in the abstract, but they may be willing to consider it on a case-by-case basis. You should ask your firm about the possibility of pro bono or reduced fee assistance. There is additional pro bono help available in non-

MAKERS NEED TO KNOW ENOUGH ABOUT LEGAL ISSUES TO KEEP POTENTIAL PROBLEMS IN MIND.

crisis circumstances, especially when considering copyright clearances and fair use. Many legal clinics and services such as Volunteer Lawyers for the Arts can sometimes offer services in this area.

Makers often qualify for reporter's privilege, a First Amendment doctrine that protects the free press, and can use shield laws in certain states to protect themselves.²³ A big issue in whether reporter's privilege applies will be journalistic integrity, especially independence and accuracy. Another issue is whether there is intent to disseminate to the public at the time the information is gathered. Some states have constitutional protections that are more protective of reporters than the First Amendment. However, it's sometimes hard to know where a challenge will be brought. Each case applies relevant laws under conflict of law principles, so consulting legal resources (see appendix A) will be important here.

Additionally, some federal courts have recognized a general reporter's privilege. This privilege is not absolute, and not all courts recognize it. Courts in the Fourth Circuit, which includes Maryland and Virginia, for example, have generally rejected this. Some federal courts, including the Second Circuit (which includes New York) have held there is a "qualified evidentiary privilege for information gathered in a journalistic investigation."²⁴ This privilege is strongest in the context of confidential information, but is not limited to those circumstances. For it to apply, you must be acting in the role of the independent press. Independence is judged by the intent to disseminate to the public at the time the gathering of information begins; it attaches when the information is gathered for the purpose of publication, not where the intent to publish later arose.

If producers are working on a co-production or internationally, they should make sure they have a line item in the budget for local legal advice, most helpfully in pre-production.

If a project covers ongoing legal proceedings, makers can get pulled into those cases. United States law allows for foreign or international tribunals, or parties with an interest in those proceedings, to seek testimony, statements, documents, or other things for use in proceedings in foreign or international tribunals, including criminal investigations conducted before formal accusation. However, a person may not be compelled to give testimony, statements, or to produce documents or other things in violation of any legally applicable privilege.²⁵ Sharing footage with people in litigation or their lawyers or an advocacy group can make it harder to argue that makers are independent or their footage should remain privileged.

If work touches on domestic litigation (or something that subsequently is litigated), footage may be subpoenaed by parties to the action. Thus, routine policy on keeping or destroying records, outtakes and other materials will be important. Destroying anything once there is talk of legal action (even if it's not filed) could be illegal. Makers need to weigh risks and advantages of maintaining or destroying different bodies of information. If you get sued for

²³ Check specifics in the Reporters Committee for Freedom of the Press Reporter's Privilege compendium at <http://www.rcfp.org/reporters-privilege>.

²⁴ *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

²⁵ See generally Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals, 28 U.S.C. § 1782 (2012).

WEIGH THE RISKS AND BENEFITS OF DESTROYING INFORMATION.

defamation, for instance, destroying your notes would mean that you have no evidence to help defend yourself. Keeping data encrypted does not keep it from being subpoenaed or otherwise ordered to be produced in court. Encrypting files *may* serve as evidence that the information was intended to be confidential, and so may make the argument stronger that they should remain secret under journalist's shield laws and reporter's privilege. However, every state has a different standard, so consult an attorney licensed in your jurisdiction for more information.

Some states have laws against defamation suits designed merely to silence speech. Laws against Strategic Lawsuits Against Public Participation (SLAPP) are designed to protect victims of a lawsuit meant to intimidate them into silence.²⁶ Makers who feel that they are being faced with a SLAPP suit should ask their attorney about the protections available to them in their jurisdiction.

In general, makers need to know enough about legal issues so to keep potential problems in mind as they make their work. For example, you should know enough about copyright to know when in general you should be looking for permission and when you do not (even though at some point you'll get a lawyer's letter on this); realizing the extent of your rights to quote without permission can save you money, time and stress. Understanding privacy rights can shortcut production processes as well. In most places, you can actually film anywhere you can lawfully be, and do not require permission to film. However, there are exceptions. Each state has its own laws governing sound and video recording. States also have different laws on using ability-enhancing tools—anything that would let you see beyond what the unaided eye would see, for example (i.e., zoom, telephoto lenses). There are also special rules for filming children, filming police, and filming in hospitals, which vary from state to state.

Partners _____

Partnerships are growing in commonality and complexity, as journalists look to expand reach and experiment with form, and as filmmakers seek out new venues, new funders, and new ways to present their work.

