

I. Introduction

Documentary filmmakers know that their works typically must include copyrighted materials belonging to others. What those same filmmakers often don't realize, however, is that they do not always need a license or approval from the owner of the copyright to use the material. Rather, the law recognizes that creators of new works have the right to make "fair use" of such material without having to obtain permission. Perhaps for the first time, documentary filmmakers, courts and many people in the entertainment industry appear to share an understanding of "fair use" – a right that is better defined than ever before and one of which many more filmmakers could be taking advantage. Indeed, a clear understanding of how fair use works may enable these filmmakers to avoid unnecessary artistic compromises. First, we begin with an explanation of basic copyright and fair use principles. Second, we address a number of myths and misconceptions about fair use protection. Finally, we outline the importance of obtaining proper insurance to protect a documentary film project.

II. Basics of Copyright And Fair Use

A. Overview

The goal of the Copyright Act is to encourage creation of new works. The law does this by providing to creators certain economic rights so that they can prosper from their works. Thus, "authors" (as creators of all kinds of works are known in copyright law) are given the right to prevent others from reproducing, distributing or otherwise using their works without permission¹. The Copyright Act recognizes, however, that an author's monopoly must be limited or it could be used to thwart the very same goal of the Copyright Act to foster new works. That is, because creators often use bits and pieces of prior works to create new works, protection must be afforded to those who use prior works as building blocks for new works.

The "fair use" doctrine is one such important protection. Fair use is grounded on the idea that certain categories of works, including documentary films, should be protected when the creators of those works use copyrighted material in creating new, different or 'transformative' works – that is, new works in which the pre-existing material is used in a distinctly different way that adds value to the new work without stripping the prior work of its value. Because it is generally accepted that artistic endeavors do and should build and comment upon previous works, courts have observed that the fair use doctrine staves off the "danger that overprotection of commercial interests will stifle and limit expression that employs the language and symbols of our popular culture."²

Indeed, "there is an extensive body of law applying the fair use factors, and the courts have opened up a space that is much larger and much more protective

of documentary filmmakers than owners of content would have you believe,” explained Karen Shatzkin, an attorney with extensive experience in fair use cases.

The doctrine of fair use stretches back more than 150 years, is now specifically codified in the Copyright Act,³ and is even required by the Constitution. Without the fair use doctrine, copyright law would run afoul of the free speech protections afforded by the First Amendment.⁴ Thus, as Patricia Aufderheide, director of American University’s Center for Social Media, puts it: “You’re not getting away with something when employing fair use, you are exercising a right that’s a venerable part of copyright law, highly regarded by judges.”

“Fair use is the lubricant between copyright law and your First Amendment right to express yourself for good or bad” said Michael Donaldson, an entertainment lawyer and author of *Clearance and Copyright*. “It’s not an invitation to poach the intellectual property of others instead of creating your own work” he added.

B. The fair use factors

The Copyright Act of 1976 provides the framework for determining when the use of another’s copyrighted work without a license or other consent is nevertheless permitted as a fair use. It sets forth that “the fair use of a copyrighted work ... for purposes such as criticism [or] comment... is not an infringement of copyright.”⁵ This is not an exhaustive list of protected fair uses, nor does the fact that a use falls into one of these categories alone mean that the use is automatically fair.⁶ Courts have recognized, however, that “documentaries and biographies fall within the protected categories of § 107, and are entitled to the presumption the use of the copyrighted material is fair.”⁷ To make that fair use determination, courts will generally consider four factors set forth in the statute: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the value of the copyrighted work.⁸

1. The purpose and character of the use, including whether of a commercial nature or for non-profit educational purposes

The most important inquiry in reviewing the first factor is determining whether the use of the copyrighted work is “transformative.”⁹ A work is transformative when the new work does not “merely supersede the objects of the original creation,” but rather “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁰ A use will be considered transformative where the defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.¹¹ Even the making of an exact copy of a work “may be transformative so long as the copy serves a different function than the original work.”¹² If the new work, however, simply “supersed[e]s the use of the original,” the new use is not likely a fair use.¹³

