

Copyright Considerations and Fair Use for Independent Filmmakers

by Kyle Neddenriep

Senior Project

California Polytechnic State University, San Luis Obispo

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Faculty Advisor: Professor Bill Loving

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It is available online at <http://vimeo.com/20153837>



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I. Rights Clearance Costs and Difficulties

The plummeting cost of digital video equipment and non-linear editors allows independent filmmakers to produce high-quality films more affordably than ever. Following production, the Internet also provides an affordable means for mass distribution of independent films. However, one aspect of filmmaking continues to bloat budgets—copyright clearances. Jonathan Caouette demonstrated just how cheaply a film could be produced with his 2004 release of *Tarnation*.

Caouette estimated he spent only \$218 to produce the homemade movie about his dysfunctional family, but securing copyright clearances¹ totaled roughly \$200,000.² A study by the Center for Social Media found the costs of producing a documentary had risen dramatically in the last twenty years due to right's clearance costs, and independent documentary filmmakers were particularly affected because their films often require newsreel footage, photographs, historical footage, pop culture elements, and music to effectively profile their subjects. Joan Sekler, director of the political documentary *Uncovered*, found even non-profit cable channel C-SPAN wanted \$100,000 for world-wide rights, a figure she found, “really outrageous.”³

¹ Rights needed to be purchased for music and other cultural iconography Caouette's home video camera

² Ramsey, Nancy. "The Hidden Cost of Documentaries." *Nytimes.com*. The New York Times, 16 Oct. 2005. Web. 13 Feb. 2011. <<http://www.nytimes.com/2005/10/16/movies/16rams.html>>.

³ Aufderheide, Patricia, and Peter Jaszi. *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media. School of Communication, Washington College of Law, American University, Nov. 2004. Web. 5 Feb. 2011. <<http://www.centerforsocialmedia.org/rock/index.htm>>.

Without Hollywood-sized budgets independent filmmakers are forced to reconsider ascetic elements or even entire projects. The song “Happy Birthday to You” is owned by Warner Music Group and brings in roughly \$2 Million in revenue a year.⁴ Rena Kosersky, in editing the film *Eyes on the Prize*, contemplated removing a whole sequence when “Happy Birthday to You” was sung at a birthday party. “This is the kind of thing that happens when the music is integral for the content of the sequence,” Kosersky said. “It took about four months to get a fee that we could handle.”²

High costs are not the only difficulty in securing rights. Often just finding the appropriate owners of the work can be a struggle. To obtain permission for a musical recording the song's writer, performer, and the actual owner of the work (i.e. the record company) must be notified and approve the use. Ownership of works frequently changes hands when record companies sell off parts of their catalog, adding ambiguity. Even more challenging are instances where the original performer is dead, filmmakers must seek approval from all major beneficiaries of their estate.

⁴ Brauneis, Robert. "Copyright and The World's Most Popular Song." *Social Science Research Network*. George Washington University Law School, 14 Oct. 2010. Web. 7 Feb. 2011.
<http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1111624_code329492.pdf?abstractid=1111624&mirid=1>.

An additional hurdle in the rights process can be securing errors and omissions insurance. Broadcasters demand films they show be insured for errors and omissions in the clearance process.⁵ Attorneys representing the insurance companies are particularly risk-adverse. If filmmakers are unable to definitively prove they have all the necessary owners permission, the film may not be insured and will not air on television. This has effectively made some works off-limits because their ownership is no longer traceable.

The Copyright Clearance Center and other global rights brokers like Harry Fox's Song File were established to help clients navigate the cumbersome process.⁶ However, as of 2002, Harry Fox discontinued providing synchronization rights⁷ through their website. Also, each work of art or piece of music needs to be negotiated individually, and costs for different works can vary wildly. Owners of works are not obligated to license a work at any rate. Meaning, if any owner disapproves of the use, the work is unusable.

Securing rights clearances can be particularly demanding on independent filmmakers without the budget or expertise to traverse the rights clearance process. However, there is another option available to filmmakers looking to use works that have not yet fallen into the public

⁵ Aufderheide, Patricia, and Peter Jaszi. *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media. School of Communication, Washington College of Law, American University, Nov. 2004. Web. 5 Feb. 2011. <<http://www.centerforsocialmedia.org/rock/index.htm>>.

⁶ "About Copyright Clearance Center." *Copyright Clearance Center | The Rights Licensing Experts*. Web. 10 Feb. 2011. <<http://www.copyright.com/viewPage.do?pageCode=au1-n>>.