Avoiding conflict of interest is key, since many outlets will not take work that has been financed by an interested party or that has close partnership ties with an advocacy organization. More generally, even the suggestion of conflict of interest can discredit your position as an independent voice, both in court and in public opinion.

Transparency with partners, particularly distributors, is also crucial. Preparing materials that help them make your case is one way to demonstrate that. If your potential partners ask you hard questions, consider how valuable these questions are to you; they give you early warnings about issues that will come up.

Makers need partners to do their work, including investors, foundation funders, distributors, or exhibitors. They need to recognize the needs and problems of those entities as they engage them with their projects. But if they've done their work well, working with partners should be fairly smooth.

AS PARTNERSHIPS GET MORE COMMON, THEY ALSO GET MORE COMPLEX.

²⁶ See Appendix A for details.

NEXT STEPS

Much information is available to help makers do their work as responsibly and with as little trouble as possible, as is evident in Appendix A, where suggestions from interviewees are gathered. These resources are not always easy to find. Organizations exist to support filmmakers and journalists, but they are not necessarily in a position to support makers of long-form documentary at the time that they need it.

Our interviewees made recommendations, including the following:

Reduce cultural differences between journalism and filmmaking for this kind of work.

- Journalistic and filmmaking organizations can strive to overcome cultural obstacles, to support and reward courageous filmmaking that tells truth to power with recruitment of new members, support statements and coverage of such efforts, and offering awards. Such organizations could also work together on policy issues, for instance harmonizing journalistic shield laws at a national level. Conferences for journalism and film can inclusively host discussions with these overlapping constituencies.

Make more and better training available.

- College film and journalism programs, law schools, membership organizations, and nonprofits such as Poynter, Nieman, and Shorenstein can expand and offer certificate training and workshops for filmmakers as well as journalists in hostile-environment training, security practices, legal knowledge and more.
- Curriculum for such training could be developed. For instance, it may be useful to create a crisis communications toolkit that builds into production research on potential adversaries, planning for defenses and case studies of media campaigns. A good breakdown of privacy and security best practices around social media behavior, promotion, back ends of websites, password protection on email, and around storing and sharing media, could be helpful. Encouraging production teaching that builds in such knowledge and makes it part of pre-production could allow makers to manage risk much more efficiently.

Amplify legal support.

- Many costs go uncovered even when errors and omissions insurance covers a claim, and pro bono legal services are hard to find. A fund that covers related costs could be helpful. One interviewee, who has been successful at assembling teams of pro bono lawyers, suggests developing a roster of firms willing to work on or collaborate with others to pledge to work on challenging films; such a pledge could encourage producers to make work, as well as make decisions at the level of insurance and broadcasting easier.

Organize for freedom of expression.

- News media can create a focus on less-visible threats to freedom of expression.
- Organizations can champion makers, issue support statements, petitions, and generally publicize the threats to freedom of expression when filmmakers tell truth to power.

Centralize knowledge for action.

- Funders can together establish best-practices expectations for projects they fund, and pledge funding to accommodate them.
- Create a clearinghouse for information on best practices in telling truth to power, which can link makers with others who can share their experiences, and to services that work with makers to strategize how best to leverage them.
- Create a service that would provide confidential, comprehensive information on safety, legal and insurance issues for filmmakers. Repeatedly, interviewees noted that independent media makers taking on risky topics are left to their own devices to piece together knowledge, training, and support networks.

Appendix A

Resources

These resources were recommended by interviewees and discussed in literature. Got a suggestion? Contact cmsimpact@gmail.com.

LEGAL GUIDES _____

GENERAL

Cameras in Court: A State-By-State Guide
Radio Television Digital News Association
http://rtdna.org/content/cameras_in_court
Hoping to film in a courtroom? Learn more about your state's policy on recording in court.
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Defamation Privileges and Defenses
Digital Media Law Project
<http://www.dmlp.org/legal-guide/defamation-privileges-and-defenses>
If someone accuses you of defamation, there are a number of defenses and privileges you can raise to protect yourself. Explore them here.
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The First Amendment Handbook
Reporters Committee for Freedom of the Press
<http://www.rcfp.org/first-amendment-handbook>
Get familiar with the basic rights and freedoms that may have an effect on your work. Topics include how to avoid libel, protect your privacy, preserve confidentiality, and access certain locations.
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Know Your Rights
Electronic Frontier Foundation
<https://www.eff.org/issues/know-your-rights>
Find out how to protect your rights and secure your data when dealing with the police in a search-and-seizure situation, at home or crossing international borders.
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Legal Guide
Digital Media Law Project
<http://www.dmlp.org/legal-guide>
This legal guide was specifically made for independent content creators and is searchable by state, keyword, section, or subject area.
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Legal Hotline
Reporter's Committee for Freedom of the Press
800-336-4243
This hotline provides fast, free legal information.
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Reporter's Recording Guide
Reporters Committee for Freedom of the Press
<http://www.rcfp.org/reporters-recording-guide>
Determining how and when you can legally record conversations is a complex issue, but this guide breaks down Federal and state laws to help you navigate it.