Uses made by documentary filmmakers are often deemed to be transformative. As one court held in a case involving the use of clips in a documentary, “it is difficult to imagine a use of short clip in a commentary/ documentary that would not qualify as transformative.”¹⁴ Another court

concluded that a television biography of the actor Peter Graves that used clips from movies in which he appeared “served to enrich the biography” and “was for the transformative purpose of enabling the viewer to understand the actor’s modest beginnings in the film business.”¹⁵ In another decision, a court concluded that the use of clips from 1950s-era B-movies in a television documentary about the company that produced the films did not affect the market for the original films: “While plaintiff’s copyrighted movies aimed to entertain their audience, defendants’ documentary aims to educate the viewing public of the impact that Samuel Z. Arkoff and James Nicholson had on the movie industry. The documentary appears intended to add something of value rather than simply copying the copyrighted expression that it documents. Indeed, it seems likely to stimulate a market for the original rather than to replace it.”¹⁶

In addition to considering whether a work is “transformative” under the first factor, a court will consider whether the use was “commercial” or whether it was non-profit. Documentary filmmakers (like virtually all creators of copyrighted works) will, of course, likely desire commercial success. The U.S. Supreme Court has emphasized, however, that commerciality does not raise any presumption against a finding of “fair use.” As noted by the Court: “If ... commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country.’”¹⁷ Indeed, the transformative nature of a use typically outweighs any commerciality.¹⁸

The “commercial” nature of the use, however, may play a role in the court’s analysis when it comes to the use of clips in the advertising and promotion for a documentary. Thus, except with an attorney’s advice, it generally is best to avoid using others’ materials in trailers and other advertising and promotion for a film without express permission to do so. Such use is often cited by courts as a factor weighing against finding fair use within the second work. That is, the court won’t just say that the advertisement isn’t fair use – it will cite the fact that the clip, cue or other copyrighted matter was used to sell the film as a ground for concluding that the use in the film also is not fair. “Whether it is fair use to use a certain item in advertising is a whole new analysis and it is much more difficult,” said Donaldson. “Advertising that sells your film can kill your film.”

2. The nature of the copyrighted work

Second, courts will look at the nature of the work that was copied, particularly whether the work was creative (less likely to be a fair use) or factual/historical (more likely to be a fair use).¹⁹ In addition, a court will consider whether the copied work was previously published (if the work was unpublished, that tends to be a factor weighing against a finding of fair use).²⁰ In practice, however, the “second factor more typically recedes into insignificance in the greater fair use calculus.”²¹ This is especially true when the nature of the work is balanced against a transformative purpose of the use.²²

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

The third factor is a quantitative and qualitative analysis. A court first looks at how much of the plaintiff's work was used.²³ Although typically the more of the plaintiff's work is used, the less likely it is to be a fair use; it has been held that the use of an entire work does not necessarily defeat a claim of fair use.²⁴ In addition to the amount of a plaintiff's work that is used, a court will look at whether the portion used was the "heart of the work."²⁵

4. The effect of the use upon the potential market for or value of the copyrighted work.

Finally, courts will look at the effect of the use on the market for the plaintiff's work. This factor reflects the copyright law's condemnation of the "copier who attempts to usurp the demand for the original work."²⁶ As stated by one court, "[t]he theory behind the copyright laws is that creation will be discouraged if demand can be undercut by copiers. Where the copy does not compete with the original, this concern is absent."²⁷

C. Fair use and documentaries

Of course, the bottom line for a documentary filmmaker is screening and distributing the film without ending up in "fair use limbo," meaning that unsettled copyright questions create an impediment to distribution. Avoiding such impediments can cause filmmakers who do not know their rights to censor themselves, in what the Center for Social Media calls the "Happy Birthday" phenomenon. That means it can be difficult, and in some cases impossible, to document events without encountering copyrighted materials, such as the "Happy Birthday" song (which a music publisher claims copyright to, although this has been challenged) being sung at a party.²⁸ Indeed, a study by Pat Aufderheide and Peter Jaszi at Washington College of Law demonstrated that filmmakers take pictures off walls, turn off radios or TVs prior to filming and later edit out any recognizable materials in efforts to avoid copyright infringement. The downside, obviously, is that such filmmakers were avoiding entire areas of popular culture, including art, music, film, politics, archival records, fashion and television. "The people in charge of documenting reality were avoiding the most popular and pervasive elements of their culture," said Aufderheide and Jaszi. "They were systematically changing reality to film it." Thus, these filmmakers are no longer documenting the world as it exists but, rather, altering reality before filming it.