⁷ Rights that allow music to be incorporated within a film

domain. Fair use is a legal defense to unauthorized use in a copyright infringement lawsuit.

Ideally, incorporating elements that were clearly used fairly under the law will deter copyright violation lawsuits.⁸ In order for a use to be “fair” the work, taken as a whole, must satisfy a four-factor test. Uses that qualify may make use of copy written material without securing permission by following the best practices established by legal scholars, prior decisions, industry practices, and this author, an independent filmmaker.

II. Review of Literature

Fair use continues to attract an enormous amount of scholarly attention within copyright law, and there are a number of consistent themes that appear and re-appear within the literature. Fair use is regularly relied upon by filmmakers within the industry; however, many chose to do so quietly to avoid unwanted attention. In a study by the Center for Social Media they found few filmmakers prepared to publically comment on any instances of fair use they employed.⁹ Tia Lessin as a producer for Michael Moore’s *Bowling for Columbine* relied on fair use to include a montage of local news anchors warning about black male criminal suspects. In applying fair use in court, judges have continually emphasized that uses must be transformative. Beyond that, Barton Beebe, in an article in the University of Pennsylvania Law Review says, “We continue to lack

⁸ If a filmmaker is sued they must first secure legal representation to make their fair use argument for them in court. Without the assets to secure representation a filmmaker may be unable to even defend the use.

⁹ Aufderheide, Patricia, and Peter Jaszi. *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Center for Social Media. School of Communication, Washington College of Law, American University, Nov. 2004. Web. 5 Feb. 2011. <<http://www.centerforsocialmedia.org/rock/index.htm>>.

any systematic, comprehensive account of our fair use case law and the actual state of our fair use doctrine. Instead, our conventional wisdom derives from a small set of conventionally agreed-upon leading cases.”¹⁰ But, cases that fall within this traditionally accepted standard continue to receive protection against litigation. Litigation, independent filmmakers can’t afford to challenge in court. The Internet has opened the floodgates to myths as to what constitutes “fair use”, but reliable and reputable online resources have also emerged for practitioners looking to implement fair use.

III. The Chase McBride Film

The aforementioned affordability of HD cameras, sound equipment, and computer based editing applications allowed me to begin work on my own student film in a relatively affordable fashion. In the summer of 2010, San Luis Obispo, California, singer-songwriter, Chase McBride began a tour of the Western United States. The band, Chase McBride, traveled through eight states—covering thousands of miles, and I was invited to follow along and document the tour. In my experience, although technology has opened up filmmaking to independent producers, copyright clearance continues to exist as a barrier to entry. Copyright considerations specific to independent filmmakers will be examined in the following through my film, *You Gotta Have Soul*,

¹⁰ Bebee, Barton. "An Empirical Study of U.S. Copyright Fair Use Opinions 1978-2005." *University of Pennsylvania Law Review* No. 3 156. January (2008). *Pennumbra.com*. Web. 27 Feb. 2011. <<http://www.pennumbra.com/issues/pdfs/156-3/Beebe.pdf>>.

which is available online.¹¹ This research is intended to shed light on the copyright process and illustrate ways in which the fair use defense may be properly invoked by independent filmmakers who do not have the resources to pay for content they hope to use.

The 2010, *Child of the Wild Tour*, was the band's first time performing in many of the cities on the tour. It is common practice for local booking agents and venue owners to require bands play a mix of covers and original songs because patrons are unlikely to be familiar with the bands original music. Venues, which are often bars, do better when people on the street recognize the music coming from inside.¹² Venues, in most cases, subscribe to rights providers such as ASCAP,¹³ BMI¹⁴, SESAC, and HFA, which allow them to play and perform copy written material. The organizations represent virtually all musicians in the United States. When bars, broadcasters, and radio stations play music, they pay ASCAP, BMI, SESAC, or HFA who then compensates the copyright holders individually. Because of these agreements Chase McBride was allowed to cover songs owned by other copyright holders without infringeing on their copyright.

Because cover songs are a large part of what unsigned bands play, naturally, I sought to include these performances within my film. However, recording a performance and including it

¹¹ *You Gotta Have Soul*. Prod. Kyle J. Neddenriep. Perf. Chase McBride and Austin Mello. 2011. Vimeo. <http://vimeo.com/20153837>

¹² Id.

