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The “Statement of Best Practices” FAQ

What’s the problem?

The problem today is that 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/rock/index.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. A comprehensive and balanced Statement of Best Practices concerning documentary filmmaking practice and intellectual property law will expand the range of filmmakers' options and lower costs. It will do this because it will help:

- 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 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 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 are filmmakers supposed to develop a statement like this on their own?

They have 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 are 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. The International Documentary Association (IDA), the Association of Independent Film and Videomakers (AIVF), the Independent Feature Project (IFP), the National Association of Media Arts Centers (NAMAC) and others are hosting conversations that will shape such a statement. If you would like to be involved, contact socialmedia@american.edu.

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)?

The good (and bad) news, is that it doesn't work this way. As anyone with experience with

lawyers know, 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.

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, though not on such a large scale. 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.

What would a Statement of Best Practices look like?

We don’t know exactly – in fact, that’s for filmmakers to decide. But we do know it will be divided into two parts, the first on “fair use” and the second on other exemptions from copyright clearance.

The first part will be the hardest, because here filmmakers will need to draw distinctions between irresponsible and excessive uses of copyrighted materials and the appropriate and limited uses that may be considered “fair.” In articulating this distinction, we’ll focus separately on the different contexts in which filmmakers employ preexisting moving and still images, texts, musical compositions, and other works. These include:

- commenting critically on media;
- “sampling” popular culture to portray societal conditions;

- incorporating background sounds and images in new documentary footage; and
- employing archival material in historical or biographical projects.

With respect to each of these, factors that might bear on whether a use is “fair” could include, among others:

- the quantity of material used;
- the prominence the material will have in the finished film;
- the importance of the use to the filmmaker’s project;
- the terms (if any) on which a license might be available.

Do you really believe just listing these topics is going to convince a broadcaster to let me use this material?

No. These are only the topics. Filmmakers need to clarify for each other, and eventually for their gatekeepers, what the best practices are with respect to each of these and other topics, in terms of the quantity of material used, the prominence that material will have in the finished documentary, the importance of the material to the filmmakers’ project, the timing of the use, the terms on which a license might be available, and other issues. Only a Statement of Best Practices in this form can have the kind of persuasive power we hope this one will.

Who’s going to take a filmmaker’s word for this—and worse, what if we’re wrong?

A legal advisory council will assist filmmakers, in order to make sure that filmmakers are not recommending to their peers behavior that could get them in trouble, or set a precedent that might negatively impact filmmakers themselves.

What about the material you don’t need to invoke “fair use” for—that material you said filmmakers never need to clear?

That’s the easier part of the Statement of Best Practices, because this knowledge is well established, even though filmmakers have often been outside the lawyers’ circle of people who know it. Building from legal knowledge and from conversations with filmmakers, the Statement will also itemize the many kinds of preexisting materials that filmmakers can use without any risk of intellectual property complications. This list will include (but not be limited to):

- Still photographs, motion picture footage, text and other works by federal government employees;
- The design of buildings that are visible from public places;
- Details of interior spaces (including the arrangement of furniture, domestic objects, etc.);
- Trademarks and commercial symbols shown in ordinary commercial use. You never need to clear rights on trademarks, unless you’re offering a rival service. (Yes, that’s really true! Morgan Spurlock didn’t need to clear rights with MacDonald’s because he’s not selling burgers!)

The Statement will also underline the permissibility of hyperlinks and other forms of reference to

copyrighted materials residing on the Internet.

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. We think the 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.

Of course, there is more to the project of loosening the grip of the clearance culture on independent documentary production than the clarification of filmmakers fair use rights.

Filmmakers may want to work along other parallel lines, as well, including:

- Building new cooperative relationships between filmmakers and licensors, so that more material (especially archival footage) becomes available on better terms;
- Developing the idea of a filmmakers voluntary commons (that is, a body of material that filmmakers volunteer to give away), which over time could become an important free-use, open archive; and
- Working on proposals for new legislation to address filmmakers concerns with the copyright system.

These initiatives, however, will take effort and time. They will require building alliances and coalitions well beyond the filmmaker community. Even then, the outcome will be uncertain.

Meanwhile, filmmakers today can act to clarify and publicize their shared vision of fair use. And doing so will take nothing away from the other initiatives just described. In fact, it may add significantly to their prospects for ultimate success.

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 will specify 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.

Want more information? Want to become part of a conversation? Want to give us some feedback?

Email: socialmedia@american.edu or visit <http://www.centerforsocialmedia.org>