

FAIR USE AND THE FIRST AMENDMENT: CORPORATE CONTROL OF COPYRIGHT IS STIFLING DOCUMENTARY MAKING AND THWARTING THE AIMS OF THE FIRST AMENDMENT

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I. Introduction: Documentaries and the First Amendment

From the New York Times, October 16, 2005:

The moment seemed innocuous enough.

Michael Vaccaro, a fourth grader, had just left P.S. 112 in Brooklyn and was headed home with his mother. Two filmmakers were in front of him, their camera capturing his every movement on video, when his mother's cell phone rang.

"It was such an indicator of today's culture," said Amy Sewell, a producer of *Mad Hot Ballroom*, the documentary that follows New York City children as they learn ballroom dancing and prepare for a citywide contest. "Michael's mom had just asked him how school was, her cell phone rings, she answers it, and the look on his face says, 'I don't get to tell my mom about my day.'"

In addition, the ringtone was "Gonna Fly Now," the theme from "Rocky," and the neighborhood was Bensonhurst. "How perfect was that?" Ms. Sewell said.

Perfect, but a problem. Had the ring tone been a common telephone ring, the scene could have dropped into the final edit without a hitch, the moment providing a quick bit of emotional texture to the film. But EMI Music Publishing, which owns the rights to "Gonna Fly Now," was asking the first-time producer for \$10,000 to use those six seconds.

Ms. Sewell considered relying on fair use, the aspect of copyright law that allows the unlicensed use of material when the public benefit significantly outweighs the costs or losses to the copyright owner. But her lawyer advised against it. "I'm a real Norma Rae-type personality," Ms. Sewell said, "but the lawyer said, 'Honestly, for your first film, you don't have enough money to fight the music industry.'" After four months of negotiating – "I begged and begged," Ms. Sewell said – she ended up paying EMI \$2,500.

Total music clearance costs for *Mad Hot Ballroom*, which featured songs of Frank Sinatra and Peggy Lee, came to \$170,000; total costs over all were about \$500,000.¹

A typical reader might ask, "Why would a music publisher ask a low-budget documentary to pay \$10,000 for a brief, incidental ringtone sound?"

¹Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. TIMES, October 16, 2005.

Another, more entertainment-industry savvy reader might say, “Hey, reality television and movies are filled with the sights and sounds of contemporary culture – if they have to pay license fees, why shouldn’t documentaries?”

Why should anyone have to pay to use a copyrighted ringtone, or a clip from a news program, TV show or movie? Aren’t these sights and sounds out there for us all to use? What about the First Amendment and our free-speech rights?

The answer to these questions, of course, is that these materials constitute copyrighted intellectual property. Copyright is as much a part of the U.S. Constitution as the First Amendment; legal scholars have traditionally viewed it as advancing First Amendment interests by providing an incentive for speech. The U.S. Supreme Court has stated, “the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”²

The Copyright Act provides protection for both aural and visual works.³ Thus the copyright owner of a ringtone sound, like all copyright owners, has the right to decide who may use it and what price to charge.

What about the fair use doctrine, mentioned in the New York Times article? Fair use is one of the so-called “internal safety valves” that help reconcile copyright’s inherent

² Harper & Row v. Nation Enterprises, 471 U.S. 539, 558 (1985) (opinion by Justice O’Connor).

³ Copyright law protects “original works of authorship fixed in any tangible medium of expression,” including pictorial and graphic works, audiovisual works and sound recordings. (17 U.S.C., § 102(a)).

limitations with the First Amendment's guarantee of free speech.⁴ Fair use provides a narrow exception for some types of use. It is called a safety valve because it purportedly guards against the chilling effect that would inhibit public speech if copyright owners were granted unlimited freedom to control the use of their creative works. On paper, the doctrine seems to strike a fair balance – but as the news story indicates, reality does not match up to the principle.

So why should documentary makers have different rights than other filmmakers? If a music publisher is going to charge for the use of its ringtone, why should it make any difference who's using it? And why would something this trivial implicate the First Amendment?

This paper addresses these issues. Its thesis is that documentaries constitute a crucial part of contemporary public debate, because in today's highly consolidated mass media environment, they offer independent voices that the First Amendment was designed to protect. Current intellectual property practices are chilling speech by forcing documentary filmmakers to tailor their films to accommodate new, strict licensing practices.

Supreme Court Justice Stephen Breyer has written, "The First Amendment must not be read in isolation, but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions."⁵ Documentaries fit into this framework by offering speech that

⁴ Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STANFORD L.R. 1, 4 (Oct. 2001).

⁵ STEPHEN BREYER, ACTIVE LIBERTY 39 (2005).

contributes to public debate of significant issues, thereby helping to maintain our democratic decision-making institutions.

II. What makes a film a documentary?

What is a documentary film?⁶ These days, the very question generates debate among its own practitioners. Thirty-five years ago, Webster's Dictionary defined the term simply as: **"A motion picture that records news events or shows social conditions without fictionalization."**⁷

A more recent Webster's definition reads: **"A work, such as a film or television program, presenting political, social, or historical subject matter in a factual and informative manner and often consisting of actual news films or interviews accompanied by narration."**⁸

The lengthier, more explicit definition signifies the field's broad development in recent years. The new phrase **"in a factual and informative manner,"** which replaces **"without fictionalization,"** points to problematic gray areas that have become a source of vociferous dispute among documentary-makers. Journalism strives for objectivity, but a documentary work presented in a "factual and informative manner" may not be entirely factual. It may contain re-enactments and fictional embellishments, and it also may convey an explicitly partisan point of view. Morgan Spurlock, the filmmaker who

⁶ "Nonfiction film" is another term commonly used to refer to the same type of work.

⁷ WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 540 (Unabridged 2d ed. 1970)

⁸ Eugene Hernandez, *Is "Fahrenheit 9/11" a Documentary Film, or What is a Documentary Film?*, http://www.indiewire.com/onthescene/onthescene_040702docs.html (definition cited by *Super Size Me* director Morgan Spurlock).

embarked on an extended McDonalds-only diet for “Super Size Me,” his commentary on how Americans’ fast-food habits affect our national health, has said:

I believe that the very act of filmmaking, whether fictional or non-fictional, is filled with subjective decisions made on the part of the director for the betterment of his/her piece. Just because you are presenting facts and crafting an honest storyline does not completely remove the involvement of one's viewpoint from a project . . . we knowingly make decisions in the edit room that can affect the audience's reaction.⁹

When Michael Moore burst onto the cultural scene in the late 1980s with his provocative style of filmmaking (“Roger and Me,” “Bowling for Columbine,” and most recently, “Fahrenheit 9/11”), he raised the profile of the genre, even as he generated arguments over how much of a personal point of view should be inserted into a nonfiction film. Moore unapologetically compares his work to that of a newspaper columnist: “Documentaries by their very nature are supposed to have a point of view. . . . My form of doc is an op-ed piece. It presents my opinion that's based on fact.”¹⁰

This dispute over definition comfortably fits into the long history of American public debate. In fact, producer Liz Manne compares the current obsession over the definition of “documentary” to the lengthy Supreme Court discussion on what constitutes pornography: “It truly does come down to, ‘We know it when we see it.’”¹¹

Regardless of definition, documentaries constitute protected speech. The Supreme Court has called motion pictures “a significant medium for the communication of ideas,”¹² therefore “within the ambit of protection which the First Amendment . . .

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952)

secures to any form of speech or the press.”¹³ While film technology may have been unknown to America’s Founders, the messages communicated by documentary films are part of the robust public dialogue that the First Amendment was designed to protect. Whether objective or subjective, aiming at illumination or persuasion, the messages they impart are all in keeping with our system’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁴

III. How insurance, licensing requirements and the threat of litigation affect documentary filmmaking

Documentaries need audiences if their speech is to be heard. But without a detailed record of rights clearance, by means of licensing or written authorization, they cannot get errors and omissions (“E & O”) insurance, without which a broadcaster or cablecaster will not show the work.¹⁵ Programmers, insurer and distributors are primarily concerned about the risk of lawsuits, however frivolous, rather than the story, message or information that the filmmaker is trying to convey.¹⁶

E&O insurance was not always a necessity, but today programmers routinely require it, no matter what the film’s size or subject matter. It is considered necessary these days because copyright owners now enforce their rights more aggressively than two

¹³ *Id.*

¹⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Opinion by Justice Brennan).

¹⁵ Patricia Aufderheide and Peter Jaszi, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS*, Center for Social Media 5 (November 2004).