The Reporter's Privilege

Reporters Committee for Freedom of the Press

<http://www.rcfp.org/reporters-privilege>

Learn more about the shield laws that apply in your area. This site offers a comprehensive set of State and Federal guides on reporter's privilege, including sections on the scope of protection and who is covered under each law.

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SLAPP Stick: Fighting Frivolous Lawsuits Against Journalists

Reporters Committee for Freedom of the Press

<http://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists>

If you suspect that you may be or have been the victim of a lawsuit meant to intimidate you into silence, read up on your state's laws prohibiting Strategic Lawsuits Against Public Participation (SLAPP). This site offers readable state-by-state guides.

COPYRIGHT

Clearance and Copyright, 4th Ed.

Michael Donaldson and Lisa Callif

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Documentary Filmmakers' Statement of Best Practices in Fair Use.

Cmsimpact.org/documentary

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Getting Permission: How to License & Clear Copyrighted Materials Online & Off

Richard Stim

<http://www.nolo.com/products/getting-permission-riper.html>

If you need to seek permissions, this book includes information about the permissions process and form permission agreements.

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Stanford University Libraries

<http://fairuse.stanford.edu/overview/>

PERMISSION FROM SUBJECTS

Obtaining Informed Consent

WITNESS

<http://library.witness.org/product/obtaining-informed-consent/>

What's involved in getting real informed consent from subjects, written for human rights advocates but applicable to many.

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Releases

Stanford University Libraries

<http://fairuse.stanford.edu/overview/releases/>

If you include footage of others in your film, you may need to secure a signed release. This resource includes information about when you need to use a release and some general rules for releases.

REPRESENTATION

Electronic Frontier Foundation

<https://www.eff.org/pages/legal-assistance>

While the Electronic Frontier Foundation takes on very few cases directly, they may be able to refer you.

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European Center for Constitutional and Human Rights

<http://www.ecchr.de/about.html>

The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit legal and educational organization dedicated to protecting civil and human

rights throughout Europe.

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Media Legal Defence Initiative

<http://www.mediadefence.org/>

The Media Legal Defence Initiative provides legal help for journalists, bloggers and independent media makers.

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Online Media Legal Network

<http://www.omln.org/lawyers>

The Online Media Network is a network of firms, law school clinics, and individual lawyers across the United States who may be able to provide legal assistance on a pro bono or reduced fee basis to qualifying digital media creators.

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Reporters Committee for Freedom of the Press

<http://www.rcfp.org/>

The Reporters Committee for Freedom of the Press provides free legal assistance to journalists.

JOURNALISTIC BEST PRACTICES _____

Journalism

BBC Academy

<http://www.bbc.co.uk/academy/journalism>

The College of Journalism, part of the BBC, oversees training for BBC News staff. This website focuses on core skills, safety, specialist areas, legal and ethical issues, and houses the News style guide.

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Journalistic Guidelines

FRONTLINE / WGBH Educational Foundation

<http://www.pbs.org/wgbh/pages/FRONTLINE/about-us/journalistic-guidelines/>

This comprehensive set of guidelines for nonfiction producers illustrates FRONTLINE's own journalistic process, and provides simple yet in-depth discussion of best practices.

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Nieman Watchdog

Nieman Foundation

<http://niemanreports.org/articles/category/watchdog/>

These reports focus on how journalists can hold those in power accountable.

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The Solutions Journalism Toolkit

Solutions Journalism Network

<http://solutionsjournalism.org/tools/solutions-journalism-toolkit/>

A free practical guide to solutions journalism.

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Story-Based Inquiry: A Manual for Investigative Journalists

UNESCO

<http://unesdoc.unesco.org/images/0019/001930/193078e.pdf>

This guide presents the basic methods and techniques of investigative journalism, but with a focus on good storytelling - which means it could be extremely useful for your next documentary.