¹³ "ASCAP Customer Licensees." *ASCAP | The Worldwide Leader in Performance Royalties*. Web. 10 Feb. 2011. <<http://www.ascap.com/licensing/about.html>>.

¹⁴ "BMI | About." *BMI.com*. Artistshouse Music. Web. 10 Feb. 2011. <<http://www.bmi.com/about/>>.

within the film is not allowed by the venue's music licensing. These organizations only allow for the performance of a song by a live band or a pre-recorded equivalent; recording a song live and including it within my film would require synchronization rights, which as demonstrated earlier, can be very difficult to secure. However, securing permission to use the bands original works was easy. They self-released three albums they composed independently. They have full rights to all tracks on these albums as well as some unreleased original songs.

Ideally, I would have liked to include a number of cover performances in addition to their original tracks to score the film. The band adapts them to their own unique style, and audience reaction is overwhelmingly positive—people like to hear music they already know. But my small budget would have made securing rights impossible. So, in order to forgo the rights clearance process, I made use of some material without securing a license, but should I be sued, I would have a fair use argument to defend my unauthorized use. In commenting on how independent bands need to play covers to book shows and get audiences involved I show a few seconds of people dancing and singing along to *The Joker* by the Steve Miller Band. The use is accompanied by interviews explaining the importance of playing covers for independent musicians. The specific arguments defending my use will be addressed in the following.

IV. Copyright and Fair Use

Copyright is a protection provided to original authors of literary, dramatic, musical and artistic works¹⁵. It grants them the exclusive right to distribute the work, make derivative works, make copies or phonorecords¹⁶ of the work, display the work publicly, perform the work, and in the case of musical recordings—perform it by means of digital transmission¹⁷ More importantly, it is illegal to violate any of the rights provided to the copyright holder unless the use is excused by a statutory exception.

Fair Use is one such exception that allows for the unauthorized reproduction of material. Fair use existed first within the common law but was incorporated into the Copyright Act of 1976, Title 17 Chapter 1 U.S.C. § 106 and 107. Fair use is explained as, “use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The act also codified the four-part test used to outline fair use that has been substantiated by a number of judicial opinions.

¹⁵ Ideas, processes, and facts are not copyrightable.

¹⁶ The physical medium for distribution e.g. DVDs, CDs, VHS Tapes

¹⁷ "Copyright Basics." United States Copyright Office. Web. 06 Feb. 2011.

<<http://www.copyright.gov/circs/circ1.pdf>>.

Fair use constitutes an affirmative defense to copyright infringement, not a “right” to use material.¹⁸ In *Stewart v. Abend*¹⁹, the court found, “an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would” undermine the purpose of copyright. Fair use is invoked only as a justification or excuse for an unauthorized use. Scholarly opinions and best practices are helpful, but the only definitive way to affirm a use as fair is through a federal court decision. Securing legal representation to defend a use in federal court, for myself and other independent filmmakers, would be prohibitively expensive. As Amy Sewell's²⁰ attorney explained to her, “Honestly, for your first film, you don't have enough money to fight the music industry.”²¹ Filmmakers invoking fair use to avoid rights clearance costs should use material conservatively to avoid potential litigation.

V. Transformative Use

The primary consideration in determining whether a use is fair or not is “the purpose and character of the use.”²² The Court has interpreted this to mean whether the use is merely copying or a “transformative” use of the original. Transformative uses of material add substantially to the original and “transform” it for comment, criticism, or parody. For example, in Robert

¹⁸ Jennings, Christopher Alan. *Fair Use on the Internet*. Rep. Federation of American Scientists. Congressional Research Service | The Library of Congress, 21 May 2002. Web. <www.fas.org/irp/crs/RL31423.pdf>.

¹⁹ *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

²⁰ A producer of “Mad Hot Ballroom,” a documentary that follows New York City children

²¹ As quoted by Ramsey, Nancy. “The Hidden Cost of Documentaries.” *Nytimes.com*. The New York Times, 16 Oct. 2005. Web. 13 Feb. 2011. <<http://www.nytimes.com/2005/10/16/movies/16rams.html>>.

²² Title 17 Chapter 1 § 107

Greenwald's documentary *Out Foxed*²³ Greenwald attacks Fox News' mantra "Fair and Balanced." Greenwald used video of Fox News to illustrate biased reporting. Greenwald never secured rights to use the footage, but the use was allowable because the video is used for comment and criticism, not its original newsreel purpose.

