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COPYRIGHT, FAIR USE AND MOTION PICTURES*

Peter Jaszi**

I. MOTION PICTURES AND COPYRIGHT DISCIPLINE

Consider the following passage, drawn from 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.¹

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¹ Edison v. Lubin, 122 F. 240, 240-41 (3d Cir. 1903).

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.² 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.³

The *Edison* court also demonstrated another kind of truth about motion pictures: that from its inception the new medium was a radically appropriative one.⁴ Whether or not one believes the self-serving and ultimately unavailing representation of the defendant, Sigmund "Pop" Lubin, that he was unaware of the Edison copyright is not the point:⁵ then, as now, the movies thrived 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 dealt with less straightforward appropriations from one production to another, like the motion picture involved in *American Mutoscope & Biograph Co. v. Edison Manufacturing Co.*

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

² *Id.* at 242 (stating that the motion picture at issue met the statutory requirement even though "the continuous method by which [the] negative was secured was unknown when the act was passed").

³ *Id.*

⁴ *Id.* at 241.

⁵ *Id.* For a first-hand account of Lubin's questionable duping practices, see FRED J. BALSHOFER & ARTHUR C. MILLER, *ONE REEL A WEEK* 7-8 (1967). 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.

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 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."⁶

Although the court was not convinced that the latter film was an unlawful derivative of the former, its opinion established the principle that infringement by wrongful adaptation, rather than from direct reproduction, is possible under the copyright law as applied to motion pictures.⁷ The United States Supreme Court underlined and extended this principle six years later, when, in the "Ben-Hur" decision, it concluded that the unauthorized production of a motion picture version could infringe the copyright of the underlying literary work.⁸

Indeed, down to the present day much of the copyright litigation surrounding motion pictures has grown out of controversies about the wrongful appropriation of content or imagery from one motion picture to another, or from a creative work in another medium into the motion pictures.⁹ This essay, however, 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."¹⁰ 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.

⁶ 137 F. 262, 264-65 (C.C.D.N.J. 1905).

⁷ *Id.* at 267-68.

⁸ *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911).

⁹ See Peter Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. REV. 715 (1981).

¹⁰ BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* 38-43 (Elizabeth Kingdom trans., Routledge & Kegan Paul 1979) (1973).

Motion pictures' dependence on the raw material of reality is, of course, most obvious in connection with the documentary film tradition,¹¹ which has its origins in early newsreels and "local views."¹² But well before 1917, it also had become an important part of 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 built on location, so that real landscapes rather than painted flats frequently appeared outside windows in the early teens."¹³ 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.¹⁴

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.

II. 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 biography.¹⁵ The fair use doctrine functions as a kind of "safety valve" in the copyright system. As the reach of copyright law increased in the mid-twentieth century, it came to be more frequently relied upon by defendants and interpreted by the judges. There have been various efforts to explain the theoretical bases of fair use, but perhaps none better than Alan Latman's 1958 summary, which was based on a comprehensive review of cases and other authorities:

¹¹ PATRICIA AUFDERHEIDE, DOCUMENTARY FILM—A VERY SHORT INTRODUCTION (forthcoming Oct. 2007).

¹² CHARLES MUSSER, THE EMERGENCE OF CINEMA: THE AMERICAN SCREEN TO 1907, at 266 (1990).

¹³ DAVID BORDWELL, JANET STAIGER, & KRISTIN THOMPSON, THE CLASSICAL HOLLYWOOD CINEMA: FILM STYLE & MODE OF PRODUCTION TO 1960, at 217 (1985).

¹⁴ In documentary practice, the tension has been further exacerbated by the rise of the *cinema verité* 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 tape the media environment itself as a subject.

¹⁵ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D.Mass 1841) (No. 4901).