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Ten Steps to Investigative Reporting

International Center for Journalists

http://www.icfj.org/sites/default/files/10_Steps_Investigative_Reporting_0.pdf

These steps cover some good principles for first-time filmmakers, and include tips on building support, working with sources, and verifying information for first-timers and veterans alike.

Training

The Poynter Institute

<http://about.poynter.org/training>

Sharpen your journalism skills with workshops, webinars, self-directed courses, and more.

RESEARCH AND MONITORING

75+ Tools for Investigative Journalists

Journalism Tools / Medium.com

<https://medium.com/@Journalism2ls/75-tools-for-investigative-journalists-7df8b151db35>

This extensive list includes links to sites for monitoring news and social media, collecting information, and mapping out story ideas.

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Journalist’s Resource

Shorenstein Center for Media, Politics and Public Policy

<http://journalistsresource.org/>

This database provides up-to-date research on topics relevant to today’s most important stories.

PHYSICAL AND MENTAL SAFETY _____

Dart Center for Journalism & Trauma

<http://dartcenter.org/overview>

The Dart Center for Journalism and Trauma, a project of the Columbia University Graduate School of Journalism, is dedicated to informed, innovative and ethical news reporting on violence, conflict and tragedy. It provides, among other things, resources and training.

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Disaster and Crisis Coverage

International Center for Journalists

http://www.icfj.org/sites/default/files/Disaster_Crisis.pdf

This guide focuses not only on physical safety but also on managing stress and emotional strain.

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Handbook for Journalists

Reporters Without Borders

<http://en.rsf.org/handbook-for-journalists-17-04-2007,21744.html>

This guide discusses principles, norms, strategies and other information useful to media professionals working in conflict zones. Available in English, Urdu, and Kurdish.

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“How Was Your Trip?” Self-Care for Researchers Working and Writing on Violence

Social Science Research Council

http://webarchive.ssrc.org/working-papers/DSD_ResearchSecurity_02_Theidon.pdf

This paper provides support for researchers dealing with traumatic subjects or working in dangerous environments.

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Journalist Security Guide

Committee to Protect Journalists

<http://cpj.org/reports/2012/04/journalist-security-guide.php>

Know the risks and prepare for them before you head out into the field. This guide can help you plan for conflict zones, natural disasters, health epidemics, and more.

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The Journalist Survival Guide: An Animated Video Guide

Skeyes Center for Media and Cultural Freedom

<http://video.skeyesmedia.org/>

These animated videos are available in English and Arabic and communicate safety

information in a much more visual way. The sites includes digital security lessons as well.

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Live News: A Survival Guide for Journalists

International Federation of Journalists

http://www.ifj.org/fileadmin/images/Live_News_versions/Live_News_EN.pdf

This guide focuses primarily on working in war and conflict zones, but raises important considerations for any filmmaker entering unknown and potentially hazardous environments.

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Reporters Instructed in Saving Colleagues

<http://risctraining.org/>

RISC trains and equips freelance journalists in all media to treat life-threatening injuries on the battlefield, offering training free to freelancers.

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Safety & Security

Rory Peck Trust

<https://rorypecktrust.org/resources/safety-and-security>

This site offers tools and resources to help you think about risk as you prepare to film. For providers of conflict zone training in the UK: <https://rorypecktrust.org/freelance-assistance/Rory-Peck-Training-Fund/Approved-Course-Providers>

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Safety & Security

WITNESS

<http://library.witness.org/product/safety-security/>

This presentation on staying safe and protecting subjects in the field was written for human rights advocates but is applicable to journalists and filmmakers.

INSURANCE _____

Documentary Filmmakers and Fair Use

Hiscox

http://www.hiscoxbroker.com/shared-documents/media-liability/8882_us_fair_use_whitepaper_factsheet.pdf

This guide to fair use includes advice on using insurance to protect yourself and your project.

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Insurance

Rory Peck Trust

<https://rorypecktrust.org/resources/insurance>

If you think you need insurance but you're not sure where to start, this site can help you figure out what types of coverage you need and what to look for when choosing a policy.

RESPONDING TO SMEAR CAMPAIGNS

Crisis Management and Communications

Institute for Public Relations

<http://www.instituteforpr.org/crisis-management-and-communications/>

This guide to best practices in crisis communications can help you contain damage from media attacks.

PRIVACY & INFORMATION SECURITY _____

Digital Security

Rory Peck Trust

<https://rorypecktrust.org/resources/digital-security>

This site provides a number of resources that can help you lay the groundwork for secure communication and determine what risks you may face. It also addresses specific security questions, such as how to safely use a public computer and avoid online monitoring.

