



Documentary Filmmakers' Statement of

BEST PRACTICES IN FAIR USE

Association of Independent Video and Filmmakers
Independent Feature Project
International Documentary Association
National Alliance for Media Arts and Culture
Women in Film and Video, Washington, D.C., Chapter

DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE

By the Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, and Women in Film and Video (Washington, D.C., chapter),

in consultation with the Center for Social Media in the School of Communication at American University and the Program on Intellectual Property and the Public Interest in the Washington College of Law at American University,

and endorsed by Arts Engine, Bay Area Video Coalition, CINE, Doculink, Electronic Arts Intermix, Grantmakers in Film and Electronic Media, Full Frame Documentary Festival, Independent Television Service, National Video Resources, P.O.V./American Documentary, University Film and Video Association, Video Association of Dallas, and Women Make Movies.

This Statement of Best Practices in Fair Use makes clear what documentary filmmakers currently regard as reasonable application of the copyright "fair use" doctrine. Fair use expresses the core value of free expression within copyright law. The statement clarifies this crucial legal doctrine, to help filmmakers use it with confidence. Fair use is shaped, in part, by the practice of the professional communities that employ it. The statement is informed both by experience and ethical principles. It also draws on analogy: documentary filmmakers should have the same kind of access to copyrighted materials that is enjoyed by cultural and historical critics who work in print media and by news broadcasters.

PREAMBLE

This Statement of Best Practices in Fair Use is necessary because documentary filmmakers have found themselves, over the last decade, increasingly constrained by demands to clear rights for copyrighted material. Creators in other disciplines do not face such demands to the same extent, and documentarians in earlier eras experienced them less often and less intensely. Today, however, documentarians believe that their ability to communicate effectively is being restricted by an overly rigid approach to copyright compliance, and that the public suffers as a result. The knowledge and perspectives that documentarians can provide are compromised by their need to select only the material that copyright holders approve and make available at reasonable prices.

At the same time, documentarians are themselves copyright holders, whose businesses depend on the willingness of others to honor their claims as copyright owners. They do not countenance exploitative or abusive applications of fair use, which might impair their own businesses or betray their work.

Therefore, documentarians through their professional organizations, supported by an advisory board of copyright experts, now offer the statement that follows.

BACKGROUND

"Fair use" is a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture. We have chosen to encourage creators by rewarding their efforts with copyright. To promote new cultural production, however,

it also is important to give other creators opportunities to use copyrighted material when they are making something new that incorporates or depends on such material. Unless such uses are possible, the whole society may lose important expressions just because one person is arbitrary or greedy. So copyright law has features that permit quotations from copyrighted works to be made without permission, under certain conditions.

Fair use is the most important of these features. It has been an important part of copyright law for more than 150 years. Where it applies, fair use is a right, not a mere privilege. In fact, as the Supreme Court has pointed out, fair use helps reconcile copyright law with the First Amendment. As copyright protects more works for longer periods, it impinges more and more directly on creative practice. As a result, fair use is more important today than ever before.

2 Creators benefit from the fact that the copyright law does not exactly specify how to apply fair use. Creative needs and practices differ with the field, with technology, and with time. Instead, lawyers and judges decide whether an unlicensed use of copyrighted material is “fair” according to a “rule of reason.” This means taking all the facts and circumstances into account to decide if an unlicensed use of copyright material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner. Fair use is flexible; it is not uncertain or unreliable. In fact, for any particular field of critical or creative activity, such as documentary filmmaking, lawyers and judges consider professional expectations and practice in assessing what is “fair” within the field. In weighing the balance at the heart of fair use analysis, courts employ a four-part test, set out in the Copyright Act. In doing so, they return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?
- Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?

Among other things, both questions address whether the use will cause excessive economic harm to the copyright owner.

