



Copyright, Fair Use and Motion Pictures*

Motion Pictures and Copyright Discipline

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Consider the following passage, drawn from the case report of what appears to have been the first published report of a copyright infringement involving the new art of motion pictures in the United States:

The complainant's operator, by means of a pivoted camera of special construction, designed and owned by complainant, took in rapid succession, on a single highly sensitized celluloid film 300 feet long, 4,500 pictures, each of which was a shade different from its predecessor and successor, and all of which collectively represented at different points Kaiser Wilhelm's yacht *Meteor* while being christened and launched. From this film or negative a positive reproduction was made on a celluloid sheet by light exposure. The value of such celluloid reproduction is that by means of an appliance similar to a magic lantern these views may be thrown on a screen in rapid succession so as to give the effect of actual motion, and pictorially reproduce launching precisely as it took place. This positive celluloid sheet was sent by the complainant to the Department of the Interior, and by it copyrighted to him as proprietor under "the title of a photograph, the title to which is in the following words, to wit, 'Christening and Launching Kaiser Wilhelm's Yacht *Meteor*.'" The complainant thereafter placed on the copies thereof issued by him a notice of copyright inscribed on a celluloid plate fastened on the front and at one end of the sheet. From the other end of one of such

marked articles about one-third thereof was detached by some unknown person, and came into the hands of respondent, without knowledge on his part of its having been copyrighted. The 1,500 pictures on this part, which represented a part of the launch, Lubin photographed on a sensitized celluloid film. From this negative he reproduced a positive on a celluloid sheet, which was, of course, an exact reproduction of the copyrighted one of the complainant. These were sold to exhibitors, and enabled them to reproduce the part of the launch therein represented. (*Edison v. Lubin*, 122 F. 240 (3rd. Cir. 1903] at 240)

The decision helped to establish, among other things, that motion pictures were entitled to the protection of the law even though they had not been in contemplation when the Copyright Act of 1870 was enacted. The court reasoned that “[f]rom the standpoint of preparatory work in securing the negative, the latter consists of a number of different views, but when the negative was secured the article reproduced therefrom was a single photograph of the whole. And that it is, in substance, a single photograph, is shown by the fact that its value consists in its protection as a whole or unit, and the injury to copyright protection consists not in pirating one picture, but in appropriating it in its entirety.” *Id.* at 242

Edison v. Lubin also demonstrates another kind of truth about motion pictures – that from its inception the new medium was a radically appropriative one. Whether or not one finds Sigmund “Pop” Lubin’s self-serving (and finally unavailing) representation

that he was unaware of the Edison copyright believable is not to the point¹: then, as now, the movies thrive on their ability to capture and repurpose existing material, much of it subject to prior claims of copyright protection.

Other early encounters between film and copyright deal with less straightforward appropriations from one production to another, like that involved in *American Mutoscope & Biograph Co. v. Edison Mfg Co.*, 137 F. 262 (C.C.D.N.J. 1905):

An examination of the complainant's positive film ... shows that it contains several hundred pictures, and that the camera in which were produced the negatives from which the positive film was printed occupied no less than seven or eight different positions, the first two or three of which, it is clear from the statements of the bill of complaint, were at or near to Gen. Grant's Tomb in New York City, the others being evidently in some country district. The defendant's photograph is also a positive film, evidently printed from negatives taken by a camera located at seven or eight different places, the first two or three of which were taken near to Gen. Grant's Tomb, or to a structure strongly resembling it; the remaining places being also in some country district. That the complainant's photograph is a reproduction upon a positive film of pictures on negatives taken by a camera located at different points is confirmed by the language of the ninth paragraph of the bill, which states that "the scene prominently

¹ For a first-hand account of Lubin's questionable duping practices, see Fred J. Balshofer & Arthur C. Miller, *One Reel a Week* (1967), at 7-8. Balshofer also notes that "[b]esides duping and occasionally making a picture, [the Philadelphia studio] faked championship bouts by using matched doubles for the boxers and staging the round-by-round action from the newspaper accounts," and describes the production of an ersatz newsreel of the San Francisco earthquake using cardboard cutouts of buildings. *Id.* at 9.

depicted in said photograph occurred largely at Grant's Tomb, on Riverside Drive, in New York City," and in the subsequent statement in the same paragraph that "in successive scenes the chase is depicted across the country in various situations." The title of the complainant's copyrighted photograph consists simply of the word "Personal." There is nothing in the proceedings for securing the copyright, as they are set forth in the bill, indicating that the scene depicted in the photograph "represents a French gentleman," or any other person who had "inserted an advertisement stating his desire to meet a handsome girl at Grant's Tomb." Consequently, there is nothing in the complainant's photograph, or in the title to its copyright, or in the proceedings for securing its copyright, in any wise suggestive of the title of the defendant's photograph, which is "How a French Nobleman Got a Wife Through the New York Herald Personal Columns."

Id. at 264-65. Although the court was not convinced that the latter film is an unlawful derivative of the former, its opinion established the principle that infringement by wrongful adaptation (as distinction from direct reproduction) is possible under the copyright law as applied to motion pictures. That principle was underlined and extended six years later, when the United States Supreme Court's "Ben Hur" decision concluded that the unauthorized production of a motion picture version could infringe copyright in the underlying literary work.²

² *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911).

Indeed, down to the present day much of the copyright litigation surrounding motion pictures has grown out controversies about the wrongly appropriation of content or imagery from one motion picture to another, or from a creative work in another medium into the motion pictures. Elsewhere, I have written about this set of issues,³ but this essay is concerned with the legal implications of another set of practices characteristic of motion picture production, to which one might apply the term coined by Bernard Edelman in a somewhat different context: the “over-appropriation of the real.”⁴ While much of the focus in what follows is on documentary filmmaking, I hope to indicate how the problems of copyright arise, and how the doctrine of fair use can help to resolve them, across a spectrum of media.

