

How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use: a Tale of Scholarship in Action

PAT AUFDERHEIDE

American University

Pat Aufderheide is a professor in the [School of Communication at American University](#) in Washington, D.C., and the director of the [Center for Social Media](#) there. She thanks Peter Jaszi for comments and Maura Ugarte and Michael Miller for formatting help.

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Executive Summary

An American University [research project](#) on fair use and documentary filmmaking, Untold Stories, which expanded freedom of expression in the field, has broad implications for scholars working on popular culture. Fair use, the project revealed, becomes far more useable when creative and scholarly communities collectively assert and publicize their expectations for fair use.

Introduction

In creating an open-access, electronic journal in which contributors are encouraged to employ fair use, the IJoC takes part, estimably, in a rising scholarly movement to reclaim freedom of expression under copyright law. Open-access publishing has grown dramatically in the last few years. Consider, for example, ongoing activities at the [Institute for the Future of the Book](#), regular discussions in the [Journal of Electronic Publishing](#), aggregation sites such as Stanford's [HighWire Press](#), standards-setting such as done by the [Open Archives Initiative](#), and the scientific open platform [arXiv](#). This publishing has been undertaken with an acute awareness of the "enclosure movement" in intellectual property, as Yochai Benkler's recent *The Wealth of Networks* (Benkler, 2006) discusses, and as scholarly foci such as the [Center for the Study of the Public Domain](#), Stanford's [Center for Internet and Society](#), and Harvard's [Berkman Center for Internet and Society](#) attest.

One healthy demonstration of IJoC's practice of asserting freedom of expression is its specific encouragement to [employ fair use appropriately](#) in quoting from copyrighted works for scholarly purposes. Fair use has long been misunderstood and misrepresented as a minor feature of copyright law, difficult and even dangerous to use. It has been disparaged even by advocates of a more flexible and balanced copyright law (Lessig, 2004). It has been represented as so corrupted by practice as to be unusable. Perhaps this discouragement with the idea that practice can change is reinforced because fair use

complicates the argument that today's copyright law cripples future creators who will build on 'the shoulders of giants,' as [Isaac Newton said](#).

A [project](#) jointly undertaken by the [Center for Social Media](#) in the School of Communication at American University and the Project on Intellectual Property and the Public Interest in American University's [Washington College of Law](#) has by contrast demonstrated the flexibility and utility of fair use, when creative communities take an active role in defining the interpretation of its core principles for their fields.

Background

The movement for scholarly freedom of expression has grown up around the unbalancing of copyright law. Copyright historically in the U.S. has been a set of social bargains, all in the service of encouraging "science and the useful arts" (17 U.S.C. Sec. 107). On one side of the balance are provisions to reward creators with strong, limited ownership rights. On the other are provisions to encourage users to quote and re-use copyrighted works in part, without payment or permission, if their use benefits the public good more than it hurts the owner (Jaszi, 2003). The creation of default copyright in 1978 and continuous extension of copyright terms have greatly shrunk [the work available in the public domain](#).

While public domain access has shrunk, judicial enthusiasm for fair use has risen (Goldstein, 2003). And rightly so. Copyright so unbalanced that owners of intellectual property can withhold access to their work at will is, effectively, a violation of the first amendment's guarantee of freedom of speech.

At the same time, corporate copyright holders have both zealously pursued their ownership rights and also worked to [intimidate and misinform](#) potential users and the general public about the viability of fair use.

The Case for Best Practices

Copyright law creates only the most general terms for defining fair use. This generality has come to be highly regarded internationally, particularly in countries where similar exemptions have been highly specified. Specificity can all too often end up as a straitjacket, and also far too quickly be outmoded. Furthermore, every specific clause becomes another battleground between the unequal forces of incumbent large corporate owners and individual users, representing not only themselves but unimagined future users. U.S. fair use, by contrast, has permitted wide interpretation.