If the answers to these two questions are affirmative, a court is likely to find a use fair. Because that is true, such a use is unlikely to be challenged in the first place. Documentary films usually satisfy the “transformativeness” standard easily, because copyrighted material is typically used in a context different from that in which it originally appeared. Likewise, documentarians typically quote only short and isolated portions of copyrighted works. Thus, judges generally have honored documentarians’ claims of fair use in the rare instances where they have been challenged in court.

Another consideration underlies and influences the way in which these questions are analyzed: Whether the user acted reasonably and in good faith, in light of general practice in his or her particular field. In the future, filmmakers’ ability to rely on fair use will be further enhanced by the Statement of Best Practices in Fair Use that follows. This statement serves as evidence of commonly held understandings in documentary practice and helps to demonstrate the reasonableness of uses that fall within its principles.

Documentarians find other creator groups' reliance on fair use heartening. For instance, historians regularly quote both other historians' writings and textual sources; artists reinterpret and critique existing images (rather than merely appropriating them); scholars illustrate cultural commentary with textual, visual, and musical examples. Equally important is the example of the news media: fair use is healthy and vigorous in daily broadcast television, where references to popular films, classic TV programs, archival images, and popular songs are constant and routinely unlicensed.

The statement that follows describes the actual practice of many documentarians, joined with the views of others about what would be appropriate if they were free to follow their own understanding of good practice. In making films for TV, cable, and theaters, documentarians who assert fair use often meet with resistance. All too frequently they are told (often by nonlawyers) that they must clear "everything" if they want their work to reach the public. Even so, some documentarians have not been intimidated. Unfortunately, until now the documentarians who depend on fair use generally have done so quietly, in order to avoid undesired attention. In this statement, documentarians are exercising their free speech rights—and their rights under copyright—in the open.

This statement does not address the problems that result from lack of access to archival material that is best quality or the only copy. The statement applies to situations where the filmmaker has ready access to the necessary material in some form.

The statement also does not directly address the problem of "orphan works"—works presumably copyrighted but whose owners cannot be located

with reasonable effort. Generally, it should be possible to make fair use of orphan works on the same basis as clearly sourced ones. Sometimes, however, filmmakers also may wish to use orphan works in ways that exceed fair use. A more comprehensive solution for orphan works may soon be provided through an initiative spearheaded by the U.S. Copyright Office (for more information, see www.copyright.gov/orphan).

This statement finally does not concern "free use"—situations when documentarians never need to clear rights. Examples of types of free use are available in documents at centerforsocialmedia.org/fairuse.

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THE STATEMENT

This statement recognizes that documentary filmmakers must choose whether or not to rely on fair use when their projects involve the use of copyrighted material. It is organized around four classes of situations that they confront regularly in practice. (These four classes do *not* exhaust all the likely situations where fair use might apply; they reflect the most common kinds of situations that documentarians identified at this point.) In each case, a general principle about the applicability of fair use is asserted, followed by qualifications that may affect individual cases.

The four classes of situations, with their informing principles and limitations, follow on the next page.

ONE: EMPLOYING COPYRIGHTED MATERIAL AS THE OBJECT OF SOCIAL, POLITICAL, OR CULTURAL CRITIQUE

DESCRIPTION: This class of uses involves situations in which documentarians engage in media critique, whether of text, image, or sound works. In these cases, documentarians hold the specific copyrighted work up for critical analysis.

PRINCIPLE: Such uses are generally permissible as an exercise of documentarians' fair use rights. This is analogous to the way that (for example) a newspaper might review a new book and quote from it by way of illustration. Indeed, this activity is at the very core of the fair use doctrine as a safeguard for freedom of expression. So long as the filmmaker analyzes or comments on the work itself, the means may vary. Both direct commentary and parody, for example, function as forms of critique. Where copyrighted material is used for a critical purpose, the fact that the critique itself may do economic damage to the market for the quoted work (as a negative book review could) is irrelevant. In order to qualify as fair use, the use may be as extensive as is necessary to make the point, permitting the viewer to fully grasp the criticism or analysis.