[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 a 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.”¹⁶

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 that is enshrined in the First Amendment to the U.S. Constitution: without fair use, copyright law could be found unconstitutional as applied to expressive activities such as documentary filmmaking.¹⁷

The judge-made fair use doctrine was codified in 1976, as part of the general revision of the Copyright Act of 1909, which took effect on January 1, 1978.¹⁸ 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 reuses that are arguably “productive” in nature.¹⁹ 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 fairing better in contemporary courts than others. Recent commentaries on case law suggest that the concept of “passive” fair use is at risk

¹⁶ ALAN LATMAN, STUDY NO. 14, FAIR USE OF COPYRIGHTED WORKS (1958), reprinted in 2 STUDIES ON COPYRIGHT 781, 785 (Arthur Fisher Memorial ed. 1963).

¹⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003).

¹⁸ 17 U.S.C. § 107 (1976).

¹⁹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (highlighting the importance of permitting reuses that are transformative); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (addressing the degree to which the fair use doctrine should protect “productive” uses). For a discussion of the difficulty of articulating a workable definition of transformative use, see, for example, Mitch Tuchman, *Judge Leval’s Transformation Standard: Can it Really Distinguish Foul from Fair?*, 51 J. COPYRIGHT SOC’Y. 101 (2003).

today, as new technologies continue to blur the public/private line.²⁰ 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.²¹

III. FAIR USE IN ACTION

Section 107 directs courts considering whether a particular challenged use is fair to evaluate, among other things, four factors derived 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.²²

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.”²³ If that is the case, the first factor can weigh in favor of fair use even if the use is “commercial” in character.²⁴ 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.²⁵

The Second Circuit Court of Appeals explained how fair use works today in *Bill Graham Archives v. Dorling Kindersley Ltd.*²⁶ In that case, the defendant

²⁰ Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004).

²¹ Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC’Y U.S.A. 133, 137–38 (2003).

²² 17 U.S.C. § 107.

²³ *Acuff-Rose Music*, 510 U.S. at 579.

²⁴ *Id.* (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism . . .”).

²⁵ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006).

²⁶ *Id.*

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.”²⁷ 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.²⁸ After license negotiations 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.²⁹

The court’s analysis began with the first statutory factor: the purpose and character of use.” Because the publisher deployed the images in a “transformative” way, 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 first fair use factor weighs heavily in favor of DK.³⁰

In other words, the recontextualization of the quoted material made all the difference to the determination of its transformative character. Moreover, if the user’s purpose was transformative, the mere fact that it was also commercial does not bar application of the doctrine.³¹ In fact, the court notes, most fair uses are conducted for profit.³²

The second factor, the 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.³³

²⁷ *Id.* at 607.

²⁸ *Id.* at 607 n.1.

²⁹ *Id.*

³⁰ *Id.* at 609.

³¹ *Id.* at 611–12.

³² *Id.* at 612 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

³³ *Id.* at 611.

Thus, while the posters were creative works, this use focused on their value as historical artifacts.

The court deemed the third factor—the amount and substantiality of the portion used—to be 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.”³⁴

Finally, the important fourth factor, the effect of the use upon the market for the value of the original, tilted conclusively for the defendant:

DK’s use of BGA’s images is transformatively different from their original expressive purpose. In 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”³⁵

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.”³⁶

One of the most notable features of this enlightening opinion is the 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.³⁷ A description of some of those decisions follows.

IV. MOTION PICTURES AND FAIR USE BY THE NUMBERS

This important development in fair use began in 1996, with *Monster Communications v. Turner Broadcasting System*,³⁸ which involved no more than two 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-television documentary called “Ali—The Whole Story.”³⁹ 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

³⁴ *Id.* at 613.

³⁵ *Id.* at 614–15 (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)).

³⁶ *Id.* at 615 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994)).

³⁷ *Id.* at 608–15.

³⁸ 935 F. Supp. 490 (S.D.N.Y. 1996).