Encrypting Email

<https://emailselfdefense.fsf.org/en/>

This guide from the Free Software Foundation helps you figure out how to encrypt email.

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Email Self Defense

Free Software Foundation

<https://emailselfdefense.fsf.org/en/>

This site gives step-by-step instructions for setting up encrypted email.

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Encryption Works: How to Protect Your Privacy in the Age of NSA Surveillance

Freedom of the Press Foundation

<https://freedom.press/encryption-works>

This resource provides an overview of digital security, including a basic primer on what encryption is and what software you can trust.

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Online Guide to Practical Privacy Tools

Electronic Privacy Information Center

<https://epic.org/privacy/tools.html>

This guide includes a quick list of privacy and security enhancing tools.

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Privacy Pack

Reset the Net

<https://pack.resetthenet.org/>

The Privacy Pack provides an easy-to-follow list of privacy enhancing technologies that work across a variety of platforms, including mobile.

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SecureDrop

Freedom of the Press Foundation

<https://freedom.press/securedrop>

SecureDrop is an open-source submission system which allows you to securely accept documents from anonymous sources.

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Security in-a-Box: Tools and Tactics for your Digital Security

Tactical Technology Collective & Front Line Defenders

<https://securityinabox.org/>

This site provides a range of How-Tos on specific security precautions you can take, such as securing your smart phone and social media accounts. It also includes guides for using a variety of common security programs.

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SpeakSafe: Media Workers' Toolkit for Safer Online and Mobile Practices

Internews

https://speaksafe.internews.org/uploads/files/Internews_SpeaksafeToolkit.pdf

This guide lists straight-forward steps to securing your information and is set up to apply across environments, platforms, and levels of expertise.

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Surveillance Self-Defense: Tips, Tools and How-tos for Safer Online Communications

Electronic Frontier Foundation

<https://ssd.eff.org/>

This guide provides comprehensive information on choosing the right security tools and how to use them. It also has sections dedicated to journalists, activists, and human rights defenders.

COMMUNITY _____

Committee to Protect Journalists

<http://www.cpj.org/>

A nonprofit organization dedicated to promoting press freedom around the world.

The D-Word

<http://www.d-word.com/>

An online community of documentary filmmakers and professionals, centered around forum discussion.

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Doculink

<http://www.doculink.org/>

A community of documentary filmmakers connected via an interactive mailing list. The site also provides a list of links to programs and organizations relevant to filmmaking.

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First Amendment Project

www.thefirstamendment.org

This Organization provides legal advice and representation on First Amendment matters to journalists, freelancers, documentarians, activists and artists, to assist them in their efforts to speak out, to find out, and to resist attacks on free speech.

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Freedom of the Press Foundation

<https://freedom.press/>

A non-profit organization dedicated to helping support and defend public-interest journalism focused on exposing mismanagement, corruption, and law-breaking in government.

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Indietalk

<http://www.indietalk.com/>

A forum for filmmakers.

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International Documentary Association

<http://www.documentary.org/>

A nonprofit membership organization for nonfiction filmmakers and industry professionals.

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Reporters Committee for Freedom of the Press

<http://www.rcfp.org/>

A nonprofit association dedicated to providing free legal assistance to journalists since 1970.

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Shooting People

<https://shootingpeople.org/home>

A place for independent filmmakers to discuss projects, find collaborators and funding, and learn new skills.

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Society of Professional Journalists

<http://www.spj.org/>

A national membership organization for journalists.

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Online News Association

<http://journalists.org/>

A nonprofit membership organization for digital journalists, connecting journalism, technology and innovation.

Appendix B

Recent Litigation: Summaries and Lessons

By Deborah Goldman

CRUDE

FILM: CRUDE²⁷ _____

How did the filmmaker end up in court?

- Chevron brought an action against the filmmaker, Joe Berlinger, seeking disclosure of documentary footage constituting outtakes for use in proceedings in foreign tribunals pursuant to 28 U.S.C. § 1782.
 - 28 U.S.C. § 1782 - Assistance to foreign and international tribunals and to litigants before such tribunals.
 - This statute provides that parties may be ordered to give testimony, statements, or produce documents or other things for use in proceedings in foreign or international tribunals, including criminal investigations conducted before formal accusation.
 - A foreign or international tribunal OR an interested person may request the information.
 - However, a person may not be compelled to give testimony, statements, or to produce documents or other things in violation of any legally applicable privilege.

What was at issue in the litigation?