Motion pictures’ dependence on the raw material of reality is, of course, most obvious in connection with the documentary film tradition,⁵ which has its origins in early newsreels and “local views.”⁶ But well before 1917, it also had become an important part of the the classical mode of American fiction film production, with its emphasis on placing the spectator within an illusionistic three-dimensional space. Not only did actual locations come to be substituted more commonly for studio backgrounds, but as the authors of *The Classical Hollywood Cinema* note, “whenever possible sets were build on location, so that real landscapes rather than painted flats frequently appeared outside

³ Peter Jaszi, “When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest,” 28 *U.C.L.A. Law Review*, 715 (1981).

⁴ Bernard Edelman *Ownership of the Image: Elements for a Marxist Theory of Law* (trans. E. Kingdom) (1979)..

⁵ Patricia Aufderheide, *Documentary -- A very short introduction* (2007).

⁶ Charles Musser, *The Emergence of Cinema: The American Screen to 1907* (1990), at 266.

windows in the early teens.”⁷ Inevitably, however, the increasing reliance of motion picture production on the appropriation of reality has given rise to tensions that have been expressed in terms of conflicts over copyright. These tensions have become more acute over time, as the “real” environment has become more and more saturated with media artifacts, and as copyright law itself has extended its domain over more and more of those media objects.⁸

Within copyright law, the tension between contemporary creators’ needs for access to preexisting material, on the one hand, and the imperatives of copyright ownership, on the other, are mediated primarily by the so-called “fair use” doctrine. The application of this venerable legal concept, which exempts some substantial takings of protected content from infringement liability, is the subject of this essay.

What is Fair Use?

“Fair use” has its origins in a line of judicial decisions dating back to 1841, when a federal court considered whether a biographer of George Washington should be excused for having borrowed material from an earlier published life of the subject.⁹ Because it functions as a kind of “safety valve” in the copyright system, the doctrine came to be more frequently relied upon by defendants, and interpreted by the judges in

⁷ David Bordwell, Janet Staiger, & Kristin Thompson, *The Classical Hollywood Cinema: Film Style & Mode of Production to 1960* (1985), at 217.

⁸ In documentary practice, the tension has been further exacerbated by the rise of the *cinema vérité* style, reliance on which increases the likelihood that copyrighted works will be captured incidentally in the course of filming, and by the increasing inclination of some filmmakers to take the media environment itself as a subject.

⁹ *Folsom v. Marsh*, 9 Fed. Cas. 342 (C.C.D.Mass 1841).

their cases, in the mid-twentieth century -- as the reach of copyright law increased. There have been various efforts to explain the theoretical bases of fair use, but perhaps none better than Alan Latman's 1958 summary (based on a comprehensive review of cases and other authorities);

[A]s a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyright work to promote the ends of public welfare for which he was granted copyright....

The theory of "enforced consent" suggests another rationale which relies more directly upon the constitutional purpose of copyright. It has often been stated that certain degree of latitude for the users of copyrighted works is indispensable for the "Progress of Science and useful Arts" [because] progress depends on a certain amount of borrowing, quotation and comment.

Justification for a reasonable use of a copyrighted work is also said to be based on custom. This would appear to be closely related to the theory of implied consent. It also reflects the relevance of custom to what is reasonable. In any event, it has been stated that fair use is such as is "reasonable and customary."¹⁰

More recently, the United States Supreme Court has made it clear that "fair use" is one of the mechanisms by which copyright recognizes the principle of freedom of expression

¹⁰ Alan Latman, "Copyright Office Study No. 14, Fair Use of Copyrighted Works," *Studies Pursuant to Senate Resolution 240*, 86th Cong., 2d Sess. (Comm. Print) (1960), at 7.

that is enshrined in the First Amendment to the U.S. Constitution; without “fair use,” copyright law was be at risk of being found unconstitutional when applied to expressive activities such as documentary filmmaking. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003).

The judge-made doctrine was codified in 1976 as Sec. 107 of Title 17, United States Code, as part of the general revision of the Copyright Act that took effect on January 1, 1978. Both before that time and afterwards, the doctrine has been extensively interpreted by the U.S. federal courts, including the U.S. Supreme Court and the various Circuit Courts of Appeals. Among other things, these courts have made it clear that, broadly speaking, fair use comes in two varieties – one relating to personal or private end-uses of copyrighted material, and the other to re-uses that are arguably “productive” in nature. Obviously, the dichotomy is a somewhat artificial one, since all creative practice ultimately is rooted in imitation. But the distinction is serviceable nevertheless, if only because it allows us to note that some aspects of the fair use doctrine are faring better in contemporary courts than others. Recent commentaries on case law suggest that the concept of “passive” fair use is at risk today, as new technologies continue to blur the public/private line.¹¹ By contrast, the “active” branch of the doctrine is thriving, in its application to fields of cultural practice as diverse as scholarship, musical parody, computer programming and film production.¹²

¹¹ Rebecca Tushnet, "Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It," 114 *Yale Law Journal* 535 (2004),

¹² Paul Goldstein, "Fair Use in a Changing World," 50 *Journal of the Copyright Society of the U.S.A.*, 133 (2003).

Fair Use in Action

Sec. 107 directs courts considering whether a particular challenged use is fair (rather than infringing) to consider, among other things, four factors (derived, in turn, from pre-1976 judicial opinions):

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In recent decisions, moreover, the courts have indicated that a critical consideration in evaluating most (if not all) of these factors, is whether the use can be considered “transformative” – whether it “adds something new, with a further purpose or different character...” *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). If that is the case, the first factor can weigh in favor of fair use even if the use is “commercial” in character. Self-evidently, the second factor tends to favor transformative uses as well, precisely because they add value to the preexisting material rather than merely repeating it for its original purpose. Moreover, if the use is transformative, courts will approve the use of a greater proportion of the protected material in connection with the third factor.

Finally, and crucially, if a use is a transformative one, it is likely to satisfy the fourth factor as well, because (as the Second Circuit Court of Appeals recently recognized) copyright owners are not entitled to control the “transformative markets” for their works.