³⁹ *Id.* at 491.

a work presented in a medium that offers a greater variety of forms of expression;⁴⁰ that the amount taken is small, both quantitatively and, in light of the different topical emphases of the two films qualitatively;⁴¹ 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 television program.⁴² 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 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.”⁴³ Finally, in addition to being 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—to not mention “transformativeness.”

For better or worse, tranformativeness rapidly became a meta-factor, dominating juridical discourse. And although most documentary filmmakers who have been 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. To illustrate, consider two decisions dealing with biographical documentaries: *Elvis Presley Enterprises, Inc. v. Passport Video*,⁴⁴ and *Hofheinz v. A & E Television Networks, Inc.*⁴⁵ In the first of these cases, defendants, Passport Video, produced a sixteen-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

⁴⁰ *Id.* at 494.

⁴¹ *Id.* at 494–95.

⁴² *Id.* at 495.

⁴³ *Id.* at 495–96.

⁴⁴ 349 F.3d 622 (9th Cir. 2003).

⁴⁵ 146 F. Supp. 2d 442 (S.D.N.Y. 2001).

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.⁴⁶

As may be imagined, the court was not impressed with the defendant's fair use arguments under the various Section 107 factors. At the outset, in connection with the first statutory factor, the filmmakers' uses were deemed preponderantly non-transformative.⁴⁷ 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;" but 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."⁴⁸

With this out of the way, the statutory fair use factors began 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 involved unnecessarily long quotations, repetitions of shorter ones, or quotations that represented the "heart" of

⁴⁶ *Elvis Presley Enters.*, 349 F.3d at 625.

⁴⁷ *Id.* at 628–29.

⁴⁸ *Id.*

the copyrighted work—"Elvis' appearance on the shows, in many cases singing the most familiar passages of his most popular songs."⁴⁹ 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.⁵⁰

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," the factoral analysis lines up neatly in the plaintiffs' favor.⁵¹

Hofheinz presents a very different picture. In a suit brought by the widow of one of the principals of American International Pictures, the court ruled that unauthorized inclusion of copyrighted film clips from *It Conquered the World* in an A&E biography 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."⁵² Once this was established, the other factors weighed, overall, in the defendants' favor.⁵³

⁴⁹ *Id.* at 630.

⁵⁰ *Id.* at 631.

⁵¹ Another recent example of a nonfiction filmmaker who went "over the top" and forfeited the ability to rely on fair use can be found in *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, No. 04 Civ. 5332(NRB), 2005 WL 2875327, at *1 (S.D.N.Y. Nov. 2, 2005). In the case, 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. *Id.* Included among the quoted materials were excerpts from a movie, *Carnegie Hall*, that the plaintiff company licenses for TV and home video distribution. *Id.* Finding that the inclusion of the clip was "non-transformative," the court then made relatively short work of the remaining statutory factors. *Id.* at *7-8.

⁵² *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001).

⁵³ *Id.* at 447-49.

Where the fourth factor was concerned, the court held that “[t]he proper question is whether the Graves biography 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.⁵⁴ The fact that the filmmakers might have licensed the clip rather than appropriating it was not, in itself, enough: “Plaintiff may not bootstrap 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.”⁵⁵

The analysis applied in *Hofheinz v. A&E Television Networks* was based, in large part, on the opinion in another of the *Hofheinz* trilogy, *Hofheinz v. AMC Productions, Inc.*⁵⁶ The discussion of the film clips from *It Conquered the World* found in *Hofheinz v. A&E Television Networks*, in turn, prefigured the outcome in the last of these cases, *Hofheinz v. Discovery Communications, Inc.*,⁵⁷ decided late in 2001, in which a fair use defense was validated in connection with the use of a clip from *Invasion of the Saucermen* in a Learning Channel program entitled *Aliens Invade Hollywood*.⁵⁸

