



Center for Social Media

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The “Statement of Best Practices” FAQ

What is the Documentary Filmmakers’ Statement of Best Practices in Fair Use?

It is a statement of filmmakers’ shared understandings about what is fair and reasonable in employing fair use, available at centerforsocialmedia.org/fairuse.

What does it do?

This document is a tool that helps filmmakers and their broadcasters, cablecasters and insurers use the doctrine of fair use with greater assurance that they are doing the right thing.

Why do we need one?

Documentary filmmakers pay too much, spend too much time, suffer too much frustration, and censor their own aspirations because of copyright clearance problems.

In a study conducted with some fifty documentary filmmakers over the course of a year, the 2004 American University study [Untold Stories](http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf) (http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.) revealed the extent of the problem. It also showed that some of that money, time and suffering is unnecessary. There is real confusion among filmmakers about the reach of intellectual property and the scope of exceptions to its application in doc filmmaking. So often they are too cautious.

What don’t filmmakers understand about copyright?

Owning copyright is not like owning a chair. Copyright, in fact, is a social bargain. It’s not about individual property rights; individual property rights are merely part of a bargain that ensures that creativity enriches the whole society. Copyright says that creative works are important to the society in many ways. It’s important to reward creators for making them, so they’ll go on doing so. You want to give them some protection so that they can collect on their own work. Licensing is one way to collect. It’s also important to reward other users for using this very same material, so that more creative work can be generated. And it’s very important to have ways to use someone else’s work without asking their permission; otherwise the whole society may lose important expressions, just because one person is arbitrary or greedy. So copyright law has features that permit users to quote other creators copyrighted work without permission.

How are filmmakers hurting themselves?

Filmmakers could make more efficient use of copyright law. They sometimes clear rights for source material that is actually available to them without intellectual property clearance. Sometimes it is in

the public domain, and sometimes its use could not conceivably trigger legitimate objections from rights holders. Filmmakers need to get more reliable information about their existing rights as users of source material.

The study also shows that many filmmakers are unnecessarily cautious in making “fair use” of preexisting copyrighted materials. Under the “fair use” doctrine, creators are permitted to make unlicensed uses of preexisting copyright materials when the social or cultural value of the new use is relatively high, and the costs it imposes on the copyright owner are relatively low. It’s the law! But filmmakers tend to avoid it either because they don’t know what’s allowed, or because they believe—often on the basis of experience, sometimes on the basis of others’ experience or hearsay—that “gatekeepers” (funders, broadcasters, distributors, insurers and others) wouldn’t accept the claim.

How can filmmakers help themselves?

They can share with each other their understanding—and the understanding of reliable lawyers—of what is fair and reasonable in fair use today. That is what filmmakers through five organizations—the Association of Independent Film and Videomakers, the Independent Feature Project, the International Documentary Association, the National Alliance for Media Arts and Culture, and Women in Film and Video (DC Chapter)—did in creating the Documentary Filmmakers’ Statement of Best Practices in Fair Use. The Rockefeller Foundation, the John D. and Catherine T. MacArthur Foundation and the Ford Foundation contributed to assist the coordination through the Center for Social Media and the Program on Information Justice and Intellectual Property at American University. Professors Pat Aufderheide and Peter Jaszi are codirectors of the project; Pat is an award-winning film critic and scholar and Peter is a prominent law professor. A legal advisory board of leading lawyers and law professors has approved the statement.

This document expands the range of filmmakers’ options and lower costs, because it helps:

- to clarify the limits on copyright and trademark law,
- to encourage filmmakers to rely upon fair use where appropriate,
- to persuade gatekeepers to accept well-founded assertions of fair use, to discourage copyright owners from threatening or bringing lawsuits relating to documentary projects, and
- in the unlikely event that such suits were brought, to provide the defendant with a basis on which to show that his or her uses were both reasonable and undertaken in good faith. (As a practical matter, such demonstrations probably count more than any other showing that a copyright defendant can make in asserting fair use.)

But filmmakers can’t just decide what the interpretation of the law is, can they?

Codes and statements of best practices are usually the first kind of evidence that courts look to in deciding whether something is “fair use,” so what filmmakers believe is fair and reasonable is definitely important.

What do we already know about the law on fair use in documentaries?

- n Fair use has been an important part of copyright law for more than 150 years.

n Fair use is a right. The Supreme Court has made it clear that fair use makes the copyright system reconcilable with First Amendment freedom of expression. Although representatives of the content industries sometimes insist that fair use is not a right but merely a defense, this is a distinction without a difference. You have a right to self defense, and what that means is that you have a right to resist aggression. Similarly, fair use is a right to use existing material without a license in some circumstances.

n Fair use is assessed according to a “rule of reason,” meaning you should take all the facts and circumstances into account. Although the language of the Copyright Act and court decisions on the subject is complicated, you can boil it down to a few basic questions.