For an introduction to how fair use works today, it is instructive to examine the exceptionally detailed 2006 decision of the federal Second Circuit Court of Appeals in *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605. In that case, the defendant published what the court described as “a 480-page coffee table book [that] tells the story of the Grateful Dead along a timeline running continuously through the book, chronologically combining over 2000 images representing dates in the Grateful Dead's history with explanatory text. A typical page of the book features a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader.” *Id.* at 607. The plaintiff owned the copyrights to posters and other graphic materials associated with the musical group's historic appearances at the Fillmore Auditorium and other Bay area venues. After a negotiation to establish license terms for the use of these materials in the book broke down, the publisher proceeded to use seven of them without authorization, and the lawsuit followed.

The court's analysis began with the first statutory factor (“Purpose and Character of Use”), emphasizing the “transformative” way in which the publisher deployed the images; the judges agreed with the trial court that the “use of images placed in chronological order on a timeline is transformatively different from the mere expressive use of images on concert posters or tickets. Because the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in

significantly reduced form, the ... the first fair use factor weighs heavily in favor of DK.” *Id.* at 609. In other words, the recontextualization of the quoted material made all the difference to the determination of its transformative character. Along the way to this conclusion, the court reemphasized another important point – if the user’s purpose was transformative, the mere fact that it was also commercial does not bar application of the doctrine. In fact, the court notes, most fair uses are conducted for profit!

The second factor (“Nature of the Copyright Work”), which often favors copyright plaintiffs, was judged here to be inconclusive, on reasoning that echoes the language already quoted: “We recognize ... that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose... of enhancing the biographical information provided in Illustrated Trip. Accordingly, we hold that even though BGA's images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK's use was to emphasize the images' historical rather than creative value.” *Id.* at 611; thus, while the posters were creative works, this use focused on their value as historical artifacts. The third factor (“Amount and Substantiality of the Portion Used”) also was deemed a toss-up, since to accomplish its transformative purpose, “DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size.” *Id.* at 613.

Finally, the important fourth factor (“Effect of the Use upon the Market for or Value of the Original”) tilted conclusively for the defendant: “DK's use of BGA's images is

transformatively different from their original expressive purpose [and] [i]n a case such as this, a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work... [C]opyright owners may not preempt exploitation of transformative markets’ ” . *Bill Graham Archive*. at 614-615 (quoting *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 [2d Cir. 1998], at 150). The court continued by noting that “a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images.” *Id.* at 615.

One of the most notable features of this enlightening opinion is that court’s heavy reliance for precedent on some of the last decade’s crop of fair use cases involving claims against documentary filmmakers – many of which were resolved in favor of the defendants. A description of some of those decisions follows.

Motion Pictures and Fair Use by the Numbers

This important line of cases begins in 1996, with *Monster Communications v. Turner Broadcasting System*, 935 F. Supp. 490 (S.D.N.Y.), which involved no more than 2 minutes of clips from *When We Were Kings*, an acclaimed non-fiction feature on the Mohammad Ali-George Forman “rumble in the jungle,” that had been incorporated into a TNT made-for-TV documentary called "Ali -- The Whole Story." In its opinion, the court marches through the four statutory factors, finding that its status as a biography of a public figure favors fair use; that “the character [of the quoted material] as historical film

footage may strengthen somewhat the hand of a fair use defendant as compared with an alleged infringer of a fanciful work or a work presented in a medium that offers a greater variety of forms of expression,” *id.* at 494; that the amount taken in small, both quantitatively and (in light of the different topical emphases of the two films) qualitatively; and that neither the commercial reception of *When We Were Kings* itself, nor the prospects for spin-offs (such as music videos) from the film, were likely to be affected by the existence of the TV program. Notably, the court did not address the powerful but circular argument that copyright owners sometimes make in connection with the fourth factor: that the very loss of licensing revenue from the defendant’s use (and others like it), represents market harm. It was this argument (apparently not presented by the plaintiff here) that the court in *Bill Graham Archives* subsequently answered by its reference to “transformative markets.” Finally, in addition to being the first in the line of documentary fair use cases, *Monster* also has the distinction of being one of the last fair use decisions – relating to this or any other domain of practice -- not even to mention “transformativeness.”

For better or worse, this new meta-factor rapidly came to dominate juridical discourse. And although most documentary filmmakers who have defending infringement claims on the basis of fair use have been as successful as TNT was in *Monster*, there have been exceptions to this trend – and they are instructive in their own right. So it is useful to contrast (for example) two decisions dealing with biographical documentaries: *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) and *Hofheinz v. A & E Television Networks, Inc.*, 146 F. Supp. 2d 442 (S.D.N.Y

2001). In the first of these cases, defendants had produced a 16-hour video documentary about the life and times of Elvis, which the court described as follows:

The biography itself is indeed exhaustive. The producers interviewed over 200 people regarding virtually all aspects of Elvis' life. The documentary is divided into 16 one-hour episodes, each with its own theme. For example, one episode is entitled "The Army Years," whereas another -- "The Spiritual Soul of Elvis" -- chronicles ... religious themes...

The Definitive Elvis uses Plaintiffs' copyrighted materials in a variety of ways. With the video footage, the documentary often uses shots of Elvis appearing on television while a narrator or interviewee talks over the film. These clips range from only a few seconds in length to portions running as long as 30 seconds. In some instances, the clips are the subject of audio commentary, while in other instances they would more properly be characterized as video "filler" because the commentator is discussing a subject different from or more general than Elvis' performance on a particular television show. But also significant is the frequency with which the copyrighted video footage is used. *The Definitive Elvis* employs these clips, in many instances, repeatedly. In total, at least 5% to 10% of *The Definitive Elvis* uses Plaintiffs' copyrighted materials.