The copyright lawyer who experienced 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, *Good Morning America* used clips from *Robot Monster*, *The Brain from Planet Arous*, and *Plan 9 from Outer Space* in segments about the American fascination with extraterrestrials. The clips illustrated presenter Joel Siegel’s theme that “big or small, cute or icky, alien life as portrayed in pop culture inevitably shares some humanlike traits.”⁵⁹ It is hardly a surprise, at this point, that the fact of this recontextualization was enough to demonstrate the transformativeness of the use. Further, the court specifically rejected the argument that uses cannot be both transformative and entertaining.⁶⁰ It quoted the judge in the final *Hofheinz* case⁶¹ and went on to cite various heavy-duty authorities for declining to parse this illusive distinction.⁶²

Three lawsuits surrounding the famous footage of the beating of truck driver Reginald Denny near the intersection of Florence and Normandie during the 1992 Los Angeles riots further illustrate the use of transformativeness in judicial decisions, although they do not involve documentary film production as such. The Los Angeles News Service, an independent provider of news footage to TV

⁵⁴ *Id.* at 449.

⁵⁵ *Id.*

⁵⁶ 147 F. Supp. 2d 127 (E.D.N.Y. 2001).

⁵⁷ No. 00 Civ. 3802(HB), 2001 WL 1111970, at *1 (S.D.N.Y. Sept. 20, 2001).

⁵⁸ *Id.*

⁵⁹ *Id.* at *1–2.

⁶⁰ *Id.* at *9.

⁶¹ “Section 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.” *Id.* (quoting *Hofheinz v. Discovery Commc’ns Inc.*, No. 00 Civ. 3802(HB), 2001 WL 1111970, at *4 (S.D.N.Y. Sept. 20, 2001)).

⁶² *Id.*

stations and other outlets, brought suit against television stations for the unauthorized use of their footage. Two of these cases, *Los Angeles News Service v. KCAL-TV*,⁶³ and *Los Angeles News Service v. Reuters Television International, Ltd.*,⁶⁴ involved unlicensed broadcast of the footage while it still had considerable “hot news” value.⁶⁵ At base, the court’s skepticism about these defendants’ fair use defenses reflected the fact that the footage in question was being reused to fulfill the very purpose for which it originally had been captured—to serve news reporting—rather than in some more “transformative” way.⁶⁶

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.⁶⁷

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 it serves some purpose beyond newsworthiness.”⁶⁸ 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.”⁶⁹ Finally, the court found that there 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 Los Angeles News Service’s core business.⁷⁰ 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.⁷¹

The *Wade Williams* and *CBS Broadcasting* decisions serve as perhaps the best evidence of how far the federal courts have gone to create a generally hospitable

⁶³ 108 F.3d 1119 (9th Cir. 1997).

⁶⁴ 149 F.3d 987 (9th Cir. 1998).

⁶⁵ *KCAL-TV*, 108 F.3d at 1120; *Reuters Television*, 149 F.3d at 990.

⁶⁶ *KCAL-TV*, 108 F.3d at 1121–22; *Reuters Television*, 149 F.3d at 993–94.

⁶⁷ *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 929–30 (9th Cir. 2002).

⁶⁸ *Id.* at 939.

⁶⁹ *Id.* at 942.

⁷⁰ *Id.* at 940–41.

⁷¹ *Id.* at 942.

space for nonfiction 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 use 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.*, actually avoids the issue of fair use in assessing a copyright challenge to the motion picture *Seven*.⁷² 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.⁷³ The previous year in *Ringgold v. Black Entertainment Television, Inc.*, another appeals court criticized a trial court’s prior finding that an artist’s poster used as set decoration in a television situation comedy constituted fair use.⁷⁴ 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.”⁷⁵ In contrast, in *Jackson v. Warner Bros., Inc.* 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.⁷⁶

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 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 documentarians 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.

⁷² 147 F.3d 215, 218 (9th Cir. 1998).

⁷³ *Id.*

⁷⁴ 126 F.3d 70, 78 (2d Cir. 1997).

⁷⁵ *Id.* at 78 n.8.