Including such copyrighted material, however, is often allowed as a fair use and no permission is required. For example, the documentary *This Film is Not Yet Rated* by Kirby Dick was highly critical of the Motion Picture Association of America (MPAA) rating system. Because of the nature of the film, no studio would agree to let the filmmaker use the various film clips that the filmmaker wanted to use in the documentary. "That documentary would not and could not have been made without fair use," said Donaldson, who worked on fair use issues for the film along with the Independent Film Channel. "No studio would license clips from its film for such a use and the film had more than 100 clips."

In light of the importance of the fair use doctrine to documentary filmmakers, film industry professionals sought to codify, buttress and publicize fair use and make it easier for filmmakers to understand their rights. That effort, which involved numerous individuals and organizations, resulted in a comprehensive document, Documentary Filmmakers' Statement of Best Practices in Fair Use, which was released in 2005.²⁹

The statement is widely seen as an important development in defining fair use and making it more understandable and accessible to filmmakers. Underlying the reasoning of the statement is the idea that in every field where fair use is common, such as broadcast television or historical scholarship, the industry has developed deeply accepted norms that enable people to make quick decisions about what is reasonable. The purpose of the statement was to make explicit what those understandings are for documentary filmmakers. It provides a basis for reasoning whether fair use applies in four common situations:

- employing copyrighted material as the object of social, political or cultural critique;
- quoting copyrighted works of popular culture to illustrate an argument or point;
- capturing copyrighted media content in the process of filming something else;
- using copyrighted material in a historical sequence.

Aufderheide noted that once the standards were published, within eight weeks two filmmakers used the statement to clear films to be shown at Sundance in 2006: (1) Kirby Dick (*This Film Is Not Yet Rated*) and (2) Byron Hurt (*Beyond Beats and Rhymes*). Both were works that could not have been made without fair use. As mentioned earlier, Dick's film used numerous clips to develop his argument that the MPAA rating system discriminated against independent production. Hurt's film featured an abundance of hip-hop and rap music in an argument about the increasing misogyny as the music became more broadly commercial.

III. Fair use misconceptions

Despite success stories like Kirby Dick's, the message may not be getting through to filmmakers. A recent survey of documentary filmmakers conducted by Hiscox, a specialist insurer, showed that while documentary filmmakers often used copyrighted materials in their film ten times or more, there were also some misconceptions about fair use.

A. The '7 seconds or 10%' myth

It is an urban legend that fair use applies automatically if the filmmaker uses only a certain number of seconds or a certain percentage of the underlying work. Sometimes this is expressed as the "7 second" (or 10 or 20 or 30 second) rule or as the 10% rule. This is simply not true. While fair use guidelines generally call for using just the amount of material needed to make a point, there are no numeric rules that instantly render a use fair. Rather, as set forth above, the amount of the material that is used is only one in many factors that courts consider on a case-by-case basis.

B. The ‘everything on the internet is free to use’ myth

During the early development of the internet, something of a “wild west” mentality governed that caused people to believe that the “usual rules,” including copyright, did not apply on line. Although the courts have largely dispelled that mindset, there are still those who continue to believe (or at least to hope) that, “if it is on the internet, it is free to use.” It is not. Content on the internet typically has copyright protection and would be subject to the same fair use analysis as information one would find in a book, on television, in a movie or in any other means of distributing content.

C. The ‘it is fair use as long as I give credit to the author’ myth

A belief persists that giving credit or attribution to the original author alone is enough to immunize copying from liability. This again is simply not true. Providing credit is not a defense to a claim for copyright infringement (although it may be important regarding certain “moral rights” claims, particularly in Europe). Thus, giving credit will never render a use fair, but it is always the proper thing to do, and the failure to do so will often be an element the courts will weigh against finding fair use.

D. The ‘I have to ask for permission from the copyright holder first’ myth

Many filmmakers erroneously believe they need to ask permission from a copyright holder before they can take advantage of fair use protection. The reality is just the opposite. “When you rely on fair use, you don’t need to ask for anyone’s permission,” said Aufderheide. Shatzkin agrees, advising her filmmaker clients to access the materials they need through sources other than the copyright holder. “The large media entities break out in hives when you talk about fair use,” she said. “If a filmmaker goes to them for the materials, it won’t matter that she can make a good fair use argument. So look everywhere you can to legally obtain a copy of the work. Then the access problem is solved, and we only need to address the copyright control question.”