¹⁶ *Id.*

decades ago,¹⁷ in large part because cable and DVD provide increased possibilities for distribution and revenue.¹⁸

E & O insurance applications ask whether the filmmaker has obtained licenses or consents from all copyright owners whose work appears in the finished film. (See Appendix A for a sample E&O liability insurance application.) If the filmmaker cannot truthfully answer “yes,” an insurance policy will not be issued unless the film’s legal counsel can persuade the insurer that the chance of litigation is slim.¹⁹ The result is that filmmakers are often compelled to edit their work to meet insurance requirements. This harms the interests of not just the filmmaker, but also the public.

Thus, another thesis of this paper is that the “clearance culture,” in which anything and everything that could possibly lead to a lawsuit must be cleared, is choking speech by hindering or preventing production of documentaries about important issues.

For example, a documentary entitled *Behind the Labels* juxtaposed brief shots from a Gap commercial with hidden-camera images from a Saipan sweatshop typical of those that manufacture Gap clothing.²⁰ The Oxygen Channel wanted to show the film, but the company’s attorneys insisted that the Gap footage be removed out of concern about liability.²¹ A narrator’s voiceover could have conveyed the same information, but not as memorably or effectively as the juxtaposed footage would have.

¹⁷ Marjorie Heins and Tricia Beckles, WILL FAIR USE SURVIVE?, Brennan Center for Justice at N.Y.U. School of Law 6 (December 2005)

¹⁸ Aufderheide and Jaszi, *supra*, at 8.

¹⁹ Producer Robert Stone (*Guerilla: The Taking of Patty Hearst*) says, “If you ever have a claim on E&O insurance, you might as well go into another line of work. You can never file a claim or you get blacklisted – and can never be insured again.” (Aufderheide and Jaszi at 23.)

²⁰ Aufderheide and Jaszi, *supra*, at 25.

²¹ *Id.*

Gap owns the advertising material that the filmmaker wanted to use, and a company that spends millions of dollars on ad campaigns doesn't want consumers associating its products with the degrading conditions under which they are made. No matter how unlikely the possibility that the clothing company would have filed suit against Oxygen, thereby exacerbating an embarrassing situation, Oxygen's lawyers persuaded creative executives that this was a risk they could not afford to take. An opportunity was thus lost to make a visual point that would have resonated with audiences, and could have helped lead to social change.

Licensing problems generally fall into one of four categories:²²

1. Filmmakers don't know where to go to obtain the rights. For example, when one filmmaker wanted to use brief segments from the musical works of Shostakovich, she was dismayed to discover that obtaining rights was much more difficult and time-consuming than she had foreseen.²³ "It was extremely complicated. Different publishers publish Shostakovich. I had to figure out which publisher has the right to license Shostakovich in North America."²⁴

Most typically, the inability to track down rights owners arises with orphan works, i.e., copyrighted works whose owners are difficult or even impossible to locate. Under the 1976 Copyright Act, copyright originates the moment an original work of authorship is fixed in a tangible form.²⁵ It need not be registered with the Copyright

²² *Id.* at 11.

²³ Heins and Beckles, *supra*, at 19.

²⁴ *Id.*

²⁵ 17 U.S.C., § 102(a).

Office or published with notice to obtain protection, nor is there any renewal requirement for registered works.

When filling out an insurance application, a filmmaker whose film contains orphan works is stuck: how can you get a work cleared if you don't know where to go? In the current environment, a filmmaker who wants to play by the rules will have to remove all images whose copyright owners can't be located.

2. The filmmaker knows who owns the rights, but can't get a response. For example, Yoko Ono would not respond to the makers of *Looking for Lennon*, who were requesting the rights to John Lennon's "Imagine." Ron Merk, the film's producer, says, "It's very frustrating, because the rights owners have no obligation to give you a license."²⁶

3. The filmmaker gets a response, but the amount of money requested is exorbitant. When the filmmaker who wanted to license Shostakovich's work finally located the composer's North American publisher, she was told the license price would be fifteen cents per DVD for each segment used, with a minimum of \$5,000 for five years.²⁷ This sum only covered North American rights (distribution is divided into geographic territories), and did not include public television rights or film festival rights.²⁸ While that sum might be nominal for a large studio, it is often prohibitive for an independent producer.

4. The filmmaker gets a response, only to learn that there are further hoops to jump through just to get the proposal read. According to *Looking for Lennon* producer Merk, "There are so many lawyers and agents and managers, those levels of

²⁶ Aufderheide and Jaszi, *supra*, at 11.

²⁷ Heins and Beckles, *supra*, at 19.

²⁸ *Id.*

buffers I would call them, between you and the creative people who create these other rights that you need to utilize. Sometimes it's just impossible to get to them."²⁹

Licensing problems implicate the First Amendment because freedom of speech encompasses not just the freedom to voice diverse opinions, but also the freedom to hear them. The Supreme Court has stated, "The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas . . . furthers the purposes of the First Amendment."³⁰ Stringent licensing requirements thwart the communication of ideas by limiting the public's ability to view creative works about social, political and cultural history.

For example, *Strange Fruit*, a documentary about lynching, depended on music that couldn't be cleared for home video. It is therefore unavailable on DVD.³¹ Licensing requirements are preventing distribution of this work about a dark, often-overlooked phenomenon in our history.

Similarly, *Eyes on the Prize*, the landmark fourteen-part series about the American civil-rights movement that originally aired on PBS stations during the 1980s, is no longer broadcast or sold new in the United States.³² The series utilized newsreels, clips from local television stations, still photos and music. In preparation for airing,

²⁹ Aufderheide and Jaszi, *supra*, at 11.

³⁰ First National Bank of Boston v. Bellotti, 435 U.S. 765, 806-807 (1978)

³¹ Aufderheide and Jaszi, *supra*, at 25.

³² Katie Dean, *Beary Days for Eyes on the Prize*, WIRED NEWS, December 22, 2004, <http://www.wired.com/news>.

licensing rights had to be acquired for 272 still photographs, 492 minutes of scenes from more than 80 archives, and the songs associated with the civil-right movement.³³

When *Eyes on the Prize* was originally produced, the cost of licensing long-term rights was prohibitive, so the filmmakers opted for shorter options. Licensing rights began to expire in the mid-1990s. As soon as the first group of rights expired, the film had to be pulled from distribution.³⁴ The renewal process is proving time-consuming and expensive.³⁵ Because of this, an entire generation of students is missing the opportunity to watch an engrossing account of an important era.

IV. Why should documentaries be treated differently from other films?

Why should the First Amendment and fair use implicate documentaries more than other films? The answer is: because documentaries are as important to our public debate as other films, but lack the heavy-duty economic muscle to assert their rights that mainstream studio films possess.

Documentaries have long been the poor but well-meaning relative of the feature-film industry, the sober, serious, “educational” side of the industry. Yet they have also been some of our most effective agents for social change and enlightenment.

³³ Nancy Ramsey, *The Hidden Cost of Documentaries*, N.Y. Times, October 16, 2005.

³⁴ *Id.*

³⁵ *Id.*

A. Documentaries deal with significant contemporary issues

Documentaries fill much the same the role that muckraking journalists served a century ago, acting as a social conscience to open the public's eyes to social ills and the abuses of the powers that be:³⁶

- *The Fog of War* showed Robert McNamara as he recalled the unfolding of the Vietnam War, and the flawed assumptions that went into Pentagon planning.
- *Born into Brothels* educated Americans about the lives of the children of Calcutta prostitutes.
- *Serengeti Shall Not Die*, about the Serengeti National Park in Tanzania, raised worldwide awareness of the need for wildlife conservation and helped preserve the park for future generations.
- *Primary*, which followed Democratic candidates John F. Kennedy and Hubert Humphrey through the 1960 Wisconsin primary, and *The Control Room*, about the 1992 Clinton campaign, showed us the inside workings of presidential campaigns.
- *Harlan County USA* educated the rest of the country about the hard lives of striking Kentucky coalminers.
- *Enron: The Smartest Guys in the Room* conveyed Enron executives' scheming, arrogance and duplicity more forcefully than the book from which it derived, by letting us see for ourselves how smoothly Ken Lay, Andrew Fastow and others

³⁶ "Muckraker" definition: Wikipedia, <http://www.en.wikipedia.org>.

lied in front of the camera, even as Enron's financial house of cards was collapsing.

B. Most documentaries are not money-makers

Regardless of subject matter, most independent³⁷ documentaries are a labor of love. No matter how small their budgets, few earn back their investment. While the same financial facts of life may hold true for feature films, the difference is that features are financed by business entities.³⁸ To use a political analogy, if features are financed like presidential campaigns, and attract contributors who believe they may earn a return on their investment, then documentaries, as often as not, are financed more like small-town city council races – through personal appeals to relatives and friends, friends of friends, and through in-kind contributions.³⁹

Compared to the audiences for large-scale studio films, documentary audiences constitute a select few: members of the intellectual and cultural elite, and those with a particular interest in a specific subject matter. Appendix B illustrates a comparison of the seventy-five top-grossing feature films and documentaries, in both list and chart form. The disparity is almost laughable: While the top features all earned \$180 million or more, only a very few of the top documentaries have grossed more than \$5 million. A

³⁷ To a certain extent, all documentaries can be called “independent,” because major film studios do not make documentaries (although they may distribute them). Here, the term “independent” refers to nonfiction films other than those whose production is ordered and supervised by television companies such as the History Channel.