⁷⁶ 993 F. Supp. 585, 592 (E.D. Mich. 1997). 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. *Id.* at 591. Fair use also provides a secondary rationale for the court’s finding of noninfringement in *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044, 1046, 1048 (S.D.N.Y. 1994), where plaintiff’s “Baby Bears” hanging mobile was used as set décor in the film *Immediate Family*.

V. 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, Professor 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.⁷⁷ Professor David Lange, in turn, has speculated about the possibility of new legislation that would supplant fair use and lighten the burden of copyright clearance on documentary filmmakers by providing them with a special compulsory license.⁷⁸

But however reasonable and unthreatening proposals like Professor 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 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?

VI. 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 of Professor 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."⁷⁹ In

⁷⁷ See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 116–68 (2004) (describing how copyright law has changed from traditional regulation of commercial copying to regulation of private copying, creativity, and transformation). These themes are developed at greater length in Professor Lessig's testimony to the House of Representatives. *Testimony on The Digital Media Consumers' Rights Act of 2003: Hearing on H.R. 107 Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 108th Cong. 15–22 (2004) (statement of Lawrence Lessig, Professor, Stanford Law School).

⁷⁸ See the webcast of the April 2, 2004 legal panel from the "Full Frame" conference, available at <http://www.law.duke.edu/framed/> (follow link titled "Culture on the Legal Cutting Room Floor").

⁷⁹ See LATMAN, *supra* note 16, at 785.

other words, courts engaged in fair use decision-making should care about evidence of what is considered “reasonable” and “customary” within the relevant practice communities. Before the enactment of Section 107, case law offered various examples of this approach.⁸⁰ These cases included several instances in which customary practice was explicitly considered.⁸¹

Fair use discourse shifted after the enactment of Section 107, and for a time the customary roots of the doctrine were obscured. Scholars sought coherence elsewhere, particularly in utilitarian economic analysis.⁸² Other commentators expressed pessimism whether fair use analysis, which depends on a “calculus of incommensurables,” could ever be rationalized or made more predictable.⁸³ Although the Supreme Court, in 1985, acknowledged the connection between custom and fair use,⁸⁴ many lower courts temporarily lost sight of this dimension of the doctrine, turning their attention instead to the factoral analysis apparently privileged by the statute.⁸⁵ And, as we have seen, their opinions came to focus increasingly on the issue of “transformativeness.”

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.”⁸⁶

⁸⁰ See generally Harry Rosenfeld, *Customary Use as “Fair Use” in Copyright Law*, 25 BUFF. L. REV. 119 (1975) (stating that where applicable, custom is per se “Fair Use”).

⁸¹ See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (unauthorized biography of Howard Hughes). 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, 1350 (Ct. Cl. 1973). This mode of analysis is also employed after 1978, as demonstrated by *Maxtone-Graham v. Burtchell*, 803 F.2d 1253, 1263 (2d Cir. 1986) (reaffirming that it is “both reasonable and customary for biographers to refer to and utilize earlier works” (quoting *Rosemont Enters.*, 366 F.2d at 307)).

⁸² Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1631 (1982); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1698–1700 (1988).

⁸³ Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291, 1306 (1999).

⁸⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550–51 & n.4 (1985).

⁸⁵ 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, 778 (9th Cir. 2006).

⁸⁶ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1587 (2004).

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.⁸⁷ 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.⁸⁸ Likewise, the focus of the Supreme Court’s celebrated 1994 “2 Live Crew” decision was whether the allegedly infringed song was a genuine parody or a mere effort to capitalize on the fame of the plaintiff’s song.⁸⁹ By the same token, in many of the cases involving nonfiction filmmakers reviewed above, the underlying issue was whether the challenged production was actually a 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 currently conducted using the vocabulary of Section 107, always involve—at bottom—a comparison between the 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.⁹⁰

In a recent article, James Gibson has extended this analysis, warning of a possible vicious circle in fair use jurisprudence.⁹¹ Documenting the extent to which custom and practice are, and long have been, touchstones for fair use analysis, he goes on to make a further point: when users are excessively 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.⁹² He points out that such failures to assert fair use are often the result of constraints imposed on users by various “gatekeepers”—including broadcasters, distributors and especially insurers.⁹³ In effect, Gibson reminds us that the watchword for fair use is “use it or lose it,” as he

⁸⁷ *Id.* at 1586–88.