- The question was whether the journalistic privilege protected Berlinger's footage from compelled disclosure under § 1782.
 - This privilege arises under the federal common law
- Plaintiffs' contentions: The plaintiffs contended that, "because Berlinger had free access to plaintiffs' counsel and shot footage when plaintiffs' counsel were in court chambers and dealing with the supposedly neutral court expert, the footage excluded from the film would show improper influence by Plaintiffs' counsel on the court and the court's expert." *Chevron*, 629 F.3d at 304.

What did the court rule?

- Both the trial and appellate court ordered Berlinger to turn over the footage because he was not independent, and thus not entitled to protection under the journalistic privilege.
- What weighed against him: (1) The Plaintiff's lawyer solicited Berlinger to create a documentary from the perspective of his clients; (2) Berlinger removed at least one scene from the final version at their direction.

What can we learn from the case?

- The Second Circuit has long recognized a qualified evidentiary privilege

²⁷ Court: United States District Court, Southern District of New York; United States Court of Appeals for the Second Circuit

Trial Judge: Kaplan

Trial Docket: 1:10-MC-00001

Appellate Opinion: *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d. Cir. 2011) (affirming trial court's ruling)

for information gathered in a journalistic investigation. *Chevron*, 629 F.3d at 306.

- This privilege is not absolute. It's at its highest when "the information sought to be protected was acquired by the journalist through a promise of confidentiality." However, it's not limited to these circumstances.
- You don't need to be a "credentialed reporter working for an established press entity" to be entitled to the privilege. *Branzburg*, 408 US at 705; *von Bulow*, 811 F.2d at 144-45; *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).
- In collecting the information in question, the person must have acted in the role of the independent press.

As Reporters Committee's lawyers explained, the two Berlinger cases—the trial court and the Second Circuit together—focused on whether Donziger "solicited" Berlinger to make the film and whether Berlinger removed a scene from the final version at Donziger's request. They together make clear that independence may be judged, among other possible reasons, on whether a subject solicits a maker to make a film, whether the subject or some interested entity finances the film in whole or part, whether the maker imposes conclusions on a film rather than doing research with an open mind and reporting the results, whether the maker's choices are subservient to the subject's or other interested parties, whether the maker acts on editorial suggestions from a subject, and whether the maker turns off the camera at request of the subjects while filming. Takeaway for Brown? "Filmmakers should be particularly careful about their sources of funding (and how they find funders) and whether they give their subjects any editorial input, if they are concerned about being able to provide independence in a court down the road."

- "Those who gather and publish information because they have been commissioned to publish in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press. Those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all." *Chevron*, 629 F.3d at 308.
 - Page 308, FN 4: "We do not suggest that a journalist loses or weakens her privilege merely because her publication reflects her previously held point of view. Consistency of point of view does not show lack of independence."
- The court points out that the ruling: "does not imply that a journalist who has been solicited to investigate an issue and presents the story supporting the point of view of the entity that solicited her cannot establish the privilege. . . . [S]uch a journalist can establish entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence. But the burden is on the person who claims the privilege to show entitlement." *Chevron*, at 309.
 - In other words, it's not a *per se* bar from asserting the privilege, but it certainly makes asserting it, at least in this circuit, more difficult.
- ** If you are not independent, it does not matter whether the materials are "of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Chevron*, at 309 (citing *Gonzales*).
 - "A person (or entity) that undertakes to publish commentary but fails to establish that its research and reporting were done with independence from the subject of the reporting either has no press privilege at all, or in any event, possesses

a privilege that is weaker and more easily overcome.” *Chevron* at 309.

CENTRAL PARK FIVE

FILM: CENTRAL PARK FIVE²⁸ _____

How did the filmmaker end up in court?

- After named plaintiffs had their convictions vacated, they brought an action against the city and various offices and officials asserting conspired and perpetuated false evidence in securing the main Plaintiffs’ convictions.
- The filmmakers, Florentine Films, Ken Burns, David McMahon, and Sarah Burns, released a documentary, *The Central Park Five*, reporting on the experiences of the five men who were convicted of participating in the 1989 ‘Central Park Jogger’ rape, then served full prison terms before their convictions were vacated.
- The city subpoenaed “audio and/or video materials documenting interviews” of the main and familial plaintiffs, their counsel, the plaintiffs’ experts, and any witnesses, to be used to defend in their civil litigation.
 - Action was brought in federal court on state and federal causes of action.

What was at issue in the litigation?

- Whether the footage requested was protected either under the New York Shield Law or the Qualified Reporter’s Privilege.

What did the court rule?