Use of the video footage, however, is not limited to brief clips. In several

instances, the audio commentary discusses Elvis' appearance on a show and then, without additional voice-over, a clip is played from the show featuring Elvis. For example, one excerpt from *The Steve Allen* show plays continuously for over one minute without interruption. This excerpt includes the heart of Elvis' famous "Hound Dog" appearance on *The Steve Allen* show....

In the aggregate, the excerpts comprise a substantial portion of Elvis' total appearances on many of these shows. For example, almost all of Elvis' appearance on *The Steve Allen Show* is contained in *The Definitive Elvis*. Thirty-five percent of his appearances on *The Ed Sullivan Show* is replayed, as well as three minutes from *The 1968 Comeback Special*.

The use of Plaintiffs' copyrighted still photographs and music is more subtle and difficult to spot. The photographs are used in a way similar to some of the video footage: the photograph is displayed as video filler while a commentator discusses a topic. The photographs are not highlighted or discussed as objects of the commentary like many of the video pieces are. Finally, the songs are played both as background music and in excerpts from Elvis' concerts, television appearances, and movies.

Passport Video at 625. As may be imagined, the court was not impressed with the defedants' fair use arguments under the various Sec. 107 factors. At the outset, in

connection with the first statutory factor, the filmmakers' uses were deemed preponderantly non-transformative. The court pointed to some instances of transformative use where "the clips play for only a few seconds and are used for reference purposes while a narrator talks over them or interviewees explain their context in Elvis' career;" however, other "clips are played without much interruption, if any," and indicated that "[t]he purpose of showing these clips likely goes beyond merely making a reference for a biography, but instead serves the same intrinsic entertainment value that is protected by Plaintiffs' copyrights." *Id.* at 629. With this out of the way, the statutory fair use factors begin to pile up against the defendants: Many of the works quoted were creative in nature (rather than merely factual), and too many of the defendant's uses involve unnecessarily long quotations, repetitions of shorter ones, or quotations that represent the "heart" of the Passport's use of clips from television appearances, "in many cases singing the most familiar passages of his most popular songs." *Id.* at 630. Finally, and fatally, the appeals court saw no reason to upset the trial judge's decision that, where the fourth factor was concerned:

Passport's use is commercial in nature, and thus we can assume market harm. Second, Passport has expressly advertised that *The Definitive Elvis* contains the television appearances for which Plaintiffs normally charge a licensing fee. If this type of use became wide-spread, it would likely undermine the market for selling Plaintiffs' copyrighted material. This conclusion, however, does not apply to the music and still photographs. It seems unlikely that someone in the market for these materials would

purchase *The Definitive Elvis* instead of a properly licensed product.

Third, Passport's use of the television appearances was, in some instances, not transformative, and therefore these uses are likely to affect the market because they serve the same purpose as Plaintiffs' original works.

Id. at 631. Although the details of this market analysis are subject to some doubt, the more general message of the Court of Appeals' opinion is clear: Once the defendant had lost the battle over "transformativeness" was lost, the factoral analysis lined up neatly in the plaintiffs' favor.¹³

Hofheinz presents a very different picture. In a suit brought by the widow of one of the principles of American International Pictures, the court ruled that unauthorized inclusion of copyrighted film clips from *It Conquered the World* in an A&E "Biography" program about the career of actor Peter Graves was protected fair use because they were "not shown to recreate the creative expression reposing in plaintiff's [copyrighted] film, [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business." *Hofheinz* at 446-47. Once this was established, the other factors weighed, overall, in the defendants' favor. Where the fourth factor was concerned, the court held that "[t]he proper question is whether the Graves biography

¹³ Another recent example of a non-fiction filmmaker who went "over the top" and forfeited the ability to rely on fair use can be found in *Video-Cinema v. Lloyd E. Rigler-Lawrence E. Deutsch Foundation*, 2005 U.S. Dist. LEXIS 26302 (S.D.N.Y.), where the defendant's Classic Arts Showcase program for public television consisted of a miscellaneous collection of clips showing famous performances by musicians, dancers and so forth, intended to whet viewers' interest in the fine arts. Included among the quoted materials were excerpts from a movie, *Carnegie Hall*, that the plaintiff company licenses for TV and home video distribution. Finding that the inclusion of the clip was "non-transformative," the court then made relatively short work of the remaining statutory factors.

was, in effect, a substitute for Hofheinz’s film clips” – not whether she stood to lose licensing revenue if the fair use defense was upheld. The fact that the filmmakers might have licensed the clip rather than appropriating it was not, in itself, enough: “Plaintiff may not boot-strap the specter of a fair use holding against her here, on the facts of this case, as reason why the use is not a fair use to begin with.” *Id.* at 448.

The just-preceding analysis was based, in large part, on the opinion in another of the Hofheinz “trilogy,” *Hofheinz v. AMC Productions, Inc.*, 147 F.Supp.2d 127 (E.D.N.Y. 2001). And the discussion of *It Conquered the World*, in turn, prefigured the outcome in the last of these cases, *Hofheinz v. Discovery Communications, Inc.*, 2001 U.S. Dist. LEXIS 14752 (S.D.N.Y.), decided late in 2001, in which a fair use defense was validated in connection with the use of a clip from *Invasion of the Saucer Men* in a Learning Channel program entitled *Aliens Invade Hollywood*.

The copyright lawyer who experienced such a dearth of success in the Hofheinz cases returned to the fray on behalf of a different client several years later – still on the trail of unauthorized clips of Hollywood aliens. This time, in *Wade Williams Distributors, Inc. v. ABC*, 2005 U.S. Dist. LEXIS 5730 (S.D.N.Y. 2005), the grievance had to do with the use of clips from *Robot Monster*, *The Brain from Planet Arous*, and *Plan 9 from Outer Space* that were included in “Good Morning America” segments on the American fascination with extraterrestrials broadcast in July 1997, and intended to illustrate presenter Joel Siegel’s theme that “big or small, cute or icky, alien life as portrayed in pop culture inevitably shares some humanlike traits.” It is hardly a surprise, at this point, that the fact of this recontextualization was enough to demonstrate the transformativeness of the use; of additional interest is the fact that the court went so far as

to specifically reject the argument that uses cannot be both transformative and entertaining! It quoted the judge in the final Hofheinz case (“[S]ection 107 does not explicitly distinguish between entertaining and serious, plausible and implausible, or weighty or frivolous commentaries, and I do not propose to engage in such subjective line-drawing”) and went on to cite various heavy-duty authorities for declining to parse this illusive distinction.