Using an entire song for soundtrack purposes within my film would not meet the standards for transformative use. In *L.A. Times v. Free Republic* the court found Free Republic, an online "bulletin board" in violation of L.A. Times' copyright when it archived full copies of its articles. Despite being a non-profit website for political purposes, the court rejected Free Republic's fair use claim citing, a work that "Merely supersedes the objects of the original creation" is not transformative.²⁴ Only if the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," may uses be considered transformative.²⁵

When my film makes use of the song *The Joker* by the Steve Miller Band the use is transformative because it illustrates the need for independent bands to play cover songs. As previously established, independent musicians have to play cover songs to appease venue owners and get crowds to connect with their music. When *The Joker* appears in my film, bassist, Austin

²³ *Outfoxed: Rupert Murdoch's War on Journalism*. Dir. Robert Greenwald. Perf. Douglas Cheek, Walter Cronkite and Roger Ailes. Brave New Films, 2004. DVD.

²⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²⁵ *Id.*

Mello says, “We want to teach people originals, but we need to draw them in with covers—to play songs that they know and they recognize—to play songs they can really get into.” To do this, he continued, “There are a few [covers] we like to lean on that we know will work well with the crowd.” As Mello finishes you begin to hear Chase McBride’s rendition of *The Joker*. You can clearly hear the crowd singing along—a departure from their standard reaction to original works. In this way, my use of *The Joker* is allowable because it is transformative. The purpose of the clip is not to feature the song *The Joker* but to show the crowds reaction to it. The song just happens to be playing in the background. This transformative use in conjunction with the other portions of the fair use test provides me with an affirmative defense to my unauthorized use of material.

VI. The Fair Use Test

The original four-part fair use test as outlined in Title 17 Chapter 1 § 107 of the U.S. code provides the original framework with which to identify a use as fair. Recent judicial opinions place the primary emphasis on the first point of the test—transformative use. “The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”²⁶ However, the other elements of the test should be considered in assessing the merits of a fair use defense.

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

²⁶ Id.

(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;

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

Beyond transformative use, the first point of the test also gives preference to non-profit uses. It is important to look beyond whether the new author is a commercial or non-profit entity and look also at whether the new work is meant to be sold or used for noncommercial purposes.²⁷

The second part of the test asks if the work is more factual or creative and if the original is published or unpublished. Because more factual works are perceived to be a public good, use of more factual work is given more leeway than use of a creative work.²⁸ Unpublished works are afforded more protection than published works because the original author has already reaped the benefits associated with publication. So, my film's use of material is couched between two extremes. A song is creative in nature, but it has already been published allowing the original performer, The Steve Miller Band, to reap the benefits of publication.

The third part of the test looks at the amount of material used in relationship to the whole. For example, using one page of a four hundred-page volume would be seen more

²⁷ Jennings, Christopher Alan. *Fair Use on the Internet*. Rep. *Federation of American Scientists*. Congressional Research Service | The Library of Congress, 21 May 2002. Web. <www.fas.org/irp/crs/RL31423.pdf>.

²⁸ "Measuring Fair Use: The Four Factors." *Stanford Copyright & Fair Use Center*. Web. 10 Feb. 2011. <http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html>.

favorably than one page of a three-page essay; however, the judgment is also qualitative. If the one page of five hundred is the most important of the entire book that will be taken into consideration. In *Harper & Row v. Nation Enterprises*²⁹ the publication *The Nation* published only 300 to 400 words of President Gerald Ford's 500-page memoir, but the portion discussed his decision to pardon Richard Nixon. Because those words were taken to be the most important of the book *The Nation* failed in its fair use defense.

My use of *The Joker* is relatively small in terms of time—only a few seconds. In the film an interview ends, and you hear the band perform, “Some people call me the gangster of love. [people sing along] Some people call me Maurice...”³⁰ But, it is also not the most infamous portion, that being the chorus, “I'm a joker. I'm a smoker...”

The forth element of the test looks into the economic implications of the use. A use is seen less favorably if it is likely to damage the original authors ability to profit from the work, but that is not the only consideration. Even if the two works are not in direct competition the court may see the use unfavorably. In *Rogers v. Koons*³¹ the Court found that although two artists may not be in direct competition (e.g. a photographer and sculptor) monetary compensation resulting from borrowed material can disqualify a fair use argument. My film is very unlikely to damage the

²⁹ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)

³⁰ Miller, Steve. "The Joker." *Song Lyrics LyricsFreak.com*. Web. 15 Feb. 2011.
<http://www.lyricsfreak.com/s/steve_miller/the_joker_20131059.html>.