LIMITATIONS: There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work (or other works like it).

TWO: QUOTING COPYRIGHTED WORKS OF POPULAR CULTURE TO ILLUSTRATE AN ARGUMENT OR POINT

DESCRIPTION: Here the concern is with material (again of whatever kind) that is quoted not because it is, in itself, the object of critique but because it aptly illustrates some argument or point that a filmmaker is developing—as clips from fiction films might be used (for example) to demonstrate changing American attitudes toward race.

PRINCIPLE: Once again, this sort of quotation should generally be considered as fair use. The possibility that the quotes might entertain and engage an audience as well as illustrate a filmmaker's argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power, and in analogous situations, writers in print media do not hesitate to use illustrative quotations (both words and images). In documentary filmmaking, such a privileged use will be both subordinate to the larger intellectual or artistic purpose of the documentary and important to its realization. The filmmaker is not presenting the quoted material for its original purpose but harnessing it for a new one. This is an attempt to add significant new value, not a form of “free riding”—the mere exploitation of existing value.

LIMITATIONS: Documentarians will be best positioned to assert fair use claims if they assure that:

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film's final credits;
- to the extent possible and appropriate, quotations are drawn from a range of different sources;

- ❑ each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- ❑ the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.

THREE: CAPTURING COPYRIGHTED MEDIA CONTENT IN THE PROCESS OF FILMING SOMETHING ELSE

DESCRIPTION: Documentarians often record copyrighted sounds and images when they are filming sequences in real-life settings. Common examples are the text of a poster on a wall, music playing on a radio, and television programming heard (perhaps seen) in the background. In the context of the documentary, the incidentally captured material is an integral part of the ordinary reality being documented. Only by altering and thus falsifying the reality they film—such as telling subjects to turn off the radio, take down a poster, or turn off the TV—could documentarians avoid this.

PRINCIPLE: Fair use should protect documentary filmmakers from being forced to falsify reality. Where a sound or image has been captured incidentally and without prevision, as part of an unstaged scene, it should be permissible to use it, to a reasonable extent, as part of the final version of the film. Any other rule would be inconsistent with the documentary practice itself and with the values of the disciplines (such as criticism, historical analysis, and journalism) that inform reality-based filmmaking.

LIMITATIONS: Consistent with the rationale for treating such captured media uses as fair ones, documentarians should take care that:

- ❑ particular media content played or displayed in a scene being filmed was not requested or directed;
- ❑ incidentally captured media content included in the final version of the film is integral to the scene/action;
- ❑ the content is properly attributed;
- ❑ the scene has not been included primarily to exploit the incidentally captured content in its own right, and the captured content does not constitute the scene's primary focus of interest;
- ❑ in the case of music, the content does not function as a substitute for a synch track (as it might, for example, if the sequence containing the captured music were cut on its beat, or if the music were used after the filmmaker has cut away to another sequence).

FOUR: USING COPYRIGHTED MATERIAL IN A HISTORICAL SEQUENCE

DESCRIPTION: In many cases the best (or even the only) effective way to tell a particular historical story or make a historical point is to make selective use of words that were spoken during the events in question, music that was associated with the events, or photographs and films that were taken at that time. In many cases, such material is available, on reasonable terms, under license. On occasion, however, the licensing system breaks down.

PRINCIPLE: Given the social and educational importance of the documentary medium, fair use should apply in some instances of this kind. To conclude otherwise would be to deny the potential of filmmaking to represent history to new generations of citizens. Properly

conditioned, this variety of fair use is critical to fulfilling the mission of copyright. But unless limited, the principle also can defeat the legitimate interests of copyright owners—including documentary filmmakers themselves.

LIMITATIONS: To support a claim that a use of this kind is fair, the documentarian should be able to show that:

- the film project was not specifically designed around the material in question;
- the material serves a critical illustrative function, and no suitable substitute exists (that is, a substitute with the same general characteristics);
- the material cannot be licensed, or the material can be licensed only on terms that are excessive relative to a reasonable budget for the film in question;
- the use is no more extensive than is necessary to make the point for which the material has been selected;
- the film project does not rely predominantly or disproportionately on any single source for illustrative clips;
- the copyright owner of the material used is properly identified.

