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The “Statement of Best Practices” FAQ

What is the Documentary Filmmaker’s 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.htm

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 American University study *Untold Stories* (www.centerforsocialmedia.org/fairuse.htm) 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. This document will expand the range of filmmakers’ options and lower costs. It will do this 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?

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

■ 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.

- Did the unlicensed use add significant value to the preexisting material, rather than just exploiting it?
- Was the amount of material taken appropriate in relation to the purpose of the use?
- Was the use made in good faith?
- 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.

■ 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.

■ Filmmakers, too, take advantage of fair use, but until now they have done so 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.

■ 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.

How did filmmakers develop a statement like this on their own?

They had help. With support from The Rockefeller Foundation and the John D. and Catherine T. MacArthur Foundation, the Center for Social Media and the Project on Intellectual Property and the Public Interest at American University have been working with filmmakers' and artists' organizations. 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.

Why do filmmakers have to establish these understandings? Why don't we just get some lawyers together to lay out exactly when we can and can't use "fair use" (and other balancing features of copyright)?

As anyone with experience with lawyers knows, they are cautious about giving categorical advice, and fond of reminding clients that "It depends..." That is never truer than in interpreting "fair use." "Fair use" is triggered if the value of the use to the public trumps the owner's private interest. This right depends on how and when and how much and for what purpose you are using the quoted material. The "situational" nature of fair use can be frustrating. In the end though, this flexibility is what makes the doctrine useful in this fast-changing field; it also respects the realities of art, where it's impossible to predict how future artists will interpret source material.

A Statement of Best Practices isn't a set of rules. Instead, it is a statement about professional consensus about common practices in fair use today. The result will be more powerful than anything lawyers could come up with on their own, because "reasonableness" and "good faith" count for so much in this kind of analysis.

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

Gatekeepers (including broadcasters and DVD distributors), like filmmakers, are the victims of the uncertainty and confusion that surrounds fair use. They don't benefit from high costs, either. Why then, are programmers and distributors so leery of fair use? One big reason is that many content owners work hard to spread the idea that fair use is rare and risky. Of course they do. It's in their interest that filmmakers should license everything they quote. Filmmakers know that such a blanket requirement is not right. ***In fact, it is ethically and legally wrong, amounting to an infringement on freedom of speech.*** Content owners also know it is not right, which is why they are so reluctant to sue. They don't want more clarification on the utility of fair use. Threatening letters are cheap and effective, especially in the absence of a statement of best practices on fair use.

Some gatekeepers have already acknowledged the importance and utility of 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.

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), the leading professional association for professors of film and video production, 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.

The best way to help gatekeepers be more willing to take risks is to provide an authoritative account of the professional consensus about what's good practice and what isn't, as vetted by legal experts. This approach has worked before. For instance, book publishers only used to

accept frame enlargements for academic film books if the rights had been cleared. The Society for Cinema Studies formed a task force and in 1993 it issued a report, “Fair Usage Publication of Film Stills,” in Cinema Journal, which identified this practice as a core fair use. It changed publishers’ practices.

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 copyrights, 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 in fair use 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.htm>