³¹ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992.)

copyright holder's ability to profit from the work. Additionally, I do not intend to sell my film or profit off its release; I've posted it online, for free.

There is no way to categorically or mathematically apply the fair use test. Each use must be weighted against each portion of the test individually. Previously decided cases can be helpful in providing more specific examples. Only a court can issue a definitive ruling, but filmmakers can judge a uses relative strengths and weaknesses before relying on a fair use argument.

VII. Cases and Precedent

Prior cases and opinions regarding the fair use test clarify the appropriate application of each portion. The circuit court's opinion in *Folsom v. Marsh*³² is sometimes thought of as the original fair use test. Decided in 1841, it predates the codification of fair use into copyright law. The case alleged Rev. Charles Upham's autobiography on George Washington infringed on Jared Sparks' prior work. However, recent scholarship suggests the case was decided on faulty logic, and is often misinterpreted in the context of fair use.³³ It is also suggested *Folsom v. Marsh's* affect on American case law is likely overestimated.³⁴

³² *Folsom v. Marsh* 9 F. Cas. 342 (D. Mass. 1841) (No. 4901)

³³ Patterson, L. Ray. "Folsom v. Marsh and Its Legacy." *Digital Commons*. University of Georgia School of Law, 1998. Web. 15 Feb. 2011.
<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1346&context=fac_artchop>.

³⁴ Bebee, Barton. "An Empirical Study of U.S. Copyright Fair Use Opinions 1978-2005." *University of Pennsylvania Law Review* No. 3 156. January (2008). *Pennumbra.com*. Web. 27 Feb. 2011.
<<http://www.pennumbra.com/issues/pdfs/156-3/Beebe.pdf>>.

More recent cases cite The Supreme Court's decision in *Campbell v. Acuff-Rose Music*,³⁵ as the new fair use standard. In *Campbell v. Acuff-Rose Music* the Court established that commercial parody may qualify for a fair use defense. When the rap group 2 Live Crew recorded the song "Pretty Woman" based on the Roy Orbison original "Oh, Pretty Woman" *Acuff-Rose Music* brought suit against 2 Live Crew for an alleged copyright violation. Orbison's original version goes, "Pretty woman, walking down the street Pretty woman, the kind I like to meet." The 2 Live Crew's parody is to the same tempo, "Big hairy woman, you need to shave that stuff, Big hairy woman, you know I bet it's tough. Big hairy woman, all that hair ain't legit, 'Cause you look like Cousin It." The Court ruled in 2 Live Crew's favor but emphasized each use must be determined individually based on the application of the fair use test:

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioner's suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair.

³⁵ *Campbell v. Acuff-Rose Music* 510 U.S. 569 (1994)

Another, often cited, case in the history of fair use is *Sony Corp. of America v. Universal City Studios, Inc.*³⁶; in which the United States Supreme Court found Sony's Betamax video recorder could record entire television programs for "time shifting"³⁷ purposes under a fair use defense. In applying the test the Court found there was no evidence that the use of Betamax recorders adversely affected Universal's ability to profit from television programming. The case illustrates the test should be applied holistically. Even if one portion of the test is not satisfied (users were recording full-length programs) this may not disqualify a fair use defense.

In *Time Incorporated v. Bernard Geis Associates*³⁸ *Life Magazine* filed suit over the unauthorized reproduction of several frames of the Abraham Zapruder film³⁹ in the defendant's book, *Six Seconds in Dallas*. The book used drawings of the frames from the film to illustrate the event; it did not use *Life Magazine's* actual photographs. In its findings the court found that *Life* had a valid copyright to the film; however, the federal district court in New York found there was an acceptable fair use defense in publishing reproductions of several frames because, "There is a public interest in having the fullest information available on the murder of President Kennedy." Additionally they found little, if any, evidence of economic injury to *Life* through the use.

³⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

³⁷ Where a television program might be recorded for private viewing at a more convenient time

³⁸ *Time Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130 - Dist. Court, SD New York (1968)

³⁹ Abraham Zapruder, while filming the President's Motorcade drive through Dallas, Texas on November 22, 1963, inadvertently captured a picture sequence of President Kennedy's assassination on his home movie camera. He subsequently sold the footage to *Life Magazine*.