A bit further afield, but nonetheless relevant, are the results in three lawsuits brought by the Los Angeles News Service, an independent provider of news footage (including aerial footage captured from helicopters) to TV stations and other outlets. All involved the famous footage of the beating of truck driver Reginald Denny near the intersection of Florence and Normandie during the 1992 Los Angeles riots. Two of these cases, *Los Angeles News Service v. KCAL-TV*, 108 F.3d 1119 (9th Cir. 1999) and *Los Angeles News Service v. Reuters Television International, Ltd.*, 149 F.3d 987 (9th Cir. 1998), involved unlicensed broadcast of the footage while it still had considerable “hot news” value. At base, the court’s skepticism about these defendants’ fair use defenses reflected the fact that the footage in question was being re-used to fulfill the very purpose for which it originally had been captured – to serve news reporting – rather than in some more “transformative” way.

By contrast, when Los Angeles News Service sued Court TV, some months later, for using “a few seconds of footage from ‘Beating of Reginald Denny,’ primarily the frames depicting Damien Williams throwing a brick at Denny’s head, in on-air ‘teaser’ spots promoting its coverage of the trial [of the assailants and] incorporat[ing] the brick-throwing footage into the introductory montage for its show ‘Prime Time Justice,’ which

used a stylized orange clock design superimposed over a grainy, tinted, monochromatic video background [that] changed as the "hands" of the clock revolved, [with] LANS's copyrighted video was in the background for a couple of seconds, one 360 degree sweep of the clock." *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924 (9th Cir. 2002). Working its way through the fair use factors, the federal appeals court concluded that while the quotations in "teasers" were not transformative, the more "commercially exploitive" incorporation of the footage into the "Prime Time Justice" introduction did include "the element of creativity beyond mere publication, and its serves some purpose beyond newsworthiness." *Id.* at 938. The court went on to note that the highly factual nature of the footage pointed "clearly" toward fair use, and that the amount of material used was small, expressing skepticism that brief excerpts could be considered "the heart of the work." Finally, the court found that because was little chance that Court TV's uses (or others like them) would harm the licensing market for longer clips – which was, after all, the News Service's core business. Despite the court's equivocation on the issue of "transformativeness," what seems to have carried the day was its conviction that Court TV's uses were somehow out of the ordinary!

The *Wade Williams* and *CBS* decisions serve as perhaps the best evidence of how far the federal courts have gone to create a generally hospitable space for non-fiction filmmaking and related media activities through their application of the fair use doctrine. Even where the quotation of existing copyright content is done as much to amuse as to enlighten, or for a promotional purpose, the fact that it has been "transformed" through repurposing weighs heavily in favor of a fair use finding – at least where the quotation is not overly extensive.

In principle, at least, similar results might be expected where quotations are used in fiction films. In practice, it is difficult to be so confident. The fair uses cases involving appropriation of preexisting copyrighted elements in narrative films are fewer – too few, in fact, to form anything resembling a pattern. One decision sometimes mentioned in this connection, *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (9th Cir. 1998) actually avoids the issue of fair use in assessing a copyright challenge to the motion picture *Seven*. Instead, the court finds that fleeting glimpses of the plaintiff photographer’s images in the background of a scene in which detectives search a suspect’s apartment are too trivial to constitute even potential infringements. The previous year, in *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70 (2d Cir. 1997), another appeals court had criticized a trial court’s prior finding that an artist’s poster was used as set decoration in a television situation comedy constituted fair use. The main ground for skepticism was the lack of transformativeness: “Ringgold’s work was used by defendants for precisely the decorative purpose that was a principal reason why she created it.” *Id.* at 78. In more or less direct contrast is *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585 (E.D. Mich. 1997), where several of the plaintiff’s appropriately themed paintings decorated a set representing the apartment of a principal character in the film *Made In America*, and the court found fair use.¹⁴

These cases are too scattered and too disparate (in both outcome and analytic approach) to offer any real guidance, going forward, to narrative filmmakers. And while the cases involving documentary filmmaking are sufficiently numerous and consistent to

¹⁴ The outcome appears to have been influenced, in some degree, by the fact that the plaintiff’s objections to the use were primarily ideological rather than economic! Fair use also provides a secondary rationale for the court’s finding of non-infringement in *Amsinck v. Columbia Pictures Indus., Inc.* 862 F. Supp. 1044 (S.D.N.Y. 1994), where plaintiff’s children’s mobile were used as set décor in the film *Immediate Family*.

suggest a pattern, a problem remains: Although the documentary cases cover a fairly wide range of different specific filmmaking practices, they by no means exhaust the list of situations in which a documentary producer might wish to rely on fair use. They illustrate a mode of analysis, and suggest a considerable judicial bias in favor of enabling documentarian's access to preexisting copyrighted material. But they leave many questions unanswered – as does any set of legal precedents applying a principle of general applicability (like “negligence” in tort or “self-defense” in criminal law) to specific circumstances.