⁸⁸ *Id.* at 1557.

⁸⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994).

⁹⁰ *See* Madison, *supra* note 86, at 1631.

⁹¹ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882, 896 (2007).

⁹² *Id.* at 896–906. Gibson assembles powerful support for the proposition that customary usage matters in fair use determinations, although his claim that customs with respect to licensing practice have long been singled out for special attention is less well documented. *See, e.g.*, RICHARD C. DEWOLF, *AN OUTLINE OF COPYRIGHT LAW* 143 (1925) (discussing possible market substitution effects without mention of licensing as such); *Shapiro, Bernstein & Co. v. P.F. Collier & Son Co.*, 26 U.S.P.Q. (BNA) 40, 42 (S.D.N.Y. 1934) (discussing same, with additional analysis of custom in general).

⁹³ Gibson, *supra* note 91, at 896–906.

points to a problem of negative reinforcement that has been aggravated greatly, and deliberately, by the practices of large copyright holders.⁹⁴

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 affect the way in which the law, as applied to them, is understood.⁹⁵ The effectiveness of the approach was tested more than a decade ago by the Society for Cinema and Media Studies (SCMS). In 1993, with the help of several experts including myself, the SCMS developed a best-practices code for its members concerning use of stills and frame grabs from films in academic literature.⁹⁶ Ever since, this code has effectively reduced costs and facilitated publication for many film scholars. Recently, the model has been extended to the field of documentary filmmaking practice.

VII. STATEMENTS OF BEST PRACTICES—PROCESSES AND PRODUCTS

*The Documentary Filmmakers' Statement of Best Practices in Fair Use*⁹⁷ ("Statement") is a testament to the power of collective self-help and accessible scholarship. Documentary filmmakers, acting through their organizations and with coordination 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 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 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

⁹⁴ *Id.* at 895.

⁹⁵ Gibson suggests that self-help may be futile because doctrinal feedback "takes place regardless of . . . whether copyright users want to do something about it . . ." *Id.* at 906. 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.

⁹⁶ See Kristin Thompson, *Report of the Ad Hoc Committee of the Society For Cinema Studies, 'Fair Usage Publication of Film Stills,'* 32 CINEMA J. 3 (1993).

⁹⁷ ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/. Excerpts from the *Statement* appear as an Appendix to this Article.

copyright clearance, *Untold Stories*, conducted by Professor Patricia Aufderheide of the School of Communication at American University, along with the present author, documented the creative costs of the “clearance culture.”⁹⁸ For instance, documentary filmmakers changed the reality they filmed during shooting by instructing subjects to turn off the television so as to avoid incidental capture of copyrighted media. They also changed their films in post-production by editing sounds and images to avoid perceived copyright clearance problems. Further, they suffered both financial uncertainty and high prices. Worst of all, they avoided topics that might involve overly 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.⁹⁹

Of the many possible solutions to the crisis in copyright clearance, filmmakers themselves could address fair use. As noted above, courts respect the views of practice communities about what constitutes reasonable and appropriate use of copyrighted materials.¹⁰⁰ 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 on how to fairly and reasonably interpret the law.¹⁰¹ To help filmmakers to establish such a consensus, Aufderheide and I 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.¹⁰² In thirteen meetings, including ten 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.¹⁰³ In these conversations, documentarians wrestled to define both what their own needs were to quote others’ material without permission or payment, and what they thought would be acceptable, were someone to quote their own material without authorization.¹⁰⁴

The *Statement*¹⁰⁵ 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

⁹⁸ PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004), available at http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

⁹⁹ *Id.* Robert Stone is a documentary filmmaker whose titles include the film *American Babylon*, as well as *American Experience* episodes “Radio Bikini,” “Satellite Sky,” and “Guerrilla: The Taking of Patty Hearst.”

