

# Fair Use and Best Practices: Surprising Success

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The viability of fair use—legitimate, unauthorized use of copyrighted material under certain circumstances—has come into question, both with aggressive policing of copyright by large media holders and with changing digital practices. And yet fair use is arguably the most important feature that maintains copyright law's constitutionality; without flexible, useable exemptions to copyright ownership rights, the Supreme Court has held, copyright law could clash with the First Amendment.<sup>1</sup>

The creation of the [Documentary Filmmakers' Statement of Best Practices in Fair Use](#)<sup>2</sup> demonstrates that in fact fair use is a vital and functional part of copyright law, when its terms are well-understood by a particular creative community. Released in November 2005, it has already changed industry practice to the point that all major insurers of documentary film now routinely accept fair use claims that a lawyer asserts are backed by the Statement.

As facilitators and coordinators of the Statement, we were frankly surprised by the rapidity of the change. We anticipated a slow process of adoption; we have instead watched as more venturesome marketplace

actors quickly cleared a path that many others followed.

Taking advantage of the recent trend toward “transformativeness” analysis in the courts,<sup>3</sup> the Statement clarifies when it is safe for a filmmaker to assert fair use, focusing on four typical situations for filmmakers: quoting media in order to critique or analyze it; quoting media to make a point about the culture; incorporation of copyrighted works in the process of filming something else; and quoting to make a historical point. (These four cases do not, of course, exhaust fair use, as the Statement makes clear, but they cover the great majority of issues that arise for documentary filmmakers.) The Statement resulted from a year-long process of small-group deliberations among members of five national filmmaker organizations.

The theory behind Statement is that courts respect the views of responsible professionals about what kinds of uses are fair in their area of practice.<sup>4</sup> [FN here to online version of my article].. In practice, the clarification offered by the Statement has made it possible for filmmakers to dramatically lower clearance costs while also honoring copyright ownership, which filmmakers as copyright holders hold in understandably high regard.

“Success has many mothers,” said Michael Donaldson, Esq., of the Los Angeles Firm of Donaldson and Hart, and a member of the project's legal advisory board. “You can now see many organizations building it into their process, and starting their own projects depending on it.” He pointed, among other things, to Stanford University's Fair Use Project, which defends filmmakers so long as their fair uses accord with the Statement.

Filmmakers, who want access to television and theaters (that would be most of them) need for gatekeepers to agree to their claims. The Statement almost immediately made that possible, and more and more gatekeepers are turning to it. Only eight weeks after release of the Statement, three films (*Hip Hop: Beyond Beats and Rhymes*, *This Film Is Not Yet Rated*, and *The Trials of Darryl Hunt*) went to the Sundance Film Festival—a make-or-break place for the documentary market—because they had

been able to justify fair use using the Statement. Partly as a result of their Sundance showcasing, all three received television screenings from entities that approved their fair uses of major parts of the films. *Hip Hop* was picked up by PBS/ITVS “Independent Lens”; *This Film* went to the IFC cable channel, which went so far as to write its own internal fair use policy; and *Hunt* went to HBO.

Filmmakers have also used the Statement in order to conduct reasoned negotiations that lower clearance costs. IFC's *Wanderlust*, a film about road movies, licensed clips from several studios and used the Statement to lower its costs by hundreds of thousands of dollars.

Television programmers increasingly turn to the Statement. U.S. public television has broadly incorporated the Statement. Independent Television Service (ITVS), which co-produces dozens of television programs a year, endorses it. Producers at WGBH, one of the largest producers in U.S. public TV, give it out to their producers, and use it themselves. Public Broadcasting Service (PBS) has shared it with all general counsels and general managers in its network. On a case-by-case basis, other cable companies, including HBO, Discovery Times and the Sundance Channel, have accepted fair use claims grounded in the Statement.

Professionals have found the Statement valuable. The legal community has publicly recognized the Statement at The Copyright Society of the U.S.A., the leading association of copyright attorneys, which has showcased fair use and the Statement at regional and national meetings. The University Film and Video Association, the leading association of film and video teachers in higher education, has endorsed it and teachers in the UFVA's Fair Use Working Group have developed boilerplate teaching language.