³⁸ –with a few notable exceptions, such as Robert Townsend's 1987 *Hollywood Shuffle*, which, according to legend, the filmmaker was able to finish only by maxing out his personal credit cards.

³⁹ Interview with independent documentary producer Mindy Pomper Johnson (July 2005).

studio feature film whose opening weekend garnered such dismal earnings would be yanked from the market.

C. Documentaries are closer to journalism than to fiction

Notwithstanding the ongoing debate over the definition of “documentary,” all documentary-makers would agree that a bright line separates their genre from fiction films. To use Michael Moore’s print-media metaphor, documentary films might be op-ed pieces, features or news stories, but they are not short stories or novels. And they usually cover subjects that are unlikely to be covered by mainstream media.

D. Documentaries contribute an independent voice to public debate

Documentaries serve as perhaps the last remaining vehicles for independent voices in mass media. A recent compilation of media ownership shows that the vast majority of this country’s print, broadcast and cable companies fall under the umbrella of five publicly owned companies: Time Warner, Disney, General Electric, News Corp, and Viacom. (See Appendix C.) This has a profound affect on the nature of what gets made.

It’s not that television and film studios censor their creative executives: In a society that prides itself on freedom of thought, only a very foolish corporate executive would venture to dictate which subjects are off-limits to his programmers. But such meat-axe efforts are not necessary. Creative executives understand that in order to hold their jobs, their programming must contribute to overall profitability by attracting the largest possible numbers in the desired demographic group. Focus groups and marketing studies advance their efforts to appeal to that audience, whether it be males aged 18-35 or adults aged 25-49. All too often, this leads to lowest-common-denominator programming.

In contrast, documentaries do not attract a broad audience. However, they do draw the attention of those concerned with public policy, including the country's influential opinion-shapers – the kind of people who watch the Sunday morning talk shows while the rest of the country is sleeping late or driving the kids to Sunday school. And therein lies their importance to our system of government. Documentaries provide those who seek to shape public policy with vital information.

Supreme Court Justice Stephen Breyer's book *Active Liberty*, which offers his vision of our constitutional system, emphasizes the First Amendment's role in promoting informed participation in the electoral process:

The people, and their representatives, should possess the tools, such as information and education, necessary to participate and govern effectively.⁴⁰ . . . The First Amendment seeks to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process.⁴¹ . . . It seeks primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that 'public opinion which is the final source of government in a democratic state.'⁴²

Documentarians' independent voices contribute to that "exchange of information and ideas" necessary for citizens to "shape public opinion."

V. The common roots of copyright and the First Amendment

Like Isaac and Ishmael, forefathers of the Jews and Muslims, the Copyright Act and the First Amendment share a common ancestry, but have long since diverged into different, often conflicting paths. Both were born in the early days of the United States, products of an educated British ruling class that engaged in animated discussion concerning the relatively new notions that rulers were not divinely appointed, that

⁴⁰ STEPHEN BREYER, *ACTIVE LIBERTY* 16 (2005)

⁴¹ *Id.* at 46.

⁴² *Id.* at 47 (quoting *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.1917)).

humans had certain innate rights, and that governmental power derived from the people, rather than the other way around.

The tension and conflicts inherent in the Copyright Act and the First Amendment are nothing new – they have been there from the start; yet the framers understood them to be able to coexist and serve the common function of helping to create and maintain an informed electorate. However, in recent years the intellectual property rights generated by the 1976 Copyright Act and subsequent congressional amendments have overridden many First Amendment interests – with the blessing and approval of our federal courts.

A. The origins of the First Amendment

The First Amendment – “Congress shall make no law abridging the freedom of speech or of the press” – was part of a Bill of Rights added to the new Constitution to win the approval of anti-Federalists who feared the new constitution lacked sufficient safeguards to prevent the new government from turning into a King George-like tyranny.

The Bill of Rights is best understood as the enactment of a philosophy of individual natural rights that dominated American political thought in the Eighteenth Century.⁴³ This philosophy was articulated in the Declaration of Independence’s pronouncement that individuals possess certain rights by virtue of their nature as rational human beings, not because the sovereign has granted them.

John Trenchard and Thomas Gordon, two widely read British political thinkers whose essays were published in the colonies as Cato’s Letters, identified three central values that the right of free speech is designed to advance:

⁴³ JAMES OSTROWSKI, A PANORAMIC HISTORY OF THE FIRST AMENDMENT, REMARKS TO THE WESTERN NEW YORK LIBRARY RESOURCES COUNCIL (March 22, 1995).

- First, freedom of speech allows people to criticize the government and make it more responsive to popular will. Certainly, Michael Moore would argue that this is the aim of his documentaries.
- Second, freedom of speech is necessary for the pursuit of truth in science and art. Such films as *A Brief History of Time*, about the life and work of cosmologist Stephen Hawkings; *Artie Shaw: Time Is All You've Got*, about the fabled band leader; and *Maya Lin: A Strong Clear Vision*, about the architect who designed the Vietnam War memorial, can be seen as furthering this goal.
- Third, freedom of speech is essential for individual self-fulfillment and expression.⁴⁴ Filmmaker Ross McElwee's quirky, autobiographical documentaries (*Backyard*, *Sherman's March*, *Six O'Clock News*) are his own means of self-fulfillment and expression, employing a highly subjective narration to explain his on-camera experiences.⁴⁵ Despite their highly personal nature, McElwee's films have resonated with tens of thousands of movie-goers.

Thanks to Cato's Letters and other, like-minded political tracts that circulated during the 18th century, by the time the Constitution was drafted, America's leading political thinkers took as a given the principles that freedom of speech and of the press were natural rights belonging to each citizen. Before the Bill of Rights was written, Thomas Jefferson, away in France, chastised his protégé Madison for failing to include a bill of rights in the Constitution which should include, among others provisions, "freedom of the press."⁴⁶

⁴⁴ *Id.*

⁴⁵ PBS website, <http://www.pbs.org/wgbh/pages/frontline/shows/news/etc/bio.html>.

⁴⁶ *Id.*

B. The First Amendment's contemporary interpretation

One hundred seventy-five years after the Constitution was ratified, Justice William Brennan, writing for the Supreme Court in *New York Times Co. v. Sullivan*, described the way in which the Court had amplified the Framers' intentions regarding the First Amendment:⁴⁷

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure **unfettered interchange of ideas for the bringing about of political and social changes desired by the people.**"⁴⁸ . . . The First Amendment, said Judge Learned Hand, "presupposes **that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.** To many this is, and always will be, folly; but we have staked upon it our all."⁴⁹

Thus, from its inception to current times, the First Amendment has been connected – not only in the mind of our highest court, but also in the public consciousness – with the belief that open, informed discussion of current events promotes stability and the overall health of the nation. However, in an era of mass media convergence and consolidation, an "unfettered exchange of ideas" by a "multitude of tongues" becomes more difficult to achieve.

C. Copyright's origins

The Copyright and Patent Clause⁵⁰ provides as to copyrights: "Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings." Like the rest of the

⁴⁷ 376 U.S. 254, 269-270 (1964).

⁴⁸ *Roth v. United States*, 354 U.S. 476, 484 (1957)

⁴⁹ *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C. S. D. N. Y. 1943). [Emphases added.]

⁵⁰ U.S. CONST. Art. 1, § 8, cl. 8.

Constitution, this clause emerged out of habits of thinking that were both based on, and a reaction to, the British model.

The earliest British copyright laws were instruments of censorship. In 1557, Queen Mary Tudor, sister of the better-known Elizabeth I, capped off a long struggle to censor printing presses by officially authorizing the Stationers' Company, a guild of printers.⁵¹ Only members of the company could legally produce books, and the Crown had to approve any books they printed.⁵² The company was authorized to confiscate unsanctioned books.⁵³

Across the Atlantic, the colonies operated under the same law.⁵⁴ Colonial governors were able to chill colonial presses by selectively issuing monopoly licenses.⁵⁵

When the British publishers' monopoly protection came up for renewal in 1709, publishers lobbied to extend their control over publishing.⁵⁶ To draw authors to their cause, they argued that the interests of both authors and the public were harmed by the lack of price stability in the marketplace.⁵⁷ The combined efforts of authors and publishers resulted in the Statute of Anne, commonly considered the first copyright law. The statute established two levels of copyright: New works were protected for fourteen years, renewable for fourteen. Previously published books were granted an additional, nonrenewable twenty-one-year term.