Fair use is assessed according to a "rule of reason," meaning that you should take all the facts and circumstances into account. The "four factors" of the copyright law (helpfully summarized on the IJOC website) are just that, factors— guides for analysis rather than preconditions or requirements. Each needs to be balanced and weighed with the others in each case, and no one is definitive. For instance, one of the factors is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes" and yet most case law on fair use concerns purely commercial products. Courts look, in fact, not at whether a product is meant to make money, but whether the makers

of the new work intend simply to exploit *the material they are quoting* for commercial benefit. In the language of recent cases, the court asks whether the use has been “transformative” rather than parasitic. And where “transformativeness” is present, the courts generally side with the user. Consider, for example, the 2 Live Crew case (Campbell v. Acuff-Rose Music), in which the Supreme Court assessed the fair use claims for defendants’ song parody and stated that when a use “adds something new, with a further purpose or different character...the goal of copyright, to promote science and the arts, is generally furthered....”

Key questions that have driven judicial decision-making and that accord with the law, according to Prof. Peter Jaszi, are:

Did the unlicensed use add significant value to the preexisting material, rather than just exploiting it?

Was the use made in good faith?

Was it reasonable according to the general opinion of the field or discipline within which it was made? (For a fuller discussion consult [Fair Use: Frequently Asked Questions](#).)

A case-by-case application of fair use seems laborious, even excruciating. And yet historians, broadcasters and others who regularly exercise fair use do so with relative ease. This is because the community has established customs and norms for doing so. “Everyone knows” what normal is. For this reason, legal scholars have noted that asserting best practices—the articulating of norms and expectations within a community--has a powerful effect in facilitating fair use (Madison, 2004).

Untold Stories: Documentaries

In 2004, American University Professors Peter Jaszi and Pat Aufderheide jointly launched a process that tested the theory that best practices would expand expression in a community that had not theretofore articulated them. They focused on independent documentary filmmakers as a community directly affected by constricting practices in copyright clearance, because documentary filmmakers constantly quote copyrighted work in the routine practice of their craft and are also typically copyright holders.

First, with the help of graduate students the scholars conducted long-form, open-ended interviews with experienced documentary producers. This resulted in a report, [Untold Stories: Creative Consequences of the Rights Clearance Culture](#) (Aufderheide & Jaszi, 2004). The report clearly documented the inhibiting and chilling effect of over-clearance practices and a culture of fear of fair use on documentary filmmaking. Documentarians were avoiding a wide range of subjects including political and social commentary, musical subjects and popular culture generally. They routinely altered the reality of the localities where they captured images, and they also changed both sound and picture after the fact.

The study also showed that many documentarians—as well as lawyers, insurers, distributors and broadcasters with whom they interacted to release their works--misunderstood the law. Some for instance confused trademark with copyright law; some believed that fair use could be quantified; some believed it only applied to nonprofit use.

Finally, fear of litigation, and the belief that it was likely, was pervasive. This was in spite of a scanty record of litigation about fair use in documentary film. Jaszi could find only nine cases since 1996, brought by a total of five plaintiffs, none of which were major studios or archives. Six of them were decided in favor of fair users, and of the three that were decided against the defendants, use had clearly been made of the original material for the original purpose.

For instance, Passport Video produced a 16-hour biography of Elvis Presley. In this biography, core sequences of Elvis' television and film appearances were included, not to illustrate a critical or even biographical point but to give the viewer another opportunity to see Elvis in performance—the original value of the material.



Passport Video trumpeted the inclusion of these performances in its own promotional material, demonstrating that it understood it was reselling, without paying for, the original value of the material. The court [ruled against](#) Passport's fair use claim, but as it did so the court judgment in the process underlined the ordinary utility of fair use. The ruling also accorded with the sense of justice that documentarians themselves expressed.

Meanwhile, filmmakers were tying themselves into knots to address problems created by a hyper-strict interpretation of their clearance responsibilities, in situations that would have been indisputably fair use. For instance, when making *A Perfect Candidate* about the political campaign of Ollie North, David Van Taylor felt compelled to pay the Irving Berlin estate (and through it the Boy Scouts to which the estate had dedicated the proceeds) when a local singer sang "God Bless America" during a political rally.



Amy Sewell, making a film about adorable kids learning to dance, *Mad Hot Ballroom*, unnecessarily paid thousands of dollars for a ring tone captured incidentally on film when a child's cellphone rang.