IV. Using insurance to protect you and your project

In addition to understanding and properly invoking fair use, a major advance for documentary filmmakers is the availability of insurance policies that provide important protections against lawsuits claiming copyright infringement, defamation or other issues. While lawsuits may be an initial concern, insurance also plays a vital role in distribution. Without exception, a distributor will require that filmmakers have an insurance policy which includes coverage for fair use before it will agree to release the film.

The documentary filmmaker should speak with an insurance broker and a clearance attorney early in the process and look for professionals who have a solid background in intellectual property and other film clearance issues. In most cases, the attorney, insurance broker and underwriter will work together closely. “I want to share my thinking with the underwriter,” said Shatzkin, noting that a free exchange of information between the three leads to the best outcome for the filmmaker.

Getting an E&O policy that includes coverage for fair use usually requires that the filmmaker: (1) fill out a detailed application; (2) get a fair use clearance letter from an attorney approved by the insurer affirming that the attorney has vetted the materials and they meet the fair use standard; and (3) submit a clip log at the insurer's request, which helps the underwriter make a determination about the likelihood of a lawsuit being filed.

V. Conclusion

With the changing media, legal and technological landscape, creating documentaries that are legally defensible can be complex. Luckily, the definition and implementation of fair use has become clearer and easier to utilize on behalf of filmmakers. By understanding and following fair use guidelines, finding the right advisors and having the right insurance in place, filmmakers can focus on expressing their creative vision and making the best film possible.

About the author

Lincoln Bandlow, contributing author, is a Partner at the law offices of Lathrop & Gage LLP., where he specializes in litigating media, First Amendment, intellectual property and other entertainment related matters. His representation includes clients in the motion picture, television, publishing, broadcasting and internet and advertising fields. Bandlow has written numerous articles regarding media law and intellectual property and is a frequent speaker on the topics. He is a former president of the Los Angeles Copyright Society and has been a visiting professor at the University of California's Annenberg School of Journalism since 1995, teaching media and intellectual property law. Bandlow received his B.A. from the University of California and J.D. magna cum laude from Boston University School of Law.

¹ See 17 U.S.C. § 106.

² See Mark Sableman, *Artistic Expression Today: Can Artists Use the Language of our Culture*, 52 St. Louis U.L.J. 187, 192-93 (2007).

³ See 17 U.S.C. § 107.

⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) ("copyright law contains built-in First Amendment accommodations" such as the fair use defense).

⁵ 17 U.S.C. § 107; see also *Kelly v. Arriba Soft Corporation*, 336 F.3d 811, 820 (9th Cir. 2003) ("To preserve the potential future use of artistic works for purposes of teaching, research, criticism, and news reporting, Congress created the fair use exception").

⁶ *Wade Williams Distribution, Inc. v. American Broadcasting Co., Inc.*, 2005 WL 774275 at n.4 (S.D.N.Y. 2005) ("Fitting into one of the purposes listed in the preamble is instructive, but not conclusive of whether there is fair use").

⁷ *Hofheinz v. Discovery*, 60 U.S.P.Q.2d at 1848 (use of film clips in documentary broadcast on the LEARNING CHANNEL about "popular fascination with the idea of alien visitations" was a fair use); *Video-Cinema Films, Inc.*, 2001 WL 1518264 at *6 ("It is well settled that where the Defendant's use is for one of the purposes set forth in the statute, there is a strong presumption this factor favors the alleged infringer"); *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490, 493 (S.D.N.Y. 1996) (defendant's documentary about Mohammed Ali related to a "subject of public interest" and thus enjoyed "favored status" in a fair use defense analysis); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2nd Cir. 2006) ("courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects").

⁸ See 17 U.S.C. § 107.

⁹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007) ("The central purpose of [the first fair use factor] inquiry is to determine whether and to what extent the new work is 'transformative'").