¹⁰⁰ See Rosenfeld, *supra* note 80, at 133–37.

¹⁰¹ AUFDERHEIDE & JASZI, *supra* note 98, at 22–25.

¹⁰² ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, *supra* note 97, at 1.

¹⁰³ *Id.* at 3–6.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* 3–4.

content in documenting the lives of a film's subjects;¹⁰⁶ and the use of copyrighted material in historical narrative.¹⁰⁷ 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.¹⁰⁸ At the same time, they were outraged by, for example, CSPAN's refusal to release some presidential and Congressional material, and the arbitrary licensing practices of some private archives.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

The balanced nature of the *Statement*, as the product of a community with stakes both in 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, including 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 & Rhymes*).¹¹² 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

¹⁰⁶ *Id.* at 3–5. This is an issue that was of great concern to documentary filmmakers working in the *cinema vérité* mode. The conclusion arrived at by the filmmakers in the *Statement* appears to be entirely consistent with the first principles of fair use articulated by the courts and Congress. Although Professor Gibson suggests that the case law on the question is divided, see Gibson, *supra* note 91, at 890 n.16, 906 n.89, the reality is that it has simply gone unaddressed, with the singular exception of *Shapiro, Bernstein & Co. v. P.F. Collier & Son Co.*, 26 U.S.P.Q. 40, 43 (S.D.N.Y. 1934) (dictum on incidental capture by *still* photographer as fair use). The other cases cited by Gibson involve the purposeful, chosen use of copyrighted material in the backgrounds of fiction film sequences, not the incidental capture of existing media content by documentarians.

¹⁰⁷ Of course, as the *Statement* itself makes clear, the articulation of these consensus principles is not intended to foreclose the assertion of fair use by filmmakers in other situations. ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, *supra* note 97, at 3–4.

¹⁰⁸ *Id.* at 3–4.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² CENTER FOR SOCIAL MEDIA, SUCCESS OF THE STATEMENT OF BEST PRACTICES 1 (2005), http://www.centerforsocialmedia.org/files/pdf/success_of_the_statement.pdf.

innocent.¹¹³ Archival footage had been used with the permission of the local broadcast station, but when news station leadership saw the potential of making their own documentary, this permission suddenly was withdrawn.¹¹⁴ The filmmakers stood on the ground of fair use to use archival broadcast news footage in their film.¹¹⁵

Within four weeks of the *Statement's* release, Aufderheide and I hosted a meeting with broadcast and cable executives. This meeting precipitated a decision by the Independent Feature Channel (IFC) to create an internal fair use policy allowing it to clear the cablecast of *This Film Is Not Yet Rated*, which includes more than one 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*.¹¹⁶ By April 2006, the Public Broadcasting Service (PBS) accepted the applicability of fair use to *Hip-Hop: Beyond Beats & Rhymes*, which quotes substantial amounts of music and video in its argument that hip-hop had become a celebration of misogyny and violence.¹¹⁷ Moreover, PBS shared the *Statement* with all general managers and general counsels in its network.¹¹⁸

Perhaps the most powerful evidence of the transformation that the *Statement* has helped to work is 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.¹¹⁹ It took insurers, cautious by nature, some eighteen months to reconsider their practice in the light of a consensus document that dramatically lowered risk.¹²⁰ At least where documentary filmmaking is concerned, the vicious circle of which Professor Gibson warns¹²¹ 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

¹¹³ Patricia Aufderheide, *How Documentary Filmmakers Overcame Their Fear of Quoting and Learned to Employ Fair Use: a Tale of Scholarship in Action*, 1 INT'L J. OF COMM. 26, 33–34 (2007), available at <http://ijoc.org/ojs/index.php/ijoc/article/view/10/26>.

