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## How American Filmmakers Created a Code of Best Practices in Fair Use

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In 2005, American documentary filmmakers created a code of best practices in fair use that dramatically changed how documentaries are made and distributed in the U.S. The first step was research in 2004, led by Patricia Aufderheide and Peter Jaszi, with funding from the Rockefeller Foundation, into their actual copyright practices. Filmmakers had many problems. They commonly ran into problems in four situations: When they were commenting on or critiquing a copyrighted work; when they were referring to existing culture as an example of something (for instance, an event happened; a popular phenomenon; a common custom); when some copyrighted work appeared, unsolicited, in their work, such as when music was playing in the background in a café; and when they wanted to retell history. When they tried to get permission, things often did not go well. Often, copyright holders did not even answer their emails.

### **Copyright headaches.**

Multiple rights were involved in many clips, especially for sound. Prices were arbitrary and high. They were also surrounded by people who urged them to caution, and against using exceptions. Distributors typically expect that the filmmaker will give them a completed product that is insured against any errors and omissions in licensing. Without errors and omissions (known as E&O) insurance, no U.S. broadcaster, cablecaster, or distributor with an asset to their name was going to risk taking the film. E&O insurers did not routinely insure against fair-use claims. E&O insurers, without any way to understand what “normal” interpretations of fair use were in filmmaking, were not about to take uncharted risks.

Lawyers usually had told filmmakers that fair use would be risky. Lawyers are, of course, professionals hired to protect their clients’ interests. Frequently, clients want to be as safe and secure as possible. When using copyrighted material in a documentary film, absolute safety is in

licensing. That is a contract—a binding agreement. A right is different. Like any other right, it could always be contested. That is why knowing what is normal makes a huge difference.

### Fair use fear.

People didn't know what "normal" looked like in fair use. People routinely decide what is

#### How to Make a Fair Use Best-Practices Code

- Identify coordinators. →
- Identify the problem. Why are people not using fair use to do their work? →
- Find the most common situations in which they encounter problems. →
- Convene organization members to discuss appropriate kinds of fair uses, and appropriate limits. Hold enough meetings with enough organizations to be able to say that the meetings' conclusions can represent a general understanding in the field. →
- Synthesize the conclusions of the meetings. →
- Review the conclusions with an advisory board of legal scholars and lawyers, whose job is to ensure that the code falls within the law, not to decide for the filmmakers what they should conclude. →
- Return the finished work to the film organizations, for approval and release. →
- Share the Statement with distributors, broadcasters, funders and other relevant entities. →
- Document and share with the field what happens next.

reasonable and normal when exercising free-speech rights. They have a general sense of what is appropriate, however, and are guided by that understanding when they speak and write. The same is true for fair use, if the community of practice has expressed what it regards as normal. Gatekeepers will not act without knowing what is generally acceptable.

Filmmakers couldn't wait for lawsuits to make their way through the courts, because lawsuits on their issues were very rare. Also, when they did appear, they were never about the most common ways that fair use could be employed.

As a consequence, they didn't use fair use. And they changed their work; they decided not to do work; and they cut entire sections out of their work. They distorted their realities they were trying to capture. They self-censored, because they

were unsure how to interpret the law.

Our report shocked filmmakers. They had thought of their caution as "being professional," not as self-censorship. They hadn't thought of their alterations as distorting reality, but the best of a bunch of bad options.

But now, they began thinking about how to better understand fair use. In response, five national organizations for working filmmakers worked together, to make clearer for their members how to employ fair use in the most common situations they encountered. Peter Jaszi, the American University law professor and the leading expert in the U.S. on fair use and creative expression, and I volunteered to coordinate the effort. (The Rockefeller and MacArthur Foundations funded this phase of the work.) Over the next year, filmmakers in the major cities

for documentary production—New York, Los Angeles, San Francisco, Washington, D.C., and Chicago—met in thirteen small-group meetings of veteran makers. Each meeting was hosted by a film organization.

### **At the meetings.**

After a brief backgrounder on what the law permits, we opened each meeting with a few problems synthesized from what we had heard, and which filmmakers could discuss. Here is one example:

You are planning to make a series of TV episodes on the “real” Greek myths—the myths we know today, but as they were told and known in ancient Greece. To contrast today’s myths with those of ancient Greece, you plan to quote from Hollywood films. For instance, in an episode on the hero Jason, you would open with a scene from the 1963 version of *Jason and the Argonauts*, in which Jason confronts one of Harryhausen’s terrifying monsters. For a discussion of *The Iliad*, you would like to start with one of the battle scenes from *Troy*, including a close-up of Brad Pitt. In each of these cases, you would be choosing a clip to contrast sharply with what you’ve found out about the realities of ancient Greece and the way the myths were told then. You would also like to do montages showing the importance of Greek myths in modern movies, and so Woody Allen’s *Mighty Aphrodite*, Pier Paolo Pasolini’s *Medea* and the Disney animated film *Hercules* might feature in such a montage, using evocative short clips to make the point of the continuing importance of Greek myths. Do you have the right to claim fair use for the introductory clips contrasting with your research results? Do you have the right to claim fair use to assemble montages of clips from popular films to make a general point about the pervasiveness of these references in films today?