The Critique of Fair Use

The notoriously fact-specific nature of fair use analysis recently led some of the foremost advocates of greater openness in the copyright system to raise questions about the doctrine's utility. Thus, for example, Prof. Lawrence Lessig has argued that fair use doesn't strike an adequate balance in copyright law. The statutory formulation, he asserts, is too vague and open-ended to be relied upon effectively; its real utility is severely limited because fair use claims can be tested only after the fact of use and then only when a creator relying on the doctrine is able to retain legal counsel and willing to expose himself or herself to considerable economic risk in the event that the defense fails.¹⁵ Prof. David Lange, in turn, has speculated about the possibility of new legislation that

¹⁵ See generally, Lawrence Lessig, *Free Culture* (2004).. These themes are developed at greater length in Prof. Lessig's *Testimony on "The Digital Media Consumers' Rights Act of 2003" (H.R. 107)*, before the Subcommittee on Commerce, Trade, and Consumer Protection, U.S. House of Representatives, May 12, 2004.

would supplant fair use and lighten the burden of copyright clearance on documentary filmmakers by providing them with a special “compulsory license”¹⁶

But however reasonable and unthreatening proposals like Prof. Lange’s may be in fact, there is little likelihood that the motion picture and music industries, which exercise considerable sway in these matters, would tolerate their enactment. Fair use, as the law summarized above now stands, actually offers filmmakers and other creators of media a considerable latitude for creative practice. But the critique of fair use -- as being too vague and unreliable to be of much practical use -- has achieved considerable currency, and it operates to discourage media practitioners, their lawyers and their so-called “gatekeepers” (including distributors, broadcasters, insurers and others) from relying on the doctrine. What can be done to address it, and to encourage filmmakers to take advantage of their fair use rights?

The Structural Meaning of the Fair Use Cases

Fair use challenges filmmakers, as well as other practice communities, to find ways of making this powerful but elusive doctrine more transparent and predictable. The key to meeting this challenge can be found in the passage Prof. Latman’s historical study, quoted earlier in this essay: “Justification for a reasonable use of a copyrighted work is also said to be based on custom.” In other words, courts engaged in fair use decisionmaking should care about evidence of what is considered “reasonable” and

¹⁶ *See* the webcast of the April 2, 2004 legal panel from the “Full Frame” conference, www.duke.law.edu/framed (linked at “Culture on the Legal Cutting Room Floor”).

“customary” within the relevant practice communities. Before the enactment of Sec. 107, case law offered various example of this approach.¹⁷ These included several instances in which the customary practice was considered in deciding fair use issues involving biography. (*Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 [2d Cir. 1986] and *Rosemont Enters., Inc. v. Random House*, 366 F.2d 303, 307 [2d Cir. 1966]).¹⁸

Something of a shift took place in the discourse of fair use after the enactment of Sec. 107, and for a time the customary roots of the doctrine were obscured. Scholars sought elsewhere for coherence, particularly in utilitarian economic analysis.¹⁹ Other commentators expressed pessimism that fair use analysis, which depends on a “calculus of incommensurables,” can ever be rationalized or made more predictable.²⁰ Although the Supreme Court, in 1985, acknowledged the connection between custom and fair use (in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, at 550-51 & n.4), many lower courts temporarily lost sight of this dimension of the doctrine, turning their attention instead to the factorial analysis apparently privileged by the statute.²¹ And, as we seen, their opinions came to focus increasingly on the issue of “transformativeness.”

¹⁷ See generally, Harry Rosenfeld, “Customary Use as “Fair Use” in Copyright Law,” 25 *Buffalo Law Review* 119 (1975).

¹⁸ In 1973, the United States Court of Claims held that handwritten copies of text materials by scholars represented fair use since they were “customary facts of copyright-life.” *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, at 1350.

¹⁹ Wendy Gordon, “Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors,” 82 *Columbia Law Review* 1600 (1982); William W. Fisher III. “Reconstructing the Fair Use Doctrine,” 101 *Harvard Law Review*, 1559.(1988).

²⁰ Lloyd Weinreb, “The Donald C. Brace Memorial Lecture: Fair Use,” 67 *Fordham Law Review* 1291 (1999)..

²¹ That this trend may have run its course is suggested by the discussion of custom in a 2006 Ninth Circuit Court of Appeals decision, *Wall Data Inc. v. L.A. County Sheriff's Department*, 447 F.3d 769, at 778.

As Michael Madison has convincingly demonstrated, however, the link between fair use and custom never really was severed – only temporarily overlooked:

I suggest ... that the contemporary focus on “case-by-case adjudication of fair use disputes misunderstands the properly contextual orientation of fair use decision making as it developed historically, as Congress understood it when it enacted the fair use statute, and as the statute actually has been applied over the last twenty-five years.”²²

In *A Pattern-Oriented Approach to Fair Use*, his important reanalysis of historical and contemporary case law, Professor Madison argues that as courts explore the four factors and ponder degrees and kinds of “transformativeness,” they are in fact seeking to ascertain whether the challenged work fits within a privileged use category, or (on the other hand) whether an invocation of fair use is merely an infringer’s attempt to dress its unjustifiable appropriations in borrowed plumage. Thus, Madison points out, the very first fair use decision, *Folsom v. Marsh* of 1841, involved a judicial effort to distinguish between true biographical scholarship and simple free-riding. Likewise, the focus of the Supreme Court’s celebrated 1994 “2 Live Crew” decision (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569) was the determination of whether the allegedly infringed song was a genuine parody or a mere effort to capitalize on the fame of the plaintiff’s song. By the same token, in many of the cases involving non-fiction filmmakers reviewed above, the underlying issue was whether the challenged production was actually a

²² Michael J. Madison, “A Pattern-Oriented Approach to Fair Use,” 45 *William and Mary Law Review*, 1525, 1587 (2004)..

documentary, or merely an entertainment film in disguise. And in the handful of cases involving narrative filmmaking, a recurrent question is whether the reproductions of defendants' artistic creations were actually part of the film's decorative background – or something more. Such inquiries, although conducted these days using the vocabulary of Sec. 107, always involve – at bottom – a comparison between practices of a defendant and the norm or pattern of use with which he seeks to affiliate. And the best way to determine whether (in Madison's terms) a genuine "patterned" use is involved is to look, in one way or another, to common or customary practice in whatever the field of practice may be.