FAIR USE IN OTHER SITUATIONS FACED BY DOCUMENTARIANS

The four principles just stated do not exhaust the scope of fair use for documentary filmmakers. Inevitably, actual filmmaking practice will give rise to situations that are hybrids of those described above or that simply have not been anticipated. In considering such situations, however, filmmakers should be guided by the

same basic values of fairness, proportionality, and reasonableness that inform this statement. Where they are confident that a contemplated quotation of copyrighted material falls within fair use, they should claim fair use.

SOME COMMON MISUNDERSTANDINGS ABOUT FAIR USE

As already indicated, two goals of the preceding statement are to encourage documentarians to rely on fair use where it is appropriate and to help persuade the people who insure, distribute, and program their work to accept and support documentarians in these choices. Some common errors about fair use and its applicability may stand in the way of accomplishing these goals. Briefly, then, here are some correctives to these misunderstandings:

- Fair use need not be exclusively high-minded or “educational” in nature.*
Although nonprofit or academic uses often have good claims to be considered “fair,” they are not the only ones. A new work can be “commercial”—even highly commercial—in intent and effect and still invoke fair use. Most of the cases in which courts have found unlicensed uses of copyrighted works to be fair have involved projects designed to make money, including some that actually have.
- Fair use doesn’t have to be boring.*
A use is no less likely to qualify as a fair one because the film in which it occurs is effective in attracting and holding an audience. If a use otherwise satisfies the principles and limitations described in the Statement of Best Practices in Fair Use, the fact that it is entertaining or

emotionally engaging should be irrelevant to the analysis.

- *A documentarian's failed effort to clear rights doesn't inhibit his or her ability to claim fair use with respect to the use in question.* Everyone likes to avoid conflict and reduce uncertainty. Often, there will be good reasons to seek permissions in situations where they may not literally be required. In general, then, it never hurts to try, and it actually can help demonstrate the filmmaker's good faith. And sometimes (as in connection with Principle Four) it can be critically important.

For more information, consult centerforsocialmedia.org/fairuse

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AUTHORING ORGANIZATIONS

Association of Independent Video and Filmmakers (AIVF)

Works to increase creative and professional opportunities for independent video and filmmakers and to enhance the growth of independent media by providing services, advocacy, and information.

Independent Feature Project (IFP)

Fosters a sustainable infrastructure that supports independent filmmaking and ensures that the public has the opportunity to see films that more accurately reflect the full diversity of the American culture.

International Documentary Association (IDA)

Promotes nonfiction film and video around the world by supporting and recognizing the efforts of documentary film and video makers, increasing public appreciation and demand

for the documentary, and providing a forum for documentary makers, their supporters, and suppliers.

National Alliance for Media Arts and Culture (NAMAC)

Provides education, advocacy, and networking opportunities for the independent media field.

**Women in Film and Video (WIFV),
Washington, D.C., Chapter**

Works to advance the professional development and achievement for women working in all areas of film, television, video, multimedia, and related disciplines.

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**ACADEMIC CONSULTING
ORGANIZATIONS**

Center for Social Media

Directed by Professor Pat Aufderheide, showcases and analyzes media for social justice, civil society and democracy, and the public environment that nurtures them, in the School of Communication at American University in Washington, D.C.

**Program on Intellectual Property and the
Public Interest**

Directed by Professor Peter Jaszi, sponsors events and activities designed to promote awareness of the social, economic, and cultural implications of domestic and international intellectual property law, in the Washington College of Law at American University.

FUNDERS

The Rockefeller Foundation

The John D. and Catherine T. MacArthur Foundation

Additional support from:

Grantmakers in Film and Electronic Media



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