⁵¹ Siva Vaidhyanathan, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* at 37, New York University Press (2003).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Vaidhyanathan at 38.

⁵⁵ *Id.*

⁵⁶ Vaidhyanathan at 39-40.

⁵⁷ *Id.*

Although the author was mentioned as the statute's beneficiary, the act was really another regulation of the practice of printing and selling books, and a recognition of the public's interest in the process.⁵⁸ The statute was designed to balance the interests of the book-printing industry with governmental concerns that monopolies were growing too powerful in England.⁵⁹ In 1709, copyright was not about property, it was about control.⁶⁰ Today copyright remains as much about control as property: Corporations routinely refuse to license uses that they perceive will reflect unfavorably on their "brand."⁶¹

D. The significance of the phrase "for limited times"

The founders understood that the copyright clause could work both ways: Granting a monopoly serves as an incentive for production, but granting permanent ownership of a creative work makes it more difficult for others to adapt or try to build on that work.⁶² Special-interest groups have existed as long as there have been legislatures. This may be why the founders only gave Congress the power to grant copyright protection for "limited times."

The legal precedent for the crucial constitutional phrase "for limited times" lay in a series of English court rulings handed down shortly before the Declaration of

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ --or that they believe will ruffle influential feathers: In August 2004, filmmaker Robert Greenwald released an updated version of his award-winning film, *Uncovered: The Whole Truth About the Iraq War*. For the DVD version, Greenwald added a clip of a Tim Russert interview with President George W. Bush on "Meet the Press," NBC's Sunday morning talk show. The president was shown rather unconvincingly defending his decision to go to war. Greenwald asked NBC for permission to run the one-minute clip, offering to pay for the right, as he had done for every other clip that appears in the film. NBC said no. The network explained to his agent that the clip is "not very flattering to the president." Greenwald included it anyway. (Lawrence Lessig, *Copyrighting the President*, WIRED MAGAZINE. (August 2004.)

⁶² Kenneth A. Paulson, *A constitutional clash: free speech, copyrights and Mickey Mouse*, Oct. 20, 2002, <http://www.freedomforum.org>.

Independence was written. The rulings arose out of a court battle revolving around a fight over ownership rights to a now-forgotten poem called “The Seasons.”⁶³

A certain Millar owned the copyright to the poem.⁶⁴ After the copyright expired, a printer named Taylor published it.⁶⁵ Millar sued Taylor, and won. In *Millar v. Taylor*,⁶⁶ Lord Mansfield wrote an opinion reflecting the view that the poem was literary property subject to the same common-law property rights as other property, and that the author had permanently assigned these rights to Millar.⁶⁷

Five years later, Millar died and his estate sold the rights, which led to another lawsuit.⁶⁸ In *Donaldson v. Becket*,⁶⁹ the House of Lords stated unequivocally that copyright was not a perpetual natural right, but a state-granted privilege that should last for a limited time.⁷⁰ The Lords clearly ruled that there had never been any such thing as copyright at common law. The idea that authors had a natural property right to their work as a principle of common law lasted only five years.

The two cases, coming so shortly before the colonies declared their independence from the British Crown, influenced the drafting of the Constitution’s Copyright Clause. The drafters saw copyright neither as a natural right, nor as a common-law right on a par with other property rights, but as a temporary monopoly designed to encourage the

⁶³ Vaidhyathan, *supra* at 42-43.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 4 Burr. 2303 (1769).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 4 Burr. 2408 (1774).

⁷⁰ *Id.*

investment of time and money in works that might not otherwise find adequate reward in a completely free market.⁷¹

James Madison argued for copyright in terms of “progress,” “learning,” and other such classic republican virtues as literacy and an informed citizenry.⁷² Copyright fulfilled its role for Madison because it looked forward as an encouragement, not backward as a reward.⁷³ Madison believed that if the federal government were to operate as the nexus of competing interests, each interest would need to approach the public sphere with reliable information.⁷⁴ Information could be deemed reliable only if it were subject to public debate. Ideas could be judged beneficial only if they had stood the tests of discourse and experience. In this way, the drafters’ underlying goals for copyright and the First Amendment merged.

VI. Copyright and the evolution of the idea/expression dichotomy

One of the maxims of copyright law, now codified in section 102(b) of the Copyright Act⁷⁵, is that copyright protection does not extend to an idea, but only to the expression of that idea. The idea/expression dichotomy, like the First Amendment and the notion of fair use, was created in a cultural environment where the terms “mass media” and “print media” were synonymous.

⁷¹Vaidhyanathan, *supra* at 8.

⁷² Vaidhyanathan, *supra* at 22.

⁷³*Id.*

⁷⁴ *Id.*

⁷⁵ Section 102(b) states: “In no case does copyright protection for an original work of authorship extend to any idea, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

Judge Learned Hand's opinions played a large role in shaping contemporary legal thinking about where to draw the line between idea and expression, such that appropriation on one side is infringement, but on the other is not. Judge Hand presided over the appeals court responsible for cases from New York City during the formative years of American mass culture, when that city was the center of the motion picture, publishing, music composition and theater industries.⁷⁶

Hand played a part in most of the major copyright decisions of the 1920s and 1930s. In the wake of a number of copyright infringement lawsuits alleging that one theatrical play or motion picture had stolen another's plot, he wrote a series of opinions delineating the idea/expression dichotomy.⁷⁷ Since then, other federal judges have elaborated on his opinions.

Today, in determining whether a defendant has appropriated the plaintiff's expression, or merely the idea, the factfinder investigates whether there are substantial similarities in sequences of scenes, characters, and storyline. More specifically, the process involves examining the following aspects of the works⁷⁸:

- (1) Substantial similarity in expression of the idea – whether the average layperson would recognize the alleged copy as having been appropriated from the work;

⁷⁶ Vaidhyanathan, *supra*, at 106.

⁷⁷ Judge Hand's copyright infringement opinions include *Hein v. Harris*, 175 F. 875 (1910), *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (1930), and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (1936).

⁷⁸ *See Nichols v. Universal Pictures*, 45 F.2d 119; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, *supra*; *Alfred Bell v. Catalda Fine Arts*, 191 F.2d 99 (1951), *Sid & Marty Krofft v McDonald's*, 562 F.2d 1157 (1977).

(2) Similarity is not limited to, on the one extreme examining the text literally, or on the other, to a series of abstract ideas. A court that limited the inquiry to the literal examination of the text would never find plagiarism; a person could make enough changes to escape prosecution.

(3) Characters and plot – the sequence of incidents. It is difficult to find infringement when only the characters are similar.

(4) Scenes à faire – characters, settings or events which necessarily follow from a certain theme or plot situation, or which have been depicted so often as to become part of the popular idiom.

(5) The concept and feel of both works.

While this process may (and often does) lead to disagreements, it sets forth a straightforward framework for analysis of plays, movies, and books. But this framework has no utility in terms of the issues that plague documentary makers who produce nonfiction works in a real-life setting, where the images and sounds of contemporary mass culture are pervasive.

Practically speaking, in today's clearance culture, a documentary film that seeks to capture reality often cannot afford to do so. Because of rights problems, filmmakers sometimes need to falsify or change reality⁷⁹ – even when the film is cinema verité, aimed at showing the mundane truth of peoples' everyday lives and the social context in which they live.⁸⁰ One filmmaker says that when entering a new location, to avoid clearance problems, “The first thing you do, in a bizarre way, is that you quiet things.

⁷⁹ Patricia Aufderheide and Peter Jaszi, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS*, Center for Social Media at American University 17 (November 2004).

⁸⁰ Robert McConnell, *Realism*, <http://www.Parlez-vous.com> (1997)

You might not necessarily want to turn the music off, because it might work for the scene. However, from a budget standpoint you might find yourself turning it off.”⁸¹

VII. The origins of fair use

Understanding why fair use, that purported constitutional safety valve, works so poorly in practice requires a look at its origins. The roots of what we now know as “fair use” are firmly planted in the early English common law, where the defense was known as “abridgement,” based on an author offering a paraphrase or summation of another author’s work.⁸²

Conceptually, fair use occupies the area of intellectual property law where a successful action for copyright infringement would interfere with the aims of the First Amendment. One federal court has written, “From the earliest days of the doctrine, courts have recognized that when a second author uses another’s protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer.”⁸³

Fair use as we know it was first introduced to American law with Justice Story’s opinion in *Folsom v. Marsh*.⁸⁴

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

⁸¹ Aufderheide and Jaszi, *supra*, at 17.