Documentarians faced a range of intellectual property problems; one of them, and the most easily remedied, was a perceived inability to employ fair use. So Jaszi and Aufderheide worked with five filmmaker organizations to conduct quiet meetings with experienced members of their organizations. In those meetings, filmmakers asked themselves what they thought was fair and reasonable fair use in their own practice of quoting material (irrespective of whether they thought broadcasters or insurers would let them do it). Then they asked themselves whether they still thought it was fair if someone exercised those principles on their own work. The result, after vetting by a legal advisory board and approval by boards of directors of the five organizations, was the [Documentary Filmmakers' Statement of Best Practices in Fair Use](#) (American University (Washington D.C.). Center for Social Media, Association of Independent Video and Filmmakers, & Washington College of Law. Program on Intellectual Property and the Public Interest., 2005).

This document was organized according to the most common situations in which documentary filmmakers found themselves employing fair use:

- commenting critically on media;
- "sampling" popular culture to portray societal conditions;
- incorporating background sounds and images in new documentary footage; and
- employing archival material in historical or biographical projects.

In each category, filmmakers articulated both general principles and also limitations, which include:

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

For the scholars as well as the filmmakers, it was important to avoid specific examples in the best practices document, not only to keep it from becoming outdated but also to avoid the danger of having users unduly limit their interpretation. At the same time, it was important to demonstrate that fair use was useable, and was being used. Since the public articulation of these principles and limitations in itself provides a powerful deterrent to frivolous lawsuits, some filmmakers and broadcasters revealed publicly that they had exercised fair use—had done so even before the existence of the statement. Such examples were showcased on the Center for Social Media’s website; more are being added as more filmmakers use the Statement to guide their decision-making. Some among the score of examples follow:

Commenting critically on media:



“Sampling” popular culture to portray societal conditions:



Incorporating background sounds and images in new documentary footage:



Employing archival material in historical or biographical projects:



Jaszi then analyzed the scanty legal record, to demonstrate what courts today regard as exceeding fair use. He found exceedingly few cases—nine since 1996, and only five plaintiffs in total, since two plaintiffs each brought three of the cases. None of the plaintiffs were motion picture studios, major producers or large archives. In most cases, the defendant won. Where the defendant did not win, the defendant had behaved in ways that documentarians who wrote the *Documentary Filmmakers' Statement of Best Practices in Fair Use* would not approve. The court decisions revealed that the most important factor courts currently consider in weighing fair use is transformation—the repurposing of material rather than simply reusing it for the original purpose. They also showed that courts favor fair use of the kind the Statement endorses. The Center [showcased these examples](#).

Knowledge and Power

Participants in this norm-setting process were often skeptical that their own participation would result in any change in business practice. They often asked Aufderheide and Jaszi if it wouldn't be better to have "a test case" that would set the standards. This, Jaszi explained, was complicated, first because there was so little litigation in the area—largely because copyright holders' lawyers understood that the chances of winning a fair use challenge against a conscientious documentarian were low. In addition, no single case would ever be definitive.

Documentarians also pointed out that they did not control the process; it was broadcasters, distributors and insurers who insisted on "the clearance culture." The scholars argued that these gatekeepers needed to be presented with a new tool to use, before they would change business practices that protected them comfortably. A best practices statement would be such a tool.

Legal scholars and activists widely expressed skepticism that fair use, a case-by-case exemption, would have the versatility needed to expand expression. They doubted that individual artists would adopt new practices as a result of grassroots education, or that lawyers or gatekeepers would take these best practices seriously.

Nonetheless remarkable change occurred almost instantly upon release of the document on Nov. 18, 2005, as seen in the introduction to the following video, which summarizes the campaign and results:



Within seven weeks, three sets of filmmakers—Kirby Dick (*This Film Is Not Yet Rated*), Ricki Stern and Annie Sundberg (*The Trials of Darryl Hunt*), and Byron Hurt (*Beyond Beats and Rhymes*)—had employed the Statement in order to release their films at the Sundance Film Festival. Dick's film quoted popular films more than 100 times to develop his argument that the MPAA rating system discriminated against independent production. *Trials* filmmakers, over more than a decade, had accumulated broadcast footage of a death-penalty case; at the last minute the TV station had decided to make its own film and

revoke permission to use the footage. 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. In none of the cases was money at issue. In each case, the films brought arguments and points of view to the public that would have been impossible to make if the makers had been hostage to the permission of copyright holders.

Shortly after, the Independent Television Service, which had co-produced *Beyond Beats and Rhymes*, and Public Broadcasting Service both accepted the fine-cut of the film in principle for broadcast, using the Statement of Best Practices in Fair Use (with a lawyer's letter verifying that Hurt's judgments had accorded with the Statement) as a rationale. In April, 2006, PBS' general counsel distributed the Statement to all general managers and general counsels in its network.