In a recent article, James Gibson has extended this analysis, warning of a possible "vicious circle" in fair use jurisprudence: When users are too conservative in their practices, choosing to license rights even when they do not have a legal obligation to do so, the result of this timidity may eventually be a recalibration of the law itself towards a less permissive setting.²³ In effect, Gibson reminds us that the watchword for fair use is "use it or lose it," as he points to a problem of negative reinforcement that has been aggravated greatly, and deliberately, by the practices of large copyright holders).

What then, can we make of these central perceptions into the real inner workings of fair use jurisprudence? The answer, I would suggest, is that collective action offers members of various practice communities a chance to effect the way in which the

²³ James Gibson, 116 Yale L.J. 882 (2007). Gibson points out that such failures to assert fair use are often the result of constraints imposed on users by various "gatekeepers" – including (in the case of filmmakers) broadcasters, distributors and – especially – insurers.

law, as applied to them, is understood.²⁴ The effectiveness of the approach was tested more than a decade ago by the Society for Cinema and Media Studies. In 1993, with the help of several experts (including the present author), the SCMS developed a best-practices code for its members concerning use of stills and frame grabs from films in academic literature.²⁵ Ever since, this code has effectively reduced costs and facilitated publication for many film scholars since. Recently, the model has been extended to the field of documentary film-making practice.

Statements of Best Practices – Processes and Products

*The Documentary Filmmakers' Statement of Best Practices in Fair Use*²⁶ is a testament to the power of collective self-help and accessible scholarship. Documentary filmmakers, acting through their organizations and with co-ordination and support from academics at American University, have asserted common principles for the application of fair use under copyright. In so doing, they have made fair use—the right to quote copyrighted material without permission or payment, under certain circumstances—far more widely available. This has made films that formerly would have been treated as too risky for broadcast—such as controversial works of social or media criticism or certain

²⁴ Although Gibson suggests that self-help may be futile, because “doctrinal feedback” takes place regardless of ... whether copyright users want to do something about it,” 116 *Yale L.J.* at 2007. But if “doing something” includes changing the conduct that gives rise to feedback, it is not clear why this need be so. The actual experience of documentary filmmakers, as described below, appears to indicate otherwise.

²⁵ Kristin Thompson, , “Report of the Ad Hoc Committee of the Society For Cinema Studies, ‘Fair Usage Publication of Film Stills’,” 32 *Cinema Journal* 3 (1993)..

²⁶ Association of Independent Video and Filmmakers *et al.* “Documentary Filmmakers' Statement of Best Practices in Fair Use” (2005), available at www.centerforsocialmedia.org/fairuse Excerpts from the *Statement* appear as an Appendix to this chapter.

historical documentaries—available to viewers today. The filmmakers’ example is one that many other creators’ organizations can profit from and emulate.

Documentary filmmakers had found themselves increasingly hemmed in by ever more owner-friendly copyright law, especially over as the term of copyrights was repeatedly extended. At this point, the bulk of surviving films and other works made after 1923 are copyrighted, along with practically all expression created since 1978 (including poems and grocery lists); therefore copyright protection is the default setting. A 2004 study of current documentary filmmaking practice in copyright clearance, *Untold Stories*, conducted by Professor Pat Aufderheide of the School of Communication at American University, along with the present author, documented the creative costs of the “clearance culture.” Documentary filmmakers changed the reality they filmed both during shooting (instructing subjects, for example, to “Please turn off the television!” so as to avoid incidental capture of copyrighted media) and in post-production (when they edit sounds and images to avoid perceived copyright clearance problems. They suffered both financial uncertainty and high prices. Worst of all, they avoided topics that might involve too-complex clearance problems: including social criticism, musical documentaries, and a wide range subjects involving historical footage. “I tell people not to make historical films,” said Robert Stone (*Radio Bikini, Satellite Sky, American Babylon, Guerrilla: The Taking of Patty Hearst*).²⁷

Of the many possible solutions to the crisis in copyright clearance, there was one that filmmakers themselves could address: fair use. As has been noted above, courts respect the views of practice communities about what constitutes reasonable and

²⁷ Patricia Aufderheide and Peter Jaszi, “Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers” (2004), available at www.centerforsocialmedia.org/fairuse

appropriate use of copyrighted materials. But filmmakers interviewed for *Untold Stories* found themselves unable to say what was appropriate because they did not know what the consensus of their peers was about what was fair and reasonable interpretation of the law. In order to help filmmakers' to establish such a consensus, Aufderheide and Jaszi worked with five filmmaker organizations—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—to establish that consensus. In 13 meetings, including 10 small group meetings hosted by the various professional organizations, the scholars worked with veteran professional filmmakers to articulate principles, and limitations on those principles, for the application of fair use. In these conversations, documentarians wrestled first with defining what their own needs were to quote others' material without permission or payment; then they confronted what they thought would be acceptable, were someone to quote their own material without authorization.

The *Statement* deals with four recurrent situations in documentary filmmaking practice: quotation of copyrighted material for purposes of critique; quotations of popular culture to illustrate an argument; incidental capture of media content as fact of the lives of a film's subjects; and the use of copyrighted material in historical narrative.²⁸ The treatment of the latter topic emerged out of a rich and difficult discussion among the documentarians; not only did the filmmakers respect the importance of archival activities (and understand the importance of compensating them), but they were quick to see that today's documentaries are tomorrow's archival footage! At the same time, they were

²⁸ Of course, as the *Statement* itself makes clear, the articulation these consensus principles is not intended to foreclose the assertion of fair use by filmmakers in other situations.

outraged by (for example) CSPAN's refusal to release some presidential and Congressional material, and the arbitrary licensing practices of some private archives. The Statement carefully balances these various concerns. It declares that filmmakers in general should clear historical archive material, unless it is impossible or the terms are extortionate. If it is still imperative to use the material—which is not the primary subject of the documentary—then the filmmaker must use only as much as is needed to make the point, and should credit the source.