VIII. Best Practices

The application of the fair use test can be complex, but independent filmmakers can thwart potential legal liabilities by following best practices. Best practices guides are available online from a number of reputable sources; they will be listed in the following. These guides can be helpful in identifying allowable uses. In fact, judicial opinions often reference television and film industry best practices publications to illustrate how violators deviated from the traditionally accepted practices.⁴⁰ The Association of Independent Video and Filmmakers publishes a best practices guide.⁴¹ It emphasizes the two primary elements that the court returns to again and again in determining what qualifies as fair use. (1) Did the unlicensed use ‘transform’ the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original? And, (2) was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use? These are essentially two points of the fair use test, but they are a useful simplification of the test for filmmakers to consider before proceeding with an unauthorized use of material.

Common sense practices and erring on the side of caution are likely to be filmmaker’s greatest defense against unwanted lawsuits, but the Stanford Copyright and Fair Use Center⁴² lists

⁴⁰ *Documentary Filmmakers’ Statement Of: Best Practices in Fair Use*. Association of Independent Video and Filmmakers. PDF. http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf

⁴¹ Id.

⁴² Online at <http://fairuse.stanford.edu/index.html>

additional practices that should always be avoided. Do not rely on fair use when: (1) use causes the owner of the original work to lose money. (2) The copyright owner is offended by your use. For example, your work uses the material for sexually explicit or offensive purposes.⁴³

There are a number of other online resources available to independent filmmakers looking to protect themselves from unwanted legal action. The Stanford Copyright and Fair Use Center⁴⁴ provides best practices guides, tutorials, and access to copyright litigation liability insurance. Stanford's Center for Internet and Society⁴⁵ even has access to lawyers who will defend copyright claims pro bono or at reduced rates.

Independent filmmakers should consider the following before using unauthorized material they hope to defend with a fair use argument. Is the material absolutely essential? Can rights be secured for the material? Is the material used as sparingly as possible? Is there case law relevant to this use of material? Have best practices guides been consulted, does the use fit within the traditionally accepted guidelines? And of course, when in doubt, consult an attorney before publishing unauthorized material.

⁴³ "Stanford Copyright & Fair Use - Disagreements Over Fair Use: When Are You Likely to Get Sued?" *Stanford Copyright & Fair Use Center*. Web. 27 Feb. 2011.

<http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-d.html>.

⁴⁴ Online at <http://fairuse.stanford.edu/index.html>

⁴⁵ Online at <http://cyberlaw.stanford.edu/projects/documentary-film-program>

IX. Conclusion

A fair use defense can adequately protect independent filmmakers looking to use copy written material they do not have the financial resources to purchase, and in a greater sense fair use helps reconcile copyright interests with the intentions of the first amendment. Fair use's function is incredibly flexible. Its importance transcends its use as cost saving measure. Fair use promotes the free dissemination of important ideas. Courts have continually applied fair use flexibly in instances where there was a strong public interest in disseminating information or when the use transcends the purpose of the original. While being filmed for, *The New Americans*, a series titled about new immigrants to the U.S. Israel Nwidor whistles along to a George Strait song on his car stereo.⁴⁶ The Filmmakers invoked fair use because Israel spontaneously chose the music and whistled in a scene intended to show his daily life as a new immigrant. The song was not meant to be a soundtrack element. While fair use is used regularly within documentary filmmaking, risk-adverse filmmakers and copyright error and omission insurance providers sometimes fear costly lawsuits from media companies with unlimited legal resources. So, while it is immensely flexible, some scholarship suggests fair use's lack of unified direction and reliance on

⁴⁶ "Incorporating Incidental Sounds and Images in Documentary Footage." *The New Americans*. Center for Social Media. Web. 05 Mar. 2011. <<http://www.centerforsocialmedia.org/fair-use/videos/podcasts/new-americans>>.

just a few flagship cases undermines its usefulness.⁴⁷ However, if practitioners utilize fair use for the purposes of adding something new for a societal benefit, “The doctrine [fair use] is entirely equitable and is so flexible as virtually to defy definition.”⁴⁸

⁴⁷ Bebee, Barton. "An Empirical Study of U.S. Copyright Fair Use Opinions 1978-2005." *University of Pennsylvania Law Review* No. 3 156. January (2008). *Pennumbra.com*. Web. 27 Feb. 2011. <<http://www.pennumbra.com/issues/pdfs/156-3/Beebe.pdf>>.

⁴⁸ *Time Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130 - Dist. Court, SD New York (1968)

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"BMI | About." *BMI.com*. Artistshouse Music. Web. 10 Feb. 2011. <<http://www.bmi.com/about/>>.

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