

Eyes off the *Prize*

Copyright clearance and the disappearance of one of television's cultural treasures. | **By Michael M. Epstein**

In 1987, public broadcasting stations aired *Eyes on the Prize*, a 14-part documentary that looked back at 30 years of the civil-rights movement. The brainchild of independent filmmaker Henry Hampton, *Eyes on the Prize* masterfully brought the civil rights struggle to life through interviews, archival footage, and more than 120 songs evocative of the era. Described by Henry Louis Gates, Jr., chair of Harvard's African-American Studies Department, as "the most sophisticated and most poignant documentary of African-American history ever made," *Eyes on the Prize* was one of the most-watched documentaries on PBS, and became widely available to homes, schools and libraries as a best-selling PBS video title.

Yet, despite its historical significance and wide acclaim, *Eyes on the Prize* can no longer be seen on television, and video copies have vanished from store shelves. Unless you can find an aging

copy in a public library and watch it at home, it is virtually impossible to screen the series today. Indeed, even if you were fortunate enough to have purchased the video when it was available, you cannot make your copy available for public exhibition or stream it over the Internet so that others can see it. At least, not legally.

The reason for this has nothing to do with the program's viewpoint, or any controversy relating to its message. No one has claimed defamation, plagiarism or threats to national security. To the contrary, *Eyes on the Prize* has become a nearly forgotten cultural artifact not because it broke the law, but because its producers and distributors have decided to abide by the law—specifically, copyright law. Under U.S. copyright law documentary producers are required to license creative expressions such as sound recordings and song compositions from record companies and composers. In nearly all cases, the



Anti-lynching Protest



NAACP Storefront Window



Jim Crow Sign

decision to grant a license, the duration of that license and its cost is at the discretion of the copyright owner, which is usually a business like a record company or film studio that

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exploits its owned content for profit. Without clearance from the copyright owner, producers and distributors are liable for monetary damages and the documentary is subject to a court-ordered injunction that would prevent it from being screened.

Eyes on the Prize was done in by the same sound track of rock, gospel and traditional music from the civil-rights movement that defined it as a masterpiece in filmmaking. The reason came down to money, pure and simple. Money that Henry Hampton's independent production company, Blackside Productions, simply did not have. Blackside spent more than ten years to scrape up the \$500,000 it needed to fund the making of *Eyes*. And while \$500,000 seems like a princely sum for some independent documentary makers, Hampton's budget did not buy him much in the way of copyright licenses to the 120 highly popular sound

recordings and music compositions he needed to fulfill his creative vision.

The result was that Blackside was only able to afford to license its soundtrack elements for a limited

duration. Therein lay the problem.

In many respects, Blackside Productions gamed the copyright law as best it could. Under Section 118 of the Copyright Act of 1976, producers who make documentaries for distribution on noncommercial education broadcast stations can take advantage of a "compulsory license," which would take away a copyright owner's discretion to both grant a license and determine its price. Because the question of price is placed in the hands of a third-party arbitrator, Blackside was able to keep licensing costs for its PBS broadcasts within its budget. Had the documentary been distributed on a commercial service like HBO or the History Channel, Blackside would have been required to negotiate licenses with content owners that may have run into millions of dollars.

While the clearance costs were kept relatively low for the documentary's



Rosa Parks (right)



Jim Crow Dining Facility



Bayard Rustin and A. Philip Randolph

PBS airings, Section 118 does not apply to commercial broadcasts, public screenings and video distribution of a creative work. Thus, in order to make the documentary available as a home video, Blackside was compelled under the Copyright Act to negotiate for synch licenses—the right to use a song composition on video—and for the “master use” of the sound recordings themselves, on a case-by-case basis. Since both the compulsory licenses and the negotiated licenses were up-front costs to Blackside, the production company saved money by entering into licenses of short duration. As soon as the first of these short-term licenses expired, in 1993, Blackside had no choice but to withdraw *Eyes on the Prize* from public distribution and exhibition.

Public broadcasters have been more alert to the promise of new technologies than many of their commercial counterparts.

While Blackside could have entered into new licensing arrangements, the modest revenues generated by a documentary that was essentially noncommercial in nature, combined with the financial limitations of Hampton’s independent production entity, made the cost of license renewal prohibitive. Though supporters of *Eyes* talked of finding funding to revive the documentary in the mid-1990s, after Henry Hampton died in 1998, the prospects of new licenses became even more remote. With Blackside now in the hands of Hampton’s heirs, and Hampton himself gone, his production business has become little more than

a caretaker organization. Indeed, without significant revenues from new documentaries, Blackside will likely never be able to come up with money on its own to rescue *Eyes* from copyright oblivion.