⁸² Maxton-Graham v. Burtchaell, 803 F.2d 1253, 1259 (1986)

⁸³ *Id.*

⁸⁴ 9 F.Cas 342, 341 (Mass.) (1841)

Justice Story distinguished works that used passages “for the purposes of fair and reasonable criticism” from those that took “the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work.”⁸⁵ The first example would be considered lawful, the second would be considered “piracy.”⁸⁶ Lawful use required “real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.”⁸⁷

Justice Story’s opinion became the basis for all judicial fair-use analysis, and was eventually codified as Section 107 of the 1976 Copyright Act. When Congress enacted the legislation, the reports accompanying it explicitly stated that the new statute was designed to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”⁸⁸

Unfortunately, fair use only works as a shield, not a sword. It serves as a defense after an action has been filed, so before it can be utilized, a person must have already been sued. The threat of costly litigation (in Los Angeles County, the filing fee to respond to a lawsuit costs \$300 alone) is enough to chill speech.

VIII. The limits of the idea/expression dichotomy: What happens when the medium is the message?

Licensing issues implicate the First Amendment: If the constitutional right to free expression doesn’t keep pace with evolving means of expression, the First Amendment

⁸⁵ *Id.* at 344-345.

⁸⁶ *Id.*

⁸⁷ *Id.* at 345.

⁸⁸ *Maxton-Graham v. Burtchaell*, 803 F.2d 1253, 1260.)

will be eviscerated. We now live in a multi-media environment, where even billboards feature movie screens.⁸⁹ When educators describe the youth of today, they invariably use phrases like “digital natives” and “visual learners.”⁹⁰ Thus, while the First Amendment was born and evolved with a view toward the print medium,⁹¹ high-tech media may be more important today in terms of an enlightened public sphere.

Thirty-five years ago, long before the dawning of the digital age, Melville B. Nimmer gave some recognition to this problem in a law review article.⁹² Discussing the distinction between fair use and the First Amendment, Nimmer noted:

The scope and extent of fair use falls within the discretion of Congress. The limitations of the first amendment are imposed upon Congress itself. Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The **first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired.**⁹³ (Emphasis added.)

Nimmer discussed this principle in relation to *Time, Inc. v. Bernard Geis Associates*,⁹⁴ a then-recent case involving the unauthorized copying of frames from the Zapruder film of President Kennedy’s assassination. Nimmer took issue with the opinion’s reasoning, but not the court’s holding, which was that the public interest in

⁸⁹ This phenomenon currently appears to be limited to the Sunset Strip, but undoubtedly it will spread.

⁹⁰ Apple Education Resources, PROFILES IN SUCCESS: TEXAS SCHOOL FOR THE DEAF - iBOOK LAPTOPS SUPPORT VISUAL LEARNERS, <http://www.apple.com/education/profiles/texas/>.

⁹¹ “Congress shall make no laws abridging the freedom of the **press** . . .” (Emphasis added.)

⁹² Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA Law Review 1180 (1970).

⁹³ Nimmer, *Does Copyright Abridge the First Amendment* at 1200-1201.

⁹⁴ 293 F.Supp. 130 (1968).

having the fullest information available on the murder of President Kennedy outweighed the copyright owner's interest.⁹⁵

The defendant had published a book containing frames of the famous film, the copyright to which was owned by the plaintiff. Nimmer wrote that the court, in finding for the defendant, “purported to rely upon fair use rather than the first amendment. He therefore found it necessary to take the position that the defendant's activities in publishing a book, containing copied frames of the Zapruder film, did not work any injury to the plaintiff's market for the same film.” Rejecting that line of reasoning, Nimmer argued, “The result in the *Bernard Geis* case can be defended, if at all, not on the ground of fair use, but rather because of the . . . free speech elements inherent in the film.”⁹⁶

These “free speech elements” consist of “certain areas of creativity where the ‘idea’ of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful.”⁹⁷ According to Nimmer, such areas include certain classic works of art – the Mona Lisa, Michelangelo's Moses – as well as certain types of culturally or historically significant photographs. As a case in point, Nimmer cited the photographs of the My Lai massacre. With the Vietnam War at its height in 1970 (the

⁹⁵ *Id.* at 146. The paradigmatic story concerning fair use in the real world – perhaps the best example that fair use does not really exist – is that two decades after *Bernard Geis Associates*, documentary producer Geraldine Wurzburg was compelled to pay a license fee for the Zapruder footage, in spite of the fact that a first-generation print had been donated by the family, and is now housed in a public museum. (Aufderheide and Jaszi, *supra*, at 25.)

⁹⁶ Nimmer, *Does Copyright Abridge the First Amendment* at 1201.

⁹⁷ *Id.* at 1197.

publication date of the article), that incident, in which U.S. military forces killed dozens of unarmed women and children, was much in the news:

Here is an instance where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue. . . . The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. Here I cannot but conclude that the speech interest outweighs the copyright interest.⁹⁸

Nimmer noted that the *Bernard Geis* opinion, while purportedly using fair use rationale to hold for the defendant, had justified the defendant's right to copy frames of the film on the ground of the "public interest in having the fullest information available on the murder of President Kennedy." While the public could have learned the facts of both incidents without recourse to the photographs, Nimmer pointed out that "without access to the photographs, all facts and interests relevant to the problem would not be fully and fairly presented."⁹⁹ In the case of My Lai, a denial that in fact any deaths had occurred would have been devastatingly refuted by the photographs in a way that the verbal reports of deaths simply could not do. . . . The photographs themselves – the 'expression of the idea' – made all the difference."¹⁰⁰

Nimmer recognized that copyright holders would undoubtedly rebut this suggestion with the argument that treating such photographs as outside the scope of copyright protection would deprive them of income. He proposed the application of a compulsory license approach, patterned not on the compulsory license relating to musical compositions, but rather one equivalent to "a reasonable royalty."¹⁰¹

⁹⁸ *Id.* at 1197-1198.

⁹⁹ *Id.* at 1198 (citing Meilejohn).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1199.

IX. Corporate control over copyright

A. The extension of duration

From this country's earliest days up until the 20th century, the copyright term remained limited two fourteen-year terms. If a work was not re-registered at the end of the first term, it fell into the public domain. As a practical matter, most works derived all their potential profitability long before the first term ended, and the majority fell into the public domain after fourteen years, becoming available for all to use.¹⁰²

In 1909 Congress rewrote the copyright laws, extending the copyright term from two fourteen-year terms to two twenty-eight year terms. More significantly, the new law also allowed for corporate authorship.¹⁰³ Up until this point, copyright had originated with the author, which meant that compilations such as newspapers and magazines were not eligible for copyright protection. The new corporate authorship category was a product of extensive publisher lobbying. Along with corporate authorship came the work-made-for-hire doctrine, which would eventually become the dominant factor in American copyright.¹⁰⁴ Today, leaving aside books, most significant works are copyrighted in the name of corporations.¹⁰⁵

USA Today editor Kenneth A. Paulson, formerly with The First Amendment Center, has written:

The original copyright law was designed to protect creators and their families. Over time, large corporations and media interests and theme parks became the wealthiest and most powerful copyright holders. Corporations like

¹⁰² *Id.*

¹⁰³ Vaidhyanathan, *supra* at 99.

¹⁰⁴ Carrie McLaren, *Copyrights and Copywrongs: Interview with Siva Vaidhyanathan*, Stayfree Magazine, Issue #20, <http://blog.stayfreemagazine.org>

¹⁰⁵ *Id.*

Disney build much of their empires by relying on public domain material, using Pinocchio, Snow White, Cinderella and many others free of charge. They then put their own creative stamp on these works and copyright them for their own protection.¹⁰⁶

Having virtually swallowed up many public domain works for their own aggrandizement – one practical consequence of which is that the public now associates the Grimm Brothers’ characters with Disney’s copyrighted versions – the large entertainment corporations also have gained the benefit of a prolonged period of protection for their copyrighted works. Under the 1976 Act, works made for hire receive protection for 120 years from the date of creation, or 95 years from the date of publication.

The lengthier ownership period benefits companies that own profitable works, but it also impedes speech by limiting works’ creative uses to those approved by the corporate copyright owner. A documentary that uses copyrighted works to criticize the corporation that owns the material will find it difficult to procure E&O insurance. While the fair use doctrine purportedly allows the use of copyrighted works for purposes of criticism, E&O insurance policies require permission for every snippet of film, photograph, music or text that is used, and the application forms make no mention of fair use.¹⁰⁷ Donald Reiff, a leading E&O insurance broker, has said that a good attorney can occasionally negotiate riders to the policy for fair use; but if a film contains controversial material – “if it’s really blasting something – like investigative reporting – then that could

¹⁰⁶ Kenneth A Paulson, *A Constitutional Clash: Free Speech, Copyrights and Mickey Mouse: Inside the First Amendment*, Oct. 20, 2002, <http://www.freedomforum.org>.