- The court granted Florentine’s motion to quash Defendants’ subpoena.
- Florentine established entitlement to the reporters’ privilege by demonstrating journalistic independence in the undertaking of the Film.
- Defendants failed to overcome the reporters’ privilege by making a showing that the information sought pertains to a significant issue and is unavailable from alternative sources.
 - This was nonconfidential information, so defendants had a lower burden than if it were otherwise.

What can we learn from this case?

- The New York Shield Law (state)
 - Initially, it only provided protection to confidential sources and materials under an absolute privilege. However, it was extended to provide qualified protection to nonconfidential materials.
 - Production of nonconfidential newsgathering materials to a party seeking such news is appropriate only with a clear and specific showing that the news is: (1) highly material and relevant; (2) critical or necessary to a party’s claim, defense, or proof of a material issue; (3) not obtainable from any source. 928 F. Supp. 2d at 753.
 - The court didn’t actually apply this privilege. But, it’s good to know about.
- The Qualified Reporter’s Privilege (federal)
 - This is the same privilege as discussed above in the case of *Crude* (*Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011)).
 - Confidential information will not be disclosed absent a “clear and specific showing” by the requesting party that the information is: (1)

²⁸ Court: United States District Court, Southern District of New York

Trial Judge: Ellis

Trial Docket: 1:03-cv-09683-DAB-RLE; also 1:10-cv-09974-DAB, 1:03-cv-10080-DAB

Trial Opinion: *In re McCray, Richardson, Santana, Wise, and Salaam Litigation*, 928 F. Supp. 2d 748 (S.D.N.Y. 2013).

highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources.

- Nonconfidential information will be disclosed when the requesting party demonstrates that the materials sought are: (1) of likely relevance to a significant issue in the case, and (2) not reasonably obtainable from other available sources. 928 F. Supp. 2d at 754.
- Re: Journalistic Independence
 - Independence can be demonstrated, as it was here, by:
 - The film not being solicited by the Plaintiffs or their attorneys
 - Proceeding over the objection of one of Plaintiffs' attorneys
 - The filmmakers retained full editorial control over the production of the film
 - There has never been any financial relationship between either Plaintiffs or their attorneys and the filmmakers.
 - Statements made publicly by the filmmakers after gathering information that advocate for a certain position are irrelevant for purposes of the privilege.
 - The timing of information gathering in relation to the formation of the intent to publish is not analyzed in a vacuum. The question to be answered is not whether any fact gathering began but when the information sought by the subpoena at issue was gathered. 928 F. Supp. 2d at 756.
 - Acknowledgements that thank a party for their help does not mean that they received assistance that would point to a lack of independence absent other facts to that point. It is a customary practice to provide acknowledgements, and doing so reveals little about the kinds of contributions made, substantive, or otherwise.
 - Here, they were included because the thanked parties served as helpful interviewees and sources.
- Re: meeting the burden to overcome the privilege.
 - To show relevance, a subpoenaing party must identify a "significant issue" in the case that the subpoenaed materials potentially address. Impeachment material is not ordinarily critical or necessary to the maintenance or defense of a claim; cumulative material is not sufficient to overcome the privilege. 928 F. Supp. 2d at 758.
 - To establish that information is unavailable requires a showing that the Defendant attempted to obtain the information from another source, or cannot obtain the information from another source.
 - Alternative sources, including depositions, must be exhausted before any deposition seeking information potentially covered by the reporter's privilege would be warranted. 928 F. Supp. 2d at 758 (citing *Application of Behar*, 779 F. Supp. 273, 276 (S.D.N.Y. 1991)).

How did the filmmaker end up in court?

- Dole sued the filmmakers for defamation under California law, alleging that the contents of the film were false, yet presented as fact.

What was at issue in the litigation?

- Whether the film defamed Dole Bananas by releasing their film after knowing that Dole alleged the contents were false and that a subject of the film had been accused of fraud.

What did the court rule?

- The plaintiff voluntarily dismissed its complaint without prejudice after the defendants filed a special motion to strike the plaintiff's complaint. However, the court did determine that: (1) this cause of action did arise from protected activity, as producing and showing a documentary constitutes an exercise of the right to free speech; and (2) Dole did not establish a probability that it would have prevailed upon the claim had it not dismissed its claim.

What can we learn from this case?

