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Freedman on Documentary Films and Fair Use

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SUMMARY: The defense of Fair Use in a copyright infringement suit has presented a moving target for many years. The application of this doctrine to the documentary film genre has attracted notice from the courts and interest from practitioners. Is the application of this difficult doctrine changing?

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ARTICLE: The documentary film as an art form and public entertainment has been growing at a frenetic pace, fueled by the proliferation of basic cable channels in search of content and the emergence of the documentary as broad-based public entertainment in movie theaters. As documentary filmmakers broaden their scope of topics and content, they are increasingly feeding on pre-existing bodies of work under the long-standing, but quite imprecise, fairness doctrine of the Copyright Act.

The Fair Use Criteria. The United States Copyright Act grants to the authors of creative rights the exclusive right to copy, display, and vend the fruits of copyrightable works they have created. *17 USCS § 101* The law is intended to foster creative works for the good of society. A defense to a claim of infringement of these exclusive rights is the doctrine of Fair Use. [*17 USCS § 107*].

To paraphrase § 107, an exception to the exclusive rights of copyright ownership is recognized when that right is used by another for purposes such as criticism, comment, news reporting, teaching, scholarship, and research after consideration of four factors:

1. The purpose and character of the use being made of the work (e.g., profit or non-profit, commercial or non-commercial).
2. The nature of the copyrighted work (e.g. factual or non-factual).
3. The length of the work being copied (i.e., the percentage of the work being copied).
4. The impact on the market for the original work (e.g., would the widespread use of the second work affect the

market for the first?).

See *Nimmer on Copyright* § 13.05

This extensive analysis as it relates to copying in documentaries can be found in *Hofheinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127 (2001), where the Eastern District Court of New York found that the producer of a documentary on the genre of monster movies that used excerpts from commercial monster movies, could successfully assert the Fair Use defense against the owner of those movies who was claiming infringement. See also, *Kramer v. Thomas*, 2006 U.S. Dist. LEXIS 96714 (C.D. Cal. 2006), where the Central District Court of California found that the producers of a documentary motion picture incorporating music owned by the plaintiff could successfully assert the defense of Fair Use in a claim by the owners of the music for copyright infringement.

A Sense of the Dilemma. For many years documentary filmmakers and their counsel took a narrow view of the Fair Use defense in determining whether to incorporate portions of other persons' copyrighted works in their documentaries. The view seemed to be that "an infringement is an infringement is an infringement." Most documentary filmmakers aptly fit the description of the starving artist who has put his last dollar into the film-and then some-and cannot afford to sustain the defense of a copyright infringement suit, regardless of the merits of his Fair Use defense.

Furthermore, most filmmakers were obligated to obtain Producer's Errors and Omissions Insurance before they could distribute their films in theaters or air them on television, and neither the insurance carriers, the networks, nor the distributors saw any upside in pushing the Fair Use defense envelope. The insurance carriers were risk-adverse for obvious reasons; and the networks and distributors were often the owners of the works being infringed. The documentary filmmaker often stood alone, and if he wanted to put up a fight, it was likely to be with the last ounce of his attorney's blood as most documentary producers could not afford the counsel fees for such litigation. See *Entertainment Industry Contracts*, 88.02.

Even if the filmmaker could afford to finance such a defense, the outcome was fraught with uncertainty. One commentator concluded that the doctrine of fair use was impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases was futile. See Lloyd L. Weinrib, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 *Harv. L. Rev.* 1137, 1138 (1990).

However, as documentary films began to proliferate, many subjects could be covered only through the use of some footage, photos, or music from other copyrighted sources, and networks were looking for productions with high production values. As a result, the pressure on independent filmmakers to take greater risks under the Fair Use Defense continued to mount.

As a parallel concern, as documentaries became increasingly popular and the demand for use of previously copyrighted works grew, the prices for use of such material rose at an ever greater rate, making the cost of licensing such materials unaffordable to many documentary filmmakers. For an analysis of this issue, see Patricia Aufderheide and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Center for Social Media (2004). Quoting one rights clearance professional, that work states "it's easier to get someone on the other end of the phone, but now it's hard to pay the outrageous fees that they want. This problem is especially bad at the larger companies, because they don't care what the message is." *Id.* at p. 8.

The Times They Are a Changin'! The mounting pressure on the Fair Use defense finally found a pressure valve in the publication of *Documentary Filmmakers' Statement of Best Practices in Fair Use* by the Center for Social Media at American University on November 18, 2005. The Statement endorsed an interpretation of the Fair Use defense favorable to the filmmaker in instances where the filmmaker was (1) employing copyrighted material as the object of social, political or cultural critique; (2) quoted copyrighted works of popular culture to illustrate an argument or point; (3) captured copyrighted media content in the process of filming something else; and (4) used copyrighted material in the context of a historical sequence.

Filmmakers took to this more liberalized statement like moths to a fire. To complete the analogy, documentary producers also ran a substantial risk of being burned by forces *greater* than themselves, such as large media conglomerates who owned much of the work that might be infringed.

Changes Are Taking Root. The gauntlet has been thrown. The movement to liberalize interpretations of the Fair Use defense has begun. An on-line article from the show-biz chronicler, *Variety*, on February 22, 2007, reported "Initiative by Media/Professional Insurance is designed to explicitly allow documentarians to retain coverage if they rely on the "fair use" doctrine... Goal is to enable docus to contain clips without forcing filmmakers to pay hefty licensing or release fees." Those fees could be as much as \$10,000-\$15,000 per clip.

Another commentator has proposed that Congress creates a Fair Use Board in the U.S. Copyright Office "that would have the power to declare a proposed use of another's copyrighted work to be a fair use." See, Michael W. Carroll, *Fixing Fair Use*, 85 *NC L Rev* 1087 (2007).

Conclusion. It is clear that interpretations of the Fair Use defense as it applies to documentary films are undergoing a change. However, the ultimate arbiters of the law—the courts—have not yet had an opportunity to rule on the new interpretation. It is clear that documentary filmmakers will be taking a more liberal approach to fair use, and at least one errors and omissions insurance carrier appears willing to endorse such an interpretation under certain circumstances. Whether such greater use of copyrighted work will establish the kind of custom and usage in the industry that courts will take judicial notice of has yet to be demonstrated. Until such time as that has occurred, counsel to documentary filmmakers will still be on the spot to advise clients whether the inclusion of copyrighted film, photographs, and music in documentary films will be defensible as Fair Use.

Guide to Practitioners. The classic interpretations of Fair Use will continue to provide some degree of safe harbor. This practitioner has often posed a more simplified test calibrated to documentary films. *Is the use arguably a form of commentary on the piece being taken, or is the use an enhancement of a film's production values?* If the former, it is likely that a defense of Fair Use will be recognized. If the latter, there is no reason why a defense of Fair Use should succeed.

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