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## **Copyright backgrounder**

By Michael Donaldson, Esq.

Michael Donaldson is an attorney in Los Angeles, many of whose clients are leading documentary filmmakers. His book, *Clearance and Copyright* (Silman-James Press, October 2003), from which much of this information has been drawn, is widely regarded as a basic text for documentary filmmakers.

### **WHAT IS COPYRIGHT?**

Copyright as we understand it today is the result of evolving practices and legal changes. It contains features protecting the rights of authors and others protecting the rights of those who wish to use the author's material without permission. Both are critical to the production of new creative work.

Before the printing press, there was no ownership of intellectual property in the Western world. U.S. copyright law draws heavily upon British copyright law, which by the 18<sup>th</sup> century established the right of authors to permit copying of their works.

The U.S. Constitution included the clause:

“The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; . . .”

Note that the Constitution both granted an exclusive right and also limited it by time (originally to 14 years, now since 1998 usually 70 years after the death of the author), with the justification being “the progress of science and useful arts.” Copyright law is thus in the service of the creation of culture; the limits are as important as the monopoly rights in terms of serving the creation of culture.

Today the copyright law covers a wide range of creations. It gives the Author a limited monopoly over a lot more activities than just copying. Since 1978, all expression is copyrighted the moment it is reduced to a tangible form. No registration necessary!

If it's an expression (not an idea!) then it can be copyrighted. Here is a partial list of the creations protected by copyright:

- Books
- Plays
- Comic books
- Songs
- Musical compositions
- Recordings of music, even if the music itself is in the public domain

Photographs  
Quilts  
Choreography  
Paintings  
Drawings  
Sculptures  
Jewelry  
Fabric designs, but not the clothes made from them  
Architectural drawings, but not the buildings created from them  
Maps, but only the newly created elements, not the location of things on the map  
Computer programs  
And, of course, movies and scripts for movies and treatments for scripts for movies.  
And translations of any of the above from one language into another.

## **WHAT ACTIVITIES ARE COVERED BY COPYRIGHT LAW?**

There are six; for the filmmaker, the first four are of interest. They are the following:

1. Making a Copy.
2. Preparing a Derivative Work – this means altering or modifying a pre-existing work. This is what happens when you make a movie from a script, a book from a movie or a knock-off of a famous painting because you can't afford to decorate the set of your motion picture with the original.
3. Distribution – this involves getting copies out to strangers.
4. Public Performance – every time your movie plays to an audience or a song is sung in concert or a poem is read at a gathering of fans, there is a public performance. The test is whether the public is invited to attend. It doesn't matter if admission was charged, whether there was a profit or if it was all for a good cause.
5. Public Display – this applies to many works, but most often to pictures or sculptural works that are displayed in galleries, museums or any other such public place. In order to publicly display a work, permission from the copyright holder is needed.
6. Digital Audio Transmission of a sound recording.

## **WHO OWNS THE COPYRIGHT?**

The Constitution says that the copyright law is to encourage authors to create works. The law says that the author is the creator of the work. This is true, EXCEPT for two situations:

- 1) if the creator happens to be an employee working within the course and scope of employment. Then the employer is the author.
- 2) **work for hire**, unique to U.S. copyright law. If you have a written agreement declaring a commissioned work to be a work for hire, then the "author" is the person or company who is designated as the author in the work for hire agreement, usually the person or company who paid for the work to be done.

This provision only applies to the following:

1. a contribution to a collective work;
2. part of a motion picture or other audio-visual work;
3. a translation;
4. a compilation;
5. an instructional text;
6. a test;
7. answer material for a test;
8. an atlas; or
9. a supplementary work.

This sea change in the copyright law was triggered by a huge technological innovation – motion pictures. The year was 1905. The early entrepreneurs who made movies realized they had to do something, because so many creative types have a hand in putting a movie together. They needed some legal help to wrangle all these creative folk. They petitioned Congress to add an idea they called work made for hire to the copyright law.