¹⁰⁷ Marjorie Heins and Tricia Beckles, WILL FAIR USE SURVIVE?, Brennan Center for Justice 5 (December 2005).

be a problem . . . they may want to stop you from doing it. Which is the most common form of censorship.”¹⁰⁸

Moreover, in the vast majority of situations, where a work no longer has any earning potential, the extended duration of copyright inhibits speech to no one’s advantage, by withholding works from the marketplace of ideas that will not be utilized.

B. Technology’s end run around the copyright clause

Jack Valenti, former longtime Washington, D.C. lobbyist for the studios, famously argued that the constitutional requirement of “limited times” would be satisfied if the term were extended to “forever minus a day.” While the Constitution theoretically prevents corporations from deriving perpetual royalties from their works, technology has succeeded in achieving an end-run around the Constitution’s “limited times” mandate. Thanks to digital encryption, corporate copyrights now control many works that are actually in the public domain, by placing them on DVDs containing anti-copying technology. “Paracopyright” is the term used to describe technology that prevents public domain works from being copied.

Now that videos are going the way of the tape-deck player, DVDs whose content requires licensing are fast becoming the only means of accessing many public domain works. The Digital Millennium Copyright Act¹⁰⁹ criminalizes any attempt to circumvent the technology for reproduction purposes or otherwise. Thus, even works in the public domain must now be licensed before they can be used by documentary makers.

C. Intellectual property and congressional largesse

¹⁰⁸ *Id.*

¹⁰⁹ 17 U.S.C., § 1201.

Fair use is close to the heart of free expression. If copyright holders can control – and effectively ban – every quotation or other use of their work, they can exercise a powerful form of censorship.¹¹⁰ Yet for all practical purposes, this is the state of affairs today. The copyright law-First Amendment see-saw has tilted sharply toward copyrights holders, to the disadvantage of the public and the polity.

As history indicates, the concept of copyright as a property right is not new.¹¹¹ However, throughout the 18th and 19th centuries, property talk was balanced and neutralized by policy talk – a discussion of what was best for society.¹¹² That is no longer the case.

One important reason for this is the way copyright policy is now crafted. For more than a decade, business lobbyists haven't merely influenced legislation – they have literally drafted it.¹¹³ William F. Patry, former legal counsel for the U.S. House of Representatives Subcommittee on Intellectual Property and Judicial Administration, has written that copyright interest groups “hold fundraisers for members of Congress, write campaign songs, invite members of Congress and their staff to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes.”¹¹⁴

Patry has documented how in 1993, Subcommittee Chair Representative William Hughes introduced a copyright reform act concerning digital performance rights that

¹¹⁰ THE FREE EXPRESSION POLICY PROJECT, “THE PROGRESS OF SCIENCE AND USEFUL ARTS”: WHY COPYRIGHT TODAY THREATENS INTELLECTUAL FREEDOM 9 (2003).

¹¹¹ Vaidhyanathan, *supra*, at 11.

¹¹² *Id.*

¹¹³ William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENTERTAINMENT L.J. 139 (1996).

¹¹⁴ *Id.* at 141.

displeased the music industry.¹¹⁵ Industry lobbyists gave him their own version to replace it, much of which he rejected on policy grounds.¹¹⁶ Two years later, at a Senate Judiciary Hearing on new digital performance rights legislation, witness after witness repeated “mantra-like” the position that Congress should enact the draft they had given Rep. Hughes.¹¹⁷ “The message at the hearing was, ‘we drafted it, the best thing for you to do is enact it down to the commas.’ The committee did just that.”¹¹⁸

Politicians have always relied on the influence and support of interest groups, but Congress’ relinquishment of its public responsibility for copyright policy to monolithic media giants works especially great harm to the public welfare. Copyright is inextricably related to intellectual innovation. The damage caused by lawmakers’ opting to allow private interests to divvy up the spoils among themselves,¹¹⁹ with no consideration for the public welfare, is more subtle and nefarious with copyright than in other public policy areas. In most areas, political mistakes eventually come to light when some disaster strikes – whether it be in the form of riots, flooding or terrorism. In contrast, it is difficult to quantify the harm caused when creative works are not made that might have been, were the vocabulary used to create audiovisual works more easily available.

X. Free Speech/Free Market: What Happens When The Marketplace Of Ideas Is Privately Owned?

The pen is, if not always mightier, often more subtly effective than the sword. Language – that is, choice of terminology – is powerful. In *Gravity's Rainbow*, Thomas Pynchon wrote, “If they can get you asking the wrong questions, they don't have to worry

¹¹⁵ *Id.* at 142.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 143.

about answers.” The large media corporations have managed to tilt the playing field without the players even realizing it by taking a debate that is really about **speech** and converting it a debate about **property rights**.

Anyone who goes to movies or watches television has seen entertainment industry-sponsored anti-piracy ads that equate downloading and other unauthorized use of intellectual property with shoplifting. Watching these ads, one would never guess that copyright is a limited right.

American courts uphold mass media companies’ stranglehold over copyright because they accept the authoritative word of *Nimmer on Copyright*,¹²⁰ the bible of copyright interpretation, which states:

It is usually said that an essential element of property is the legal right to exclude others from enjoying it, and that such a right may be enforced as against any member of the public. . . . A copyright owner possesses a property interest in this absolute sense. He may exclude all persons from copying his work, not merely those with whom he has contracted or those standing in a fiduciary relationship.¹²¹

Nimmer’s categorical statement that copyright owners have a legal right to exclude all others from enjoying their property omits any consideration of public policy interests. Yet there have been occasions on which our courts held that public policy interests and the First Amendment would trump the rights of private property owners.

A. Public policy interests may trump private property rights

Courts have ruled that where a private property owner’s interests run contrary to public policy interests, the law will intervene. *Eyerman v. Mercantile Trust Co.*¹²² dealt

¹²⁰ While the treatise’s author, David Nimmer, has publicly expressed reservations about recent trends in congressional copyright policy (David Nimmer, Southwestern Law School 2004 Melville B. Nimmer copyright speech.), *Nimmer on Copyright* stands as the authority for judicial interpretation.

¹²¹ Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT, § 16.02 (2005).

¹²² 524 S.W.2d 210, 215 (1975).

with a testator's directive that her residential property should be torn down, which her heirs contested. In deciding the matter, the court approvingly cited a Scottish case in which a testator had ordered construction of a private amphitheater that would contain statues erected to honor her family. The amphitheater was to be so private that no one at all would be allowed in.¹²³

Balustrades were to be erected so that [no one] would have access inside. Special provision was made for keeping out the public and the ground enclosed was expressly declared to be a private enclosure. There were no living descendants of any member of the family who might, if so permitted, take pleasure in contemplating the proposed statues.¹²⁴

The Scottish court struck down these provisions, stating that “without being illegal . . . the principle of public policy will prevent such post-mortem expenditure.”¹²⁵

Following the Scottish court, the *Eyerman* court said, “A well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society.”

Likewise, it runs counter to public policy to allow media copyright owners to withhold certain works from public use, when such acts directly harm important interests of society. For example, news broadcasters that own copyrighted archives of past news stories can make it difficult, or prohibitively expensive, to license their stories, even when broadcast news is the primary audiovisual record of a historical event.¹²⁶ As copyright owners, they have the absolute right to do whatever they want with the materials, including destroy them. One frustrated documentary maker has said, “History is being

¹²³ *M’Caig’s Trustees v. Kirk-Session of the United Free Church of Lismore*, 1915 Sess. Cas. 426 (Scot.).

¹²⁴ *Eyerman*, 524 S.W.2d at 215.

¹²⁵ *M’Caig’s Trustees* at 438.

¹²⁶ *Aufderheide and Jaszi, supra*, at 19.

wiped away, and we don't have reasonable access to the real moving visual materials to properly construct films . . . even though, through the airwave license, networks are sort of grantees of the citizens of the U.S.”¹²⁷ This filmmaker suggests mandating that television news gatherers make their material available to the public after five years.

B. The First Amendment may trump private property rights

The U.S. Supreme Court has considered the public's First Amendment rights vis-à-vis private property rights. *Marsh v. Alabama*¹²⁸ involved a company-owned town whose corporate owner refused to allow distribution of religious literature on sidewalks outside of stores. The legal basis for the policy was the state anti-trespassing law, which criminalized entering or remaining on another's property after being warned not to do so.