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See* Elaine Dutka, *Legendary Film Clips: No Free Samples?*, N.Y. TIMES, May 28, 2006, § 2, at 16.

¹¹⁷ *See* CENTER FOR SOCIAL MEDIA, *supra* note 112, at 1; *HIP-HOP: Beyond Beats & Rhymes* (PBS Independent Lens premier Feb. 20, 2007).

¹¹⁸ CENTER FOR SOCIAL MEDIA, *supra* note 112, at 1.

¹¹⁹ *Id.* *See also* the postings for February 13, 2007 ("Insurer accepts fair use claims!") and February 24, 2007 ("MediaPro also uses Fair Use Best Practices Statement for insurance policies"), on the "Beyond Broadcast Blog," http://www.centerforsocialmedia.org/blogs/future_of_public_media/.

¹²⁰ CENTER FOR SOCIAL MEDIA, *supra* note 112, at 1.

¹²¹ *See* Gibson, *supra* note 91, at 896.

professor's work.¹²² In addition, teachers began using the Center for Social Media's Fair Use Teaching Tools, including a DVD that provides core teaching materials on fair use.¹²³

Other creator groups also 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.¹²⁴ In her 2006 book, *Permissions, A Survival Guide: Blunt Talk About Art as Intellectual Property*, veteran publisher Susan Bielstein warmly endorses the potential of the best practices approach.¹²⁵

The Documentary Filmmakers' Statement of Best Practices in Fair Use has begun to change practices and expand possibilities in many areas of media-making and scholarship.¹²⁶ 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.

¹²² See Center for Social Media Newsletter, News from the Fair Use Project (Feb. 2, 2006), http://www.centerforsocialmedia.org/newsletter/entry/february_events_and_new/#.

¹²³ See http://centerforsocialmedia.org/resources/fair_use_teaching_tools/.

¹²⁴ See, e.g., RENEE HOBBS, PETER JASZI & PAT AUFDERHEIDE, CENTER FOR SOCIAL MEDIA, THE COSTS OF COPYRIGHT CONFUSION FOR MEDIA LITERACY 21–22 (2007), available at http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf.

¹²⁵ See SUSAN M. BIELSTEIN, PERMISSIONS, A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 4–5 (2006).

¹²⁶ 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* (bepress Legal Series, Working Paper No. 950, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=4599&context=expresso>.

APPENDIX

[An excerpt from the *Documentary Filmmakers' Statement of Best Practices on Fair Use*]¹²⁷

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

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

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

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

Limitations: There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and 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).

¹²⁷ ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, *supra* note 97, at 3–6.

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

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

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

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

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film's final credits;
- to the extent possible and appropriate, quotations are drawn from a range of different sources;
- each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- the quoted material is not employed merely in order to avoid or inconvenience of shooting equivalent footage.

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

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

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

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

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

FOUR: USING COPYRIGHTED MATERIAL IN A HISTORICAL SEQUENCE

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

Principle: Given the social and educational importance of the documentary medium, fair use should apply in some instances of this kind. To conclude otherwise would be to deny the potential of filmmaking to represent history to new generations of citizens. Properly conditioned, this variety of fair use is critical to fulfilling cultural mission of copyright. But unless limited, the principle also can defeat the legitimate interests of copyright owners—including documentary filmmakers themselves.

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

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

FAIR USE IN OTHER SITUATIONS FACED BY DOCUMENTARIANS

The four principles just stated do not exhaust the scope of fair use for documentary filmmakers. Inevitably, actual filmmaking practice will give rise to situations that are hybrids of those described above or that simply have not been anticipated. In considering such situations, however, filmmakers should be guided by the same basic values of fairness, proportionality, and reasonableness that inform this statement. Where they are confident that a contemplated quotation of copyrighted material falls within fair use, they should claim fair use.