The balanced nature of the *Statement*, as the product of a community with stakes both maintaining copyright and allowing for reasonable levels of access to protected material, has made the document powerfully persuasive. Following its release on November 18, 2005, the *Statement* had an immediate effect. It was used by three filmmakers to justify inclusion of their films at the Sundance Film Festival only eight weeks later. Kirby Dick (*This Film Is Not Yet Rated*), Ricki Stern and Annie Sundberg (*The Trials of Darryl Hunt*), and Byron Hurt (*Hip Hop: Beyond Beats and Rhymes*). In *The Trials of Darryl Hunt*, for example, the filmmakers had followed, and helped to organize, protests in a racially-charged death penalty case, and then chronicled the eventual proof that the accused was innocent. Archival footage had been used with the permission of the local broadcast station, but when new station leadership saw the potential of making their own documentary, this permission suddenly was withdrawn. The filmmakers stood on the ground of fair use to use archival broadcast news footage in their film.

Within four weeks of the release, Aufderheide and Jaszi hosted a meeting with broadcast and cable executives; this meeting precipitated a decision by the Independent

Feature Channel to create an internal fair use policy allowing it to clear the cablecast of *This Film Is Not Yet Rated*, which includes more than a hundred uncleared quotes from popular recent films as part of a critique of the MPAA rating system. IFC also saved hundreds of thousands of dollars by relying on fair use to reduce clearance claims for a documentary, about road movies, *Wanderlust*.²⁹ By April 2006, the Public Broadcasting Service had accepted the applicability of fair use to *Hip Hop: Beyond Beats and Rhymes*, which quotes substantial amounts of music and video in its argument that hip-hop had become a celebration of misogyny and violence. Moreover, PBS had shared the *Statement* with all general managers and general counsels in its network.

Perhaps the most powerful evidence of the transformation that the *Statement* has helped to work is the fact that four of the seven insurers who offer errors and omissions insurance to filmmakers are now offering to cover fair use claims, and others may soon follow.³⁰ It took insurers, cautious by nature, some 18 months to reconsider their practice in the light of a consensus document that dramatically lowered risk. At least where documentary filmmaking is concerned, the vicious circle of which Professor Gibson warns may have been replaced by a “virtuous circle.”

Film professors also have become activists for the expanded freedom of expression that the *Statement* permitted. The University Film and Video Association sponsored an award for the best use of fair use in a student and/or professor’s work.

²⁹ Elaine Dutka, “Legendary Film Clips: No Free Samples?,” *New York Times*, May 28, 2006, at Sec. 2., p. 16, col. 2..

³⁰ See the postings for February 13 (“[Insurer accepts fair use claims!](#)”) and 24 (“MediaPro also uses Fair Use Best Practices Statement for insurance policies”), 2007, on the “Beyond Broadcast Blog,” at http://www.centerforsocialmedia.org/blogs/fair_use/.

Teachers began using the Center for Social Media's Fair Use Toolkit, a DVD providing core teaching materials on fair use (available at centerforsocialmedia.org/fairuse).

Other creator groups began to organize to emulate the best-practices model. Music educators, media literacy practitioners, and art historians began the process of assessing problems in their communities and establishing peer groups among professionals to deliberate common values. In her 2006 book, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property*, veteran publisher Susan Bielstein warmly endorses potential of the best practices approach.

The Documentary Filmmakers' Statement of Best Practices in Fair Use has begun to change practice and expand possibility in many areas of media-making and scholarship.³¹ It is part of a contemporary movement to reclaim the copyright system for the public -- its original intended beneficiary. Responsibility for realizing the potential of the approach exemplified by the *Statement* now lies with teachers, students and practitioners themselves.

APPENDIX

[An excerpt from the *Documentary Filmmakers' Statement of Best Practices on Fair Use*]

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.

³¹ For a further discussion of the Statement and its background, see Paige Gold, Fair Use and the First Amendment: Corporate Control of Copyright is Stifling Documentary-making and Thwarting the Aims of the First Amendment, 15 *U. of Baltimore Intell. Prop. L.J.* 1 (2006).

It is organized around four classes of situations that they confront regularly in practice. In each case, it states a general principle about the applicability of fair use and then discusses qualifications that may affect filmmakers' choices in particular situations.

ONE: EMPLOYING COPYRIGHTED MATERIAL AS OBJECTS 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 to the analysis.

Limitations: There is one – and only one – general qualification to the principle just stated. In order to qualify as a fair use, the use should be only as extensive as is necessary to make the point, to permit the viewer to fully grasp the criticism or analysis. It should not be so extensive or pervasive that it ceases to function as critique and become, 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 we are concerned 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 an argument or a 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 to illustrate a filmmaker’s argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power precisely because they are popular. 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 to harness it for a new one. This is an attempt to add significant new value, not a form of “free riding.”

Limitations: Documentarians’ fair use claims will be most unassailable 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 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 or 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 contradict the fundamental purposes of copyright: to encourage new creativity.

Limitations: Consistent with the rationale for treating such uses as fair ones, it is important that documentarians should be careful that:

- Particular media content played or displayed in a scene being filmed was not requested or directed.
- Incidentally captured media content that included in the final version of the film is integral to the scene/action.
- The content is properly attributed.
- The use is not so extensive that it calls attention to itself as the overall scene's primary focus of interest (or if the scene has been included primarily to exploit the incidentally captured content in its own right).
- In the case of music, the content does not function as a substitute for a synch track (as it might, for example, were the captured music to be used after the filmmaker has cut away to another sequence).

FOUR: USING COPYRIGHTED MATERIAL IN A HISTORICAL NARRATIVE

Description: In many cases the best (or even the only) effective way to tell a particular historical story is to make selective use of words that were spoken during the events in question, music that was associated with them, 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 because of the copyright owner's disapproval or simple greed.

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 cultural mission of copyright. But unless limited, the principle also can defeat the legitimate interests of copyright owners – including documentary filmmakers themselves.

Limitations: Before concluding that a use of this type is fair, one must be satisfied 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.
- The material cannot be licensed (or cannot be licensed at a price consistent with the budget of the filmmaker).
- 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.

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.