In deciding the issue of whether all residents and visitors might be denied constitutional rights simply because a single company held legal title to the town property, the Court stated:

We do not agree that the corporation's property interests settle the question. . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.¹²⁹

A world where public places are inundated with corporate logos and copyrighted images is comparable to the privately-owned company town in *Marsh*. Just as the Supreme Court held that the First Amendment limited the rights of the town's corporate owner to control the use of its property, so should a corporate copyright holder's right to control the use of its property be limited by the First Amendment. Thus, a documentary-

¹²⁷ Matt Kohn, personal Email (Oct. 9, 2005).

¹²⁸ 326 U.S. 501 (1946).

¹²⁹ *Id.* at 505-506.

maker whose camera captures music, logos, and other copyrighted cultural artifacts in a public place should have a First Amendment right to utilize those artifacts in his film without facing a civil lawsuit.

Regarding the *Marsh* townspeople's First Amendment rights, the court stated:

When we balance the Constitutional rights of property owners against those of the people to enjoy freedom of press and religion, we remain mindful of the fact that the latter occupy a preferred position. The right to exercise the liberties safeguarded by the First Amendment lies at the foundation of free government by free men, and we must in all cases weigh the circumstances and appraise the reasons in support of the regulation of those rights.¹³⁰

Likewise, courts need to begin weighing the circumstances and appraising the reasons behind licensing practices that make no room for the liberties safeguarded by the First Amendment.

XI. Contemporary fair use in action: death of a documentary

Section 107 of the 1976 Copyright Act reads:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (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.

In 2003, the Ninth Circuit used these factors to determine that *The Definitive Elvis*, an unauthorized video documentary about Elvis Presley's life, was not entitled to utilize unlicensed video clips, photographs, and music under the fair use doctrine.¹³¹ The

¹³⁰ *Id.* at 509.

¹³¹ *Elvis Presley Enterprises v. Passport Video*, 349 F.3d 622, 624 (2003)

holding proved the death knell for a creative effort that must have involved considerable time and energy.

The Definitive Elvis contained sixteen one-hour episodes on Presley, each with its own theme.¹³² A great deal of it was original material, including interviews with more than 200 people regarding virtually all aspects of Presley's life.¹³³ However, five to ten percent consisted of copyrighted materials, including Presley's appearances on television shows.¹³⁴

The documentary production company had not intended to be a freeloader: It had requested a license to use the materials, but was refused because Presley Enterprises planned to release its own anthology in the near future.¹³⁵

Soon after the first *Definitive Elvis* videocassettes reached stores, Presley Enterprises sued for copyright infringement, at the same time seeking a preliminary injunction forbidding further distribution.¹³⁶ The district court granted the injunction, and the defendant immediately appealed to the Ninth Circuit.¹³⁷

After hearing arguments, a three-judge panel voted 2-1 to uphold the lower court ruling. Judge Noonan, who found himself on the losing side, filed an outraged dissent. A few months later, after apparently giving the matter further thought, he filed an amended dissent that included several new paragraphs concerning the ruling's First Amendment implications.¹³⁸

¹³² *Id.* at 625.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 626.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 357 F.3d 896, 899.

A. The first fair use factor: the purpose and character of the use

The majority opinion began by describing the abuse-of-discretion standard of review it was required to follow: “A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous legal findings.”¹³⁹

After laying out the parties’ respective positions, the court prefaced its discussion by citing a guiding principle laid down by the U.S. Supreme Court, that fair-use analysis “should not be simplified with bright-line rules, but instead requires a case-by-case analysis.”¹⁴⁰ This type of analysis, which at first glance may seem to assure a better brand of justice, in practice does not lend itself to predictable rules that might serve as useful guides for filmmakers.

Looking at the first of the four factors, the purpose and character of the use, the court noted that “the fact that a new use is commercial as opposed to non-profit weighs against a finding of fair use. And the degree to which the new user exploits the copyright for commercial gain – as opposed to incidental use as part of a commercial enterprise – affects the weight we afford commercial nature as a factor.”¹⁴¹ Here, the documentary had clearly been intended for commercial gain.

However, the court then stated that the “transformative” nature of the new work would be more important than any commercial aspect: “The more transformative a new work, the less significant other inquiries, such as commercialism, become.”¹⁴² The court pointed to two prior cases involving documentary biographies, where the use of film clips was determined to be sufficiently transformative as to weigh in favor of fair use.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 627 (citing *Campbell v. Acuff-Rose*, 510 U.S. 569, 577-578).

¹⁴¹ *Id.* (citations omitted).

¹⁴² *Id.* at 628.

In *Monster Communications, Inc. v. Turner Broadcasting*,¹⁴³ the issue concerned the defendant's use of less than two minutes of video footage of Muhammad Ali in a biography of the boxer. The court found that the biography, while commercial, constituted "a combination of comment, criticism, scholarship and research concerning a figure of legitimate public concern,"¹⁴⁴ thus the purpose and character weighed in favor of fair use.¹⁴⁵

In *Hofheinz v. A & E Television Networks*,¹⁴⁶ the court found the A & E Channel's use of a copyrighted movie trailer clip for a biography of Peter Graves to be transformative, thus leading to a finding of fair use, because the use "was not shown to recreate the creative expression reposing in plaintiff's film."¹⁴⁷

In contrast, the court found that use of the Presley film clips here was not consistently transformative.¹⁴⁸ The filmmaker was "not advertising a scholarly critique or historical analysis,"¹⁴⁹ but instead sought "to profit at least in part from the inherent entertainment value of Elvis' appearances."¹⁵⁰

The court admitted that the defendant had used many of the Presley television clips in a transformative way, "because the clips play for only a few seconds and are used for reference purposes while a narrator talks over them or interviewees explain their

¹⁴³ 935 F.Supp. 490. 491 (S.D.N.Y. 1996).

¹⁴⁴ *Id.* at 493-494.

¹⁴⁵ *Elvis Presley Enterprises*, 349 F.3d at 628.

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

¹⁴⁷ *Id.* at 446.

¹⁴⁸ *Elvis Presley Enterprises*, 349 F.3d at 628-629.

¹⁴⁹ The court interprets the phrase "for educational purposes" in § 107 more strictly than some scholars of popular culture would.

¹⁵⁰ *Id.* at 628.

context in Elvis' career."¹⁵¹ After stating that it "would be impossible to produce a biography of Elvis without showing some of his most famous television appearances for reference purposes,"¹⁵² the court said: "But some of the clips are played without much interruption, if any. The 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."¹⁵³

Admitting that the first factor was "a close issue,"¹⁵⁴ the court ultimately decided that the film used more clips than were actually necessary to tell the story of Elvis's life, determining that their real purpose was simply "for entertainment purposes that Plaintiffs rightly own,"¹⁵⁵ leading to a finding that the district court had not abused its discretion in deciding that the first factor weighed against fair use.

B. The second fair use factor: the nature of the copyrighted work

Turning to the second fair-use factor, the nature of the works, the court stated:

The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasyFor example, works such as original songs, motion pictures, and photographs taken for aesthetic purposes, are creative in nature and thus fit squarely within the core of copyright protection. But works such as news broadcasts and news video footage are more conducive to fair use.¹⁵⁶

However, as to the still photographs used in the documentary, the court said that they did not "depict newsworthy events, nor are the pictures inherently newsworthy, but

¹⁵¹ *Id.*

¹⁵² *Id.* at 629.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 629.

instead comprise the photographer’s artistic product.¹⁵⁷ Moreover, it is undisputed that original musical compositions are inherently creative.”¹⁵⁸ For this reason, the court stated that it “could not say” that the district court had abused its discretion in reaching the conclusion that the second factor weighed in Plaintiff’s favor.¹⁵⁹

C. The third fair use factor: the amount and substantiality of the portion used

Regarding the third factor, the amount and substantiality used in relation to the work as a whole, the court noted the importance of evaluating the qualitative nature of the work used – “we look to see whether ‘the heart’ of the copyrighted work is taken – in other words, whether the portion taken is the ‘most likely to be newsworthy and important in licensing serialization.’”¹⁶⁰ The court stated that the use of so many clips, even though relatively short, lasting a few seconds, were “in many instances the heart of the work.”¹⁶¹ Again, the court stated that it could not say that the district court had abused its discretion in reaching the conclusion that the third factor weighed in Plaintiff’s favor.¹⁶²

D. The fourth fair use factor: the effect of the use upon the potential market for the copyrighted work

As for the fourth factor – “undoubtedly the single most important of all”¹⁶³ – the effect the use would have “on the potential market for and value of the copyrighted

¹⁵⁷ Many professional photographers would no doubt frown at the distinction the court draws between a photo that is “newsworthy,” and one that is deemed a photographer’s “artistic product.”