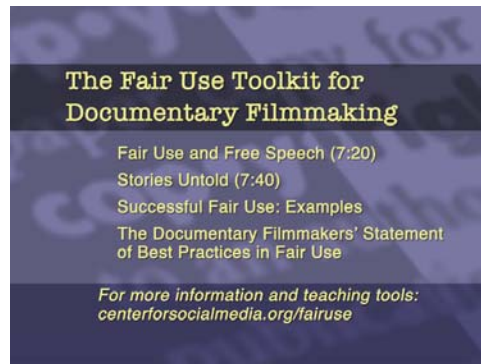
In part as a result of a meeting the scholars held with broadcast executives in December 2005, attended by Jessica Wolfson of IFC, the cable company contacted Michael Donaldson, one of the legal advisors to the process, to develop an internal fair use policy sparked by the Statement. It was this policy that permitted IFC to conduct negotiations that [lowered clearance costs](#) by hundreds of thousands of dollars for *Wanderlust*, a film about road movies, and to release *This Film Is Not Yet Rated* for cablecast.

Quiet meetings also began with insurance brokers, some of whom believed that the Statement might provide a tool with which they could offer differentiated insurance policies in what had been a highly commoditized market for errors-and-omission insurance.

Intellectual property lawyers found the Statement and its progress of intense interest. After two regional meetings devoted to the project, the Copyright Society featured fair use and the documentary filmmakers' work at its annual meeting in June 2006, even devoting an evening to screenings of films employing fair use.

Even legal scholars who have been dubious of the efficacy of fair use in general seem to be persuaded that the documentary filmmakers are onto something. Stanford's Lawrence Lessig approached Peter Jaszi to join in a nonprofit project to offer supplementary insurance coverage on fair use claims to documentary filmmakers who would abide by the terms of the Statement.

This initial success within the first six months of release provided dramatic evidence of the power of education. This was, however, only the beginning of the process, as the leadership of the University Film and Video Association recognized. Using a DVD developed by the Center for Social Media for teaching use, the organization that represents more than 100 schools teaching film and video production began a long-term campaign to provide film production teachers with ways to teach fair use appropriately. These same materials began circulating as well to law schools, to encourage modules on fair use in intellectual property classes.



The Untold Stories project continues to develop with filmmakers. Their own organizations have continued the education, and more organizations including media arts organizations, distributors and film festivals have joined as [endorsers](#) of the Statement and, effectively, educators of their constituencies. One constant request throughout the process of Untold Stories was for reliable legal support. Many filmmakers professed themselves unable to take risks, even unlikely, of a lawsuit. In September 2006, the Washington College of Law convened a group of representatives from legal clinics at law schools throughout the U.S., as the hub of a budding network for such legal support.

Untold Stories: Extending the Model

The success of Untold Stories has led other creative communities to put in motion similar processes to articulate shared values around fair use. These communities include media literacy educators, music educators and art historians. A 2006 white paper from the Berkman Center for Internet and Society, [The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age](#), highly recommended the best practices approach. The Society for Cinema and Media Studies has established a working group on the issue. And in her 2006 book, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property*, Susan Bielstein warmly endorses the potential of the best practices approach.

One group is proceeding rapidly to expand the best practices model. Media literacy educators have long faced exasperating and contradictory advice on what, when, where and how much they can quote from popular culture in order to teach about it. These educators face challenges in the classroom; in preparing teaching materials; in sharing media literacy products; and in teaching values on intellectual property to their own students. [Prof. Renee Hobbs](#) at Temple University's School of Communications and Theater, in consultation with [Henry Jenkins](#) at MIT, has joined with Aufderheide and Jaszi to coordinate research leading to a best practices statement.

As open-source, digitally-produced academic publishing continues, the question of what is appropriate fair use rises in importance. Communication scholars may well wish to clarify their own values and expectations in this area, in order to be able to use their rights.

In closing a [conference](#) at New York University on fair use, Judge Alex Kozinski [said](#) that the flexibility of common law is a boon to free speech. "The problem is not copyright law...But those who [have] rights need to be more assertive."

In order to assert their rights, users need to know they have them, and need to know what is appropriate assertion within their culture. That is educational work that only they can do, in deliberation with each other.

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