- o Did the unlicensed use add significant value to the preexisting material, rather than just exploiting it?
- o Was the use made in good faith?
- o Was it reasonable according in the general opinion of the field or discipline within which it was made?

If the answer to these questions is yes, a court is likely to find a use fair. And because that is true, such use is unlikely to be challenged in the first place.

n Creators of all kinds rely successfully on fair use --writers who quote from others texts, plastic artists who reinterpret existing images, musicians who sample and scholars who engage in critique of contemporary culture. Although they have occasional problems convincing gatekeepers that these practices are legitimate under the fair use doctrine, they often succeed especially when there is a well-established and well-publicized consensus about what is (and isn't) good practice.

n Filmmakers, too, take advantage of fair use, but with great inconsistency. Fair use is extremely healthy and vigorous in daily broadcast television, where references to popular films, classic TV, archival images, and popular songs are constant, and routinely unlicensed. It is anemic in films made for TV, cable and theatrical distribution, where filmmakers routinely are told they must clear everything! Even so, while some independent producers are afraid to employ fair use, others continue to depend on it routinely. Often, though, they are (understandably) unwilling to acknowledge the nature and extent of this reliance.

n Courts have supported filmmakers on fair use issues. As we've just noted, filmmakers relying on fair use usually aren't challenged. But in the rare instances when they are, judges and juries usually find for them, and against the content owners. And this is hardly surprising, given the long history of the fair use doctrine and its strong constitutional roots.

But haven't filmmakers been sued for employing fair use? It's too risky!

Well, actually the litigation record is extremely thin. Media corporations avoid lawsuits about fair use, probably because they would lose them. There have been nine lawsuits on fair use brought since 1996, and every single one of them has been settled according to the principles and limitations set forth in the Documentary Filmmakers' Statement of Best Practices in Fair Use. For a breakdown, lawsuit by lawsuit, check out http://www.centerforsocialmedia.org/videos/sets/fair_use_case_studies/.

Although copyright owners rarely sue about fair use, media corporations are fond of issuing cease-and-desist letters, in the often-correct assumption that they can just scare people into not using their fair use rights.

We can develop any kind of statement we want, but who will listen to us?

Since the Statement was released on November 18, 2005, it has had extraordinary success in changing practice.

Public television has embraced the Statement. The Independent Television Service, public television's lead producing organization for independent documentary work, has endorsed the statement. So has P.O.V./American Documentary, the producer of the leading public TV series for independent documentary. The Public Broadcasting Service has shared it with all its general counsels and general managers. PBS and ITVS used it to clear *Hip Hop*, a film that fair-used hip-hop video and music, for broadcast.

Cable programmers are using. Cable channel IFC used the statement to make decisions on two recent films: *Wanderlust*, a movie about road movies (the Statement permitted negotiations that dramatically lowered clearance costs) and *This Film Is Not Yet Rated* (a film that contains 134 fair-used clips of Hollywood films).

Insurers are now accepting fair use claims if supported by a letter from a lawyer verifying that the use conforms to the principles and limitations of the Statement. Insurers include AIG, Chubb and MediaPro.

Teaching and training organizations have also endorsed it, recognizing the value of balanced copyright education for film students. The University Film and Video Association (ufva.org) has not only endorsed it, but is sponsoring a contest for short films employing fair use according to the terms of the Statement. Bay Area Video Coalition, a leading training center for videomakers, is using it in its own educational programs, and Arts Engine, which hosts the Media that Matters Festival, is also using it educationally.

Lawyers are themselves spreading the word about the Statement. Fair use was the theme of the main event at the 2006 meeting of the Copyright Society—the annual conference for intellectual property lawyers throughout the U.S.

Is this really a useful tool, given the scope of the problem?

This tool will work as part of a self-help strategy. It's not about test cases in the courts, not about regulations, not about new laws. It's about using existing law. Existing law is actually pretty clear, both about your copyright owner's rights and about your user rights. But it's not useable if you don't know what best practices are in your field.

Wait a minute—I like my copyright, and I certainly don't want people just taking my stuff without asking for it.

Nobody wants to open the door to piracy, and this statement certainly doesn't. This statement specifies under what limited circumstances users' rights take precedence over owners' rights, within today's law.

This Statement of Best Practices will certainly affect documentary filmmakers equally as users and as owners. In fact, that's one of the reasons why a statement of what is considered fair by documentary filmmakers has such credibility. They benefit from the owners' rights in copyright and from the users' rights in the same law. A filmmaker who, for example, took footage of a public event would be expected to allow access by others in situations prescribed the Statement.

For more information, visit <http://www.centerforsocialmedia.org/fairuse>