These scenarios helped filmmakers think together about why they thought they had rights to quote without payment or permission in some cases, what they thought would be appropriate uses, and what they thought would be exceeding that right. They also thought about how they as copyright holders felt about others using that right, and when they thought it would be acceptable. At the end of three hours, they typically came to a conclusion:

I need fair use to be able to make work with integrity, and therefore I also need to acknowledge others’ right to use it. But people shouldn’t use my work just to save themselves money or time; if they want to do that, they should pay me. And by the way, I would like other people to give me credit, even if they use it for free. Even if they have the right to use my work for free, they shouldn’t give anyone the impression that they did work that they took from someone else.

Filmmakers had come, on their own, to a place that looked basically like judges’ current interpretation of fair use, but described specifically for their own practices. They weren’t deciding about the law in general, or the full extent of fair use. They were only deciding how to apply fair use in the most common circumstances they faced as documentary filmmakers. Over the next several months, Prof. Jaszi and I reviewed all the notes from all the meetings, and distilled the common conclusions of the filmmakers in the different group discussions into a code of best practices in fair use. Then a legal advisory board of three lawyers, some of whose clients come from the entertainment industry, and two legal scholars reviewed their

conclusions. By the time they had thoroughly reviewed the code, it was sturdy and reliable. And it still said what the filmmakers had said. The five filmmaker organizations that had helped to identify participating filmmakers and to convene the meetings then sent the statement to their boards of directors, for approval to become cosignatories to the final document, as authors.

### **Release of the code: First effects.**

On November 18, 2005, the Documentary Filmmakers' Statement of Best Practices in Fair Use was released at American University's Washington College of Law. Within eight weeks, three films used the statement to do copyright clearance for films to be shown at the 2006 Sundance Film Festival. All three were works that could not have been made without fair use. *This Film Is Not Yet Rated*, Kirby Dick's exposé of the Motion Picture Association of America's flawed ratings system, used more than a hundred clips from Hollywood and independent films—all under fair use. He never had an alternative. The licensing contracts for Hollywood films included clauses saying that he would not criticize either the film or the film industry with them. *The Trials of Darryl Hunt*, by Ricki Stern and Annie Sundberg, used video from two decades of local television to document the history of a prisoner falsely charged with murder. Upon the overturning of his conviction, the local TV station had suddenly decided that it would not license any of the material; the TV station apparently was considering making a film of its own. That film's use of all the TV footage rested firmly on fair use. Finally, Byron Hurt's *Hip-Hop: Beyond Beats and Rhymes* critiqued misogyny in hip-hop by quoting and commenting on hip-hop lyrics, music, and videos. Hurt never even considered asking hip-hop stars for permission to use their material, in order to criticize them.

Then all three were picked up by television programmers, in spite of the fact that they all contained huge amounts of unlicensed, copyrighted material, and didn't yet have E&O insurance. The film company IFC meanwhile had a film project that was running far overbudget, because of its use of movie clips. With legal help from one of the Statement's legal advisors, the company was able to negotiate much better terms, by reminding executives that it would be possible to fairly use their material if necessary.

### **Insurers change, the business changes.**

Then insurers changed their policies, after they took a good look at the Statement. One of them quietly insured the film *Hip Hop*. Once another of them publicly announced they were insuring for fair use, then all the E&O insurers also started advertising that they, too, were insuring for fair use.

Documentary filmmakers had pioneered a new approach to changing copyright policy. They educated themselves about the law, claimed their own right to interpret fair use as citizens and creators, worked together to clarify their common understandings, and used those understandings in their work. They also changed their understanding of who they were. They were not only creators, but also users, of culture. They learned to value the selection and repurposing of culture as a creative act, and they learned to accept that other people would

sometimes be able to use their work without paying or getting permission because those people too would be creating something new.

**The information in this document is discussed further, and with context, in Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, 2d. ed., University of Chicago Press, 2018. Prof. Aufderheide wrote this while a Fulbright Senior Research Fellow at Hankuk University of Foreign Studies in spring 2024.**