### **WHAT IS THE PUBLIC DOMAIN?**

Public domain materials are not copyrighted, and freely available for use. These include materials whose copyright has expired, and federal government products. For further information consult:

Peter Jaszi, “Yes, You Can! Where You Don’t Even Need ‘Fair Use’”  
([http://www.centerforsocialmedia.org/files/pdf/free\\_use.pdf](http://www.centerforsocialmedia.org/files/pdf/free_use.pdf))

and

Paul Hirtle, How to Find Out What Is in the Public Domain  
(<http://www.centerforsocialmedia.org/rock/backgrounddocs/copyrightterm.pdf>)

### **WHEN CAN COPYRIGHTED MATERIAL BE USED WITHOUT PERMISSION?**

Copyright law permits a wide range of uses without the author’s permission, including some very specific uses in the classroom and the library. It also permits anyone to resell a copyrighted work without permission. For filmmakers, the most important exemption to the author’s limited monopoly right is fair use.

The concept of fair use was first introduced into the law of copyright by a court in Massachusetts in 1841. Rev. Charles W. Upham wrote an 866-page, two-volume book about George Washington. Three hundred and fifty-three of the 866 pages were letters written by George Washington. The letters were part of a collection owned by a Mr. Sparks who had purchased them, archived them, published them and – most importantly - owned the copyright to them. Mr. Sparks sued the good Rev. Upham for copyright infringement. Mr. Sparks won.

Rev. Upham's book was based almost entirely on these letters and without them, the book would have been quite insignificant. Rev. Upham took the most interesting and valuable letters from Mr. Sparks' collection for use in his own book.

The court said that when deciding issues of this sort, one must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."

These factors all weighed in favor of Mr. Sparks. In fact, these original factors are the core of the four factors that the courts still use to decide fair use cases today.

And while the court didn't use the words "fair use" and didn't think Rev. Upham had been fair in his taking, that is where the concept was born. And the courts kept developing and refining and defining the concept for over one hundred and fifty years. Then Congress froze the courts' approach into the Copyright Law when it overhauled the Copyright Law in 1978. But Congress still left it up to the courts to decide fair use on a case by case basis and to make their decisions considering all the facts, not just the answers to the four questions that are set out in the statute.

With the extension of copyright terms into something a lot like infinity to an ordinary person, fair use has become a highly favored category in the courts. Courts have decided all recent cases involving documentary film and fair use in favor of fair use as understood by consensus in the documentary filmmaking community (see [http://www.centerforsocialmedia.org/videos/sets/fair\\_use\\_case\\_studies/](http://www.centerforsocialmedia.org/videos/sets/fair_use_case_studies/)). A recent lawsuit in a related area—use of posters in a book—creates very strong language in support of a broad definition of fair use (see [http://www.centerforsocialmedia.org/resources/publications/statement\\_of\\_best\\_practices\\_in\\_fair\\_use/](http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/)).

Documentary filmmakers had been in the uncomfortable position of having to guess what kinds of fair use were acceptable, until filmmakers developed a guide to their own best practices in fair use (see [http://www.centerforsocialmedia.org/resources/publications/statement\\_of\\_best\\_practices\\_in\\_fair\\_use/](http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/)) in 2005. Working with Pat Aufderheide, a communications professor, and Peter Jaszi, a law professor, both at American University, and with funds from the Rockefeller, MacArthur and Ford Foundations, documentary filmmakers from five national organizations met in a series of meetings across the country. They established four common situations in which fair use was needed, and decided on the principles and limitations to be used in each.

Since then, public television and cable television services have approved fair use using this best-practices statement, and it is now routine to be able to get errors and omissions insurance for fair use claims grounded in the statement's principles and limitations. For instance, the Independent Film Channel approved the use of fair use in Kirby Dick's documentary *This Film is Not Yet Rated*. The film was highly critical of the film rating system. No studio would license clips from its films for such a use. The film had over 100 clips. Every one was used without a license pursuant to the fair use doctrine, using the best-practices statement for a guide.