As frustrating as the saga of *Eyes on the Prize* is to those who want to make it available to the public once again, it is not the only documentary to encounter problems with copyright clearances. Within the last few years, a number of organizations representing documentary filmmakers have become increasingly vocal in opposition to what they call “Rights Clearance Culture.” Groups such as American University’s Center for Social Media, the Association of Independent Video and Filmmakers and the International Documentary Associations have

issued statements of concern over the impact copyright clearances can have on public discourse. Publications

such as “Untold Stories: The Creative Consequences of the Rights Clearance Culture” and

numerous grassroots “blog” sites on the Internet chronicle what they believe to be the chilling effect of copyright law on independent filmmakers, and offer recommendations for ways to lower costs and reduce frustration in clearance negotiations. A number of newspapers have published articles detailing the travails of the documentary producers who were unable to complete their films because copyright owners refused clearance. In a Toronto *Star* article, one producer refers to licensing negotiations as “economic censorship” after he was refused clearance for drug-themed tunes such as Wings’ “Hi, Hi, Hi,” and The Steve Miller Band’s “The

Joker” for a documentary on the history of marijuana.

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Of course, what is “economic censorship” for a documentary producer is the enforcement of an intellectual property right on the part of a copyright owner. Under the copyright statute, the owners of creative works ordinarily have the right to set the price of a license as high as they want, and they can even refuse to grant the license for any reason, including creative differences. To record companies, music publishers, film studios and other authors, copyright is a proprietary right which can be controlled much like a landlord can control who gets to use its private property. Still, there is a difference between intellectual property rights and private property rights that gives documentary producers and their advocates hope in their struggle to use copyrighted content. Under certain circumstances, producers may be entitled to use a portion of a copyrighted work in their own creations without obtaining a license from an owner. Known as “fair use,” this statutory defense to copyright infringement allows individuals to use insubstantial portions of copyrighted content under certain circumstances and for certain purposes.

Because courts will weigh a

number of factors on a case-by-case basis to determine if an unlicensed use is “fair,” the extent to which fair use may apply to a particular documentary’s use of copyrighted content is the subject of ongoing debate. The fair-use defense was employed successfully, for example, by the producer of the documentary *Outfoxed*, after Fox News Channel refused to license news clips. The use of copyrighted

advertising images in a documentary on female body image was also deemed a fair use, as was the use of CBS news footage in a *Frontline* profile of presidential adviser Karl Rove.

Although many copyright attorneys would argue that the use of copyrighted material in *Eyes on the Prize* is too substantial to qualify as a fair use, that has not stopped a number of groups from making that claim. DownhillBattle.org, a group dedicated to promoting *Eyes* to the general public, argues that its initiative to organize public screenings of library videos is protected by fair use. Another group, based in Canada, has gone as far as to stream a copy of *Eyes* on its website. Whether these organizations really believe that what they are doing constitutes fair use, or whether it is a form of civil disobedience, the fact that *Eyes on the Prize* occupies a special position in America’s public discourse on civil rights allows them to justify their conduct in their own minds. Ironically, these efforts have been met with disdain from Blackside, who see unauthorized copying of the documentary as a violation of its copyright. Efforts at DownhillBattle.org to encourage illegal downloading of *Eyes on the Prize* abruptly ended in

early 2005, after Henry Hampton's heirs threatened to sue for infringement.

Despite these organized efforts to exhibit the documentary without copyright clearance, the real hope for *Eyes on the Prize* lies not in insurgent claims of fair use, but in negotiations for licenses with copyright owners. Streaming video and organizing community screenings may allow a few people to see the documentary, but it is no substitute for wide distribution via television and on video. To make that type of deal, the owners of *Eyes on the Prize* will need to pay for licenses. Without clearances from copyright owners, no company will screen the work or distribute it on video or DVD. Even PBS will not air the series until it can be assured that it will not be held liable for monetary damages under the Copyright Act.

To that end, there is an effort currently under way to raise the money necessary to get *Eyes on the Prize* back on television. At the urging of Henry Louis Gates, the conservative philanthropist Richard Gilder has contributed \$250,000, and the Ford Foundation has pledged \$600,000, to a fund that will help Blackside pay for the more "affordable" public broadcasting clearance under Section 118's compulsory license provision. Still,

even with this cash infusion, Blackside will need to raise additional funds from other donors before it can rebroadcast *Eyes on the Prize* on PBS, which it hopes to do by next year. And unless you are fortunate enough to own a video of *Eyes* that was sold fifteen years ago, there is virtually no chance of obtaining a video or DVD of the series for home use. Blackside simply does not have the millions it would likely be required to pay for clearance at market prices.

Moreover, even if Blackside succeeds in its effort to get *Eyes* on the air, it is just a matter of time before these renewed licenses will expire and *Eyes on the Prize* again fades into obscurity. But there is some good news. If you want a home copy for personal use, you will be able to tape the series when it is broadcast. Under copyright law, making a home recording is generally deemed a fair use. So keep an eye out for a programming announcement, and your finger on the record button. Not only will you preserve a copy of one of television's most acclaimed documentaries for your own future use, but you can make your copy available to a friend. Only then can we be sure that *Eyes on the Prize* will continue to be seen and appreciated as a cultural treasure.

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