¹⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹¹ *Perfect 10, 487 F.3d at 721* (quoting *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.3d 769, 778 (9th Cir. 2006)); *Bill Graham Archives*, 448 F.3d at 609 (use of concert posters as historical artifacts in a biography about the musical group GRATEFUL DEAD was transformative).

¹² *Perfect 10, 487 F.3d at 721-722*.

¹³ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 550-551 (1985); *Blanch v.* , 467 F.3d , 252 (20 courts have "declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work"); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 79 (2nd Cir. 1997) (use of copy of plaintiff's painting as set decoration for a television program was not transformative because it was used for "the same decorative purpose" as the original).

¹⁴ *Hofheinz v. Discovery Communications Inc.*, 60 U.S.P.Q.2d 1845, 1849 n.7 (S.D.N.Y. 2001); see also *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) ("There is a public interest in receiving information concerning the world in which we live. The more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information"); *Bill Graham Archives*, 448 F.3d at 609-610 (use of concert posters "as historical artifacts to document and represent the actual occurrence of GRATEFUL DEAD concert events" was transformative because it "enhances the reader's understanding of the biographical text").

¹⁵ *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 447 (S.D.N.Y. 2001).

¹⁶ *Hofheinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127 (E.D.N.Y. 2001).

¹⁷ *Campbell*, 510 U.S. at 584 (quoting *Harper & Row*, 471 U.S. at 592); *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 803 (9th Cir. 2003) (first 'fair use' factor held for defendant even though he "had a commercial expectation and presumably hoped to find a market" for his work).

¹⁸ See *Kelly*, 336 F.3d at 818 ("The more transformative the new work, the less important the other factors, including commercialism, become"); *Perfect 10, 487 F.3d at 723* (significantly transformative nature of the use outweighed the commercial aspect of the use); *Blanch*, 467 F.3d at 254 (because work was 'substantially transformative' court "properly discounted the secondary commercial nature of the use"); *Video-Cinema Films*, 2001 WL 1518264 at *6 (courts should look to whether the defendant's work is one favored by the statute rather than defendants' status as a for-profit entity); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 138 (E.D.N.Y. 2001) (fact that defendant "will profit from the exhibition of the Documentary to over '67,000,000 paying cable subscribers" did not defeat fair use defense); *Hofheinz v. Discovery*, 60 U.S.P.Q.2d at 1849 ("profit motive does not alter the analysis of the first fair use factor").

¹⁹ *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F. Supp. 1044, 1050 (S.D.N.Y. 1994) ("the more creative the primary work, the more protection it should be accorded from copying); *Blanch*, 467 F.3d at 256 ("a greater leeway [is] allowed to a claim of fair use where the [plaintiff's] work is factual or informational").

²⁰ *Perfect 10, 487 F.3d at 723*; *Blanch*, supra ("the scope of fair use involving unpublished works [is] considerably narrower"); *Kelly*, 336 F.3d at 820 ("Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred").

²¹ *Nimmer*, § 13.05[A][2][a]; *Mattel*, 353 F.3d at 803.

²² *Bill Graham Archives*, 448 F.3d at 612-613 ("the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose" particularly where the use "was to emphasize the images' historical rather than creative value").

²³ On *Davis v. The Gap, Inc.*, 246 F.3d 164, 175 (2nd Cir. 2001) (“fragmentary copying is more likely to have a transformative purpose than wholesale copying).

²⁴ *Bill Graham Archives*, 448 F.3d at 613 (wholesale copying “does not necessarily weigh against fair use because copying of the entirety of a work is sometimes necessary to make a fair use of the image”); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (concluding that to copy any less than the entire image would have made the picture useless to the story).

²⁵ *Harper & Row*, 471 U.S. at 564-565 (although defendant used only 300 of 200,000 words of the memoirs of former President Ford, it was not a fair use because alleged infringer “took what was essentially the heart of the book”).

²⁶ *Consumer Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2nd Cir. 1983).

²⁷ *Id.* at 1051.

²⁸ The article is “Copyright and the World’s Most Popular Song,” by Robert Brauneis, who is an Associate Professor and Co-Director of the Intellectual Property Law Program, The George Washington University Law School, which was published in the *Journal of the Copyright Society of the USA*, Vol. 56, No. 2-3, Winter-Spring 2009.

²⁹ The document was written 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.

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