

# FIAF's Declaration on Fair Use and Access...

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*says Leo Enticknap*

In November, the International Federation of Film Archives (FIAF) issued a ten-point 'Declaration on Fair Use and Access' (for full text, see *Journal of Film Preservation*, no. 74-75 (2007), pp. 5-20), setting out areas of non-commercial exploitation which it believes public sector archives should be able to undertake without legal restriction or the need to observe copyright. FIAF's statement certainly poses a stark and uncompromising challenge to the trend in copyright legislation of the last decade, as represented principally by the 1997 Digital Millennium Copyright Act in the US and the 2001 European Union Copyright Directive.

It also contradicts itself. On the one hand, articles 7 and 8 in the statement talk of 'recognising the rights of owners of motion picture copyrights' and 'supporting the owners of motion picture copyrights' in opposing piracy. Yet article 10, which has caused the greatest controversy, asserts the right of FIAF members, without payment, to use their holdings for 'exhibition on their premises, loans to other affiliates, and use in their publications and promotional activities.'

This article is prefaced as a 'principle of fair use...', thereby leaving open the interpretation that it is a statement



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of how FIAF would like the law to treat its member institutions, not a statement of intent to ignore the law as it currently stands. But it does not take a great leap of imagination to interpret the whole declaration as a statement from FIAF to its members that they are morally justified in breaking the law, even if doing so may have practical consequences.

While there are some positive aspects to the FIAF statement, in particular its call to clarify the law in respect of 'orphan' films (films for which it cannot easily be determined if copyright still subsists, and if so who owns it), I fear that in the long term, it will turn out to be counter-productive. Concern has already been expressed within the profession that it amounts

to a call on FIAF's member archives to break the law. As the infringements involved are in most cases civil and impossible to detect, the result will inevitably be a weakening of trust between the archives and the rights owners of whose intellectual property they are the custodians.

In a recent discussion on the email list operated by the Association of Moving Image Archivists (AMIA), the owner of a small, US-based arthouse theatrical distributor and DVD publisher voiced the fear that if public sector archives were to undertake free theatrical screenings or electronic distribution of the titles he publishes, his revenue stream could be badly affected, thereby limiting his ability to take risks on more esoteric releases.

## Not just David v Goliath

This intervention is especially significant, because it shows that we're not just looking at a David (small, poor archives) vs. Goliath (big, rights-owning corporate gorilla à la Disney or Canal Plus) scenario. A large proportion of the commercial activity related to archive film is undertaken by small businesses and self-employed individuals, who do not make telephone number profits and whose viability could be directly threatened if the major, well-resourced (by film archive standards) public sector moving image archives suddenly start undertaking large-scale, and in some cases illegal, access activity of the sort that is called for by FIAF's declaration.

In strictly moral and ethical terms, the issue is easy to articulate. Taxpayers the world over are funding the preservation of films and television programmes, many of which are decades old and for which the people and organisations

involved in originally creating them have already received just reward. Therefore, there remains no moral case for continuing to restrict access to this material in the way that the concept of copyright was originally intended to do.

The reality, of course, is nowhere near as simple as that. Studios which face a significant decline in licensing revenue may have to cut back on the long term preservation of their newly produced titles, thereby risking their loss or passing the bill onto the taxpayer. Theatrical distributors and DVD publishers of archival titles, which already operate on very tight margins, could be hit especially hard.

There is no doubt that the current concept of 'Fair Use' as it is applied in US (and to a lesser extent, other) copyright legislation is not ideal, either from the non-profit user's or the rights owner's perspective. But neither is it the worst case scenario. Though in the last analysis ambiguous, FIAF's declaration could be and has been

interpreted as a call on its member institutions to publicly ignore the law in the way they provide access to their holdings.

Very few archivists can claim to be whiter than white when it comes to access and copyright law.

But there's a big difference between making the occasional DVD for a researcher and publicly declaring that you're going to show what you like, when you like and how you like, regardless of what the law says. While I hope that the overall effect of FIAF's move will be a constructive contribution to an ongoing debate, I fear that it could exacerbate an already emerging division.

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