Online video organizations have found it useful. Joost has endorsed the Statement, and Revver.com links to the Statement on its copyright page for uploaders.

Errors and omissions insurance may well be the best gauge of the adoption of fair use in general, and the Statement in particular; since insurance companies are both the ultimate gatekeepers for television documentary and also historically cautious to adopt practices that involve risk. And since fair use is a right, which can be challenged as well as asserted, insurance companies have typically only accepted fair use

claims with considerable negotiation, on a case by case basis, and have much more routinely insisted that rights be licensed.

The four companies most used by U.S. documentary filmmakers—AIG, MediaPro, ChubbPro, and OneBeacon—all announced programs to cover fair use claims between January and May of 2007. They first became aware of this issue for documentary filmmakers through meetings in autumn 2006, coordinated by American University law professor Peter Jaszi, P.O.V. executive director Simon Kilmurry, and insurance broker Debra Kozee. Soon after, Kozee tested the waters with Byron Hurt's *Beyond Beats and Rhymes*, which has extensive quotation from hip hop video and music. She found several insurance companies newly interested, with all requiring a legal letter of opinion about fair use. The Statement made such a letter of opinion far easier to write than ever before. Jaszi complied, and Hurt's film was insured by AIG.

"I think AIG was more aware earlier of the value of the Statement because of New York geography," Kozee recalled with a smile. "I bumped into their rep all the time because our offices were around the corner from each other."

AIG quietly began offering coverage based on the precedent set by Hurt's film. MediaPro was the first to make public its acceptance of fair use claims, at the International Documentary Association's 26<sup>th</sup> Annual Celebration of Academy Award Nominees in February 2007. Soon ChubbPro also announced its willingness to insure fair use claims with proper opinion letters, and OneBeacon followed in April.

MediaPro made a special arrangement with Hollywood attorneys and with the Stanford University's Fair Use Project. If the Fair Use Project agrees to defend a filmmaker in case of lawsuit pro bono, or if several Hollywood attorneys including Michael Donaldson agree to defend the filmmaker for reduced fees—both decisions dependent on the filmmaker complying with the terms of the Statement—MediaPro agrees to pay legal costs if the defense fails. MediaPro also requires a complete shotlist.

Other companies follow AIG in simply requiring a legal letter of opinion. ChubbPro's Ken Goldstein, worldwide media liability manager for Chubb Specialty Insurance, noted that in the past ChubbPro had been willing, in principle, to consider insuring a fair use claim, but since

the Statement's release is willing to make that explicit: "In light of recent developments in the industry," he noted, "we have added a fair use endorsement to our media product library."

Insurers do not have standard pricing. Insurance policies are each negotiated individually, and filmmakers sometimes try several companies to find out which offers the best arrangement.

"I'm really pleased that documentary filmmakers now have this insurance option," said Kozee. "It's still important for filmmakers to recognize that getting the best insurance policy still requires negotiation."

The Documentary Filmmakers' Statement of Best Practices in Fair Use has had a profound effect on the documentary marketplace, still shy of its two-year mark—all without jeopardizing the strength of copyright ownership, if filmmakers continue to use it and tell others about its effectiveness. Furthermore, the example is being emulated by other creative communities. Media literacy teachers, who need to quote copyrighted material to teach, are now working on a similar statement of best practices. As well, discussions are underway with film scholars, art teachers, and dance professionals.

## ENDNOTES

1. (1) See *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003).
2. Available at [http://www.centerforsocialmedia.org/resources/publications/statement\\_of\\_best\\_practices\\_in\\_fair\\_use/](http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/).
3. (2) See generally *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324 (S.D.N.Y. 2005).
4. See Peter Jaszi, "Motion Pictures and Copyright Discipline," forthcoming in the *Utah Law Review*, and the *Oxford Handbook of Film and Media Studies*, and available at [http://www.centerforsocialmedia.org/files/pdf/fairuse\\_motionpictures.pdf](http://www.centerforsocialmedia.org/files/pdf/fairuse_motionpictures.pdf)