- A special motion to strike is much like a motion for summary judgment. Ruling on such a motion is a two-step process. (11/17/2010 Final Order, pages 2-3)
 - First, the court must decide whether the defendant has made a threshold showing that the causes of action in the complaint "arise from" protected activity (i.e. whether the acts plaintiff complains of were in furtherance of free speech rights) (focus here is not on the cause of action, but defendant's actions; do not need to show that it was necessarily protected as a matter of law, and the merits of the plaintiff's claims are irrelevant).
 - Second, the court must decide whether the plaintiff has demonstrated a reasonable probability of success on the merits (whether it has shown that the causes of action alleged are "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if [the] evidence submitted by the plaintiff is credited.").
- An actionable defamation can only be based on provably false statement of fact, not matters of opinion. (page 6, citing *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974)). Tone is generally a matter of opinion, not fact, and thus cannot be the basis for a defamation claim.
- To be actionable as a defamation, false statements must be "of and concerning" the person complaining of them.
- The test for whether a misquotation/alterd quotation is sufficiently inaccurate as to be defamatory is: "whether the alteration results in a material change in the meaning conveyed by the statement." (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).
- A media defendant is not liable for a work which may be capable of supporting defamatory impressions, but whose actual content is not defamatory (citing *Newton v. National Broadcasting Co.*, 930 F.2d 662, 681 (9th Cir. 1990), *cert denied*, 502 U.S. 866).
- In determining the defamatory character of a work, the "publication in

²⁹ Court: California Superior Court (LA)
Trial Judge: Chaney
Trial Docket: BC417435

question must be considered in its entirety; it may not be divided into segments and each portion treated as a separate unit” (Final order page 9, citing *Balzaga v. Fox News Network*, 173 Cal. App. 4th 1325, 1338 (2009)).

FILM: VENUS AND SERENA³⁰ _____

VENUS AND SERENA

How did the filmmaker end up in court?

- The U.S. Tennis Association (USTA) sued the filmmakers for copyright infringement because the documentary used copyrighted footage of the U.S. Open.

What was at issue in the litigation?

- Whether the inclusion of footage of the U.S. Open infringed upon USTA's copyrights.

What did the court rule?

- There was no ruling. The case settled in April 2014, and was voluntarily dismissed with prejudice against the plaintiffs (meaning they could not file again). The terms were not disclosed, so there is only a little information available.

What can we learn from this case?

- The filmmaker asserted that its use was protected by fair use.
- Another thing that was asserted multiple times was that USTA wasn't entitled to the relief it sought because it had not registered the copyrights in the footage before the infringement occurred.
- USTA asserted that the filmmakers had approached them seeking a license, but never paid licensing fees or executed a licensing agreement. According to USTA's complaint (¶ 24), the filmmakers said they understood that they would have to license footage.
 - However, one thing to keep in mind, especially when fair use comes into the equation, is that inquiring into licensing arrangements and then not acquiring a license has no bearing on the fair use analysis. See generally Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

³⁰ _____ Court: United States District Court, Southern District of New York
Trial Judge: Roman
Trial Docket: 7:13-cv-04124-NSR

Appendix C

Participants

INTERVIEWEES

Anonymous (21)
Violeta Ayala, Filmmaker
Lincoln Bandlow, Lathrop & Gage
Suzan Beraza, Reel Thing Productions
Liz Canner, Filmmaker
Daniel Chalfen, Filmmaker
Caty Borum Chattoo, American University
Michael Collins, Filmmaker
Marshall Curry, Marshall Curry Productions
Michael Donaldson, Donaldson & Callif
Daniel Fallshaw, Filmmaker
Robert Greenwald, Brave New Films
Amy Grey, Dish Communications
Johanna Hamilton, Filmmaker
Darrell Hayes, American University
Simon Kilmurry, POV
Brian Knappenburger, Luminant Media
Gregg Leslie, Reporters Committee for Freedom of the Press
Hagit Limor, Society of Professional Journalists
Carrie Lozano, Al Jazeera
Jennifer Maytorena Taylor, UC Santa Cruz
David McMahon, Florentine Films
Marilyn Ness, Big Mouth Productions
Joanne Richardson, Hiscox
Susan Saladoff, Filmmaker
Nancy Schwartzman, Filmmaker
Jim Sommers, ITVS
Marty Syjuco, Filmmaker
Richard Tofel, Pro Publica
Katie Townsend, Reporters Committee for Freedom of the Press
Sandra Whipham, BRITDOC
Pamela Yates, Skylight Pictures

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Amy Eisman, American University
Robert Greenwald, Brave New Films
Deirdre Haj, Full Frame Documentary Film Festival
Tom Isler, Reporters Committee for Freedom of the Press
Ken Jacobson, International Documentary Association
Simon Kilmurry, POV
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Sandra Whipham, BRITDOC
Jenni Wolfson, Chicken & Egg Pictures
Pamela Yates, Skylight Pictures



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