¹⁵⁸ *Id.* at 630.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (citing *Campbell*, 510 U.S. at 586).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566 (1985))

works”¹⁶⁴ – the court noted that “the more transformative the new work, the less likely the new work’s use of copyrighted materials will affect the market for the materials;”¹⁶⁵ but said that “if the purpose of the new work is commercial in nature, the likelihood of market harm may be presumed.”¹⁶⁶

Here, the court ruled that because the use was undisputedly commercial in nature, because the defendant had “expressly advertised that *The Definitive Elvis* contains the television appearances for which Plaintiffs normally charge a licensing fee,”¹⁶⁷ and because Defendant’s use of the television appearances “was, in some instances, not transformative, and therefore likely to affect the market because they serve the same purpose as Plaintiff’s original works,” “we cannot say that the district court abused its discretion”¹⁶⁸ in finding that this factor weighed in favor of the Plaintiff.

The court closed by repeating a phrase it had stated throughout the analysis: “We emphasize that our holding today is not intended to express how we would rule were we examining the case *ab initio* as district judges. Instead, we confine our review to whether the district court abused its discretion . . .”¹⁶⁹

E. Judge Noonan’s dissent

Judge Noonan based his interpretation of how the case ought to have been decided on the issue of transformativeness. His dissent stated that the district court had “misstated critical facts and misstated the governing law.”¹⁷⁰

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 631..

¹⁶⁶ *Id.* (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984).)

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

In terms of the critical facts, Judge Noonan believed that the court should not have deferred to the trial court's blanket adoption of the Plaintiff's Statement of Fact, which repeatedly stated, "Defendants did not add anything new or transformative to the copyrighted works" – thus conveniently ignoring the addition of the voice-over narrative.¹⁷¹ Judge Noonan countered, "Not only are the ignored voice-overs new. They are transformative. They turn the original Presley shows into part of a substantial biography. . . . Rather than regurgitation, Passport provides independent analysis of the appearance and frames it in the context of Elvis's life and career."¹⁷² Likewise, Judge Noonan noted that the copyrighted photos that had been used were "not presented for their own sake,"¹⁷³ but were "intelligently incorporated into the larger, 16-hour biography."¹⁷⁴

Judge Noonan then proceeded to lecture his colleagues that "a judge may not abdicate his responsibility by continuing to omit key facts that have been omitted by the party on whose work the judge is relying"¹⁷⁵ – that is, the existence of the voice-overs. He stated:

The resolution of this case and the grant of the preliminary injunction affect the public interest. The King is dead but his legacy remains very much alive. . . . *USA Today* . . . described the documentary as "the most comprehensive overview yet of the King's personal and professional life."¹⁷⁶

The judge went on to say that the public interest in viewing the Elvis biography outweighed any harm the Plaintiff might suffer.¹⁷⁷ He reminded his colleagues that the

¹⁷¹ *Id.* at 632.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 633.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Ninth Circuit had previously held, in *Abend v. MCA*,¹⁷⁸ that where “an injunction could cause public injury by denying the public the opportunity to view a classic film, Hitchcock’s *Rear Window*, monetary damages would adequately compensate the plaintiff for any infringement. . . . There is little doubt that a television biography of Muhammed [sic] Ali is a subject of public interest. There is equally little doubt of the public interest in Elvis.”¹⁷⁹

According to the dissent, in determining whether an injunction was proper, the district court ought to have included an analysis of the public interest, either as part of a balancing of hardships or as a separate inquiry.¹⁸⁰

In a case of this kind involving the biography of a man with an immense following, it is necessary for a court to keep in mind that injunctions are a device of equity and are to be used equitably, and that a court suppressing speech must be aware that it is trenching on a zone made sacred by the First Amendment.¹⁸¹

Judge Noonan concluded by reiterating that given the string of factual errors committed by the district judge, it was a mistake for the appellate court to accord deference to the lower court.¹⁸² “The mistake is magnified by the district court’s and this court’s remarkable error of law in failing to weigh the public interest in a biography of Elvis. For these reasons, the grant of the preliminary injunction was a miscarriage of justice.”

Three months later, Judge Noonan filed an amended dissent, incorporating additional comments:¹⁸³

¹⁷⁸ 863 F.2d 1465 (9th Cir. 1988), *aff’d sub nom.* *Stewart v. Abend*, 495 U.S. 207 (1990).

¹⁷⁹ *Elvis Presley Enterprises*, 349 F.3d at 633 (citing *Monster Communications, Inc. v. Turner Broadcasting*, 935 F.Supp. at 494.)

¹⁸⁰ *Id.* at 633-634.

¹⁸¹ *Id.* at 634.

¹⁸² *Id.*

¹⁸³ 357 F.3d 896, 899.

Indifference to the public interest at stake incorporates a profound misunderstanding of the purpose of the constitutional empowerment of Congress to protect copyright. As the Supreme Court . . . patiently explains: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”¹⁸⁴

. . . To neglect the public interest in the protection afforded a copyright is to forget the purpose of copyright law. The Constitution permits the creation of temporary monopolies in a context ruled by our American suspicion of monopolies and our high valuation of freedom of expression.

Whatever one’s opinion of Elvis Presley’s music, it is difficult to dispute his tremendous impact on mid-twentieth century American culture. As Judge Noonan rightly pointed out, the court’s failure to consider the First Amendment implications of fair use deprived the public of a significant work about an American icon.

F. Post-*Presley*

Given the current intellectual property climate, *Elvis Presley Enterprises* may be a harbinger of things to come. With so much money at stake, it should come as no surprise that the legal community is unabashedly assisting copyright holders in stifling First Amendment values.

As one sign of this, Plaintiff’s counsel in the Presley case has held up its victory like a trophy, devoting an entire internet webpage to it. Headlined **SUMMARY**

JUDGMENT FOR “THE KING,”¹⁸⁵ the webpage states:

. . . The firm convinced the court that regardless of the “documentary” nature of Passport’s production, the amount of material appropriated from plaintiffs was far more than a minimal, illustrative use, and that Passport should have paid to license the clips from plaintiffs.¹⁸⁶ **The ruling is a big victory for copyright owners on issues of fair use in a documentary setting, especially given the increasing popularity of documentaries with box office audiences,**

¹⁸⁴ Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

¹⁸⁵ Quinn Emanuel website, http://www.quinnemanuel.com/news/Victory_detail.aspx?recid=8.

¹⁸⁶ This statement directly contradicts the court opinion, which says that the defendant in fact had sought a license, and had been refused. (*Elvis Presley Enterprises, Inc.*, 349 F.3d at 626.)

as evidenced by last year's successes such as Fahrenheit 9/11 and Super Size Me.¹⁸⁷ [Emphasis added.]

In other words, filmmakers with the temerity to seek to create new films about American culture can expect to be threatened with *Presley Enterprises*-like lawsuits for the foreseeable future.

XII. Conclusion: A fair use standard for documentaries

Current copyright policy rides roughshod over the First Amendment principles and goals conceived of by our Founders, and developed by the U.S. Supreme Court during the twentieth century. The situation's overall impact on our culture in general, and on documentary filmmaking in particular, extends far beyond the small niche market that documentaries comprise: In point of fact, it actually harms our democratic system of governance.

As with most social problems, it all boils down to economics. Independent documentary filmmakers are neither organized nor wealthy, and even the educational community's outcry over the limitations imposed by the current system is unlikely to change the status quo any time soon.

However, the filmmaking and educational communities have not given up. A consortium of interested groups¹⁸⁸ recently released a *Documentary Filmmakers' Statement of Best Practices in Fair Use*.¹⁸⁹ Its purpose is to clarify the fair use doctrine so as to provide some guidance to filmmakers. The statement works from the principle

¹⁸⁷ Quinn Emanuel website, http://www.quinnemanuel.com/news/Victory_detail.aspx?recid=8.

¹⁸⁸ The Association of Independent Video and Filmmakers, the Independent Feature Project, the International Documentary Association, and the National Alliance For Media Arts And Culture, in consultation with American University's School Of Communication And College Of Law.

¹⁸⁹ <http://www.centerforsocialmedia.org/fairuse.htm> (November 2005).

that documentary filmmakers should have the same kind of access to copyrighted materials enjoyed by cultural and historical critics who work in print media, and by news broadcasters.¹⁹⁰

The statement sets out four classes of situations that documentary makers confront regularly, which ought to be the grounds for exercise of fair use:

- When employing copyrighted material as the object of social, political, or cultural critique;¹⁹¹
- When quoting copyrighted works of popular culture to illustrate an argument or point;¹⁹²
- Capturing copyrighted media content in the process of filming something else;¹⁹³ and
- Using copyrighted material in a historical sequence.¹⁹⁴

The hope is that trial courts will also make use of the document in deciding future cases. Only time will tell.

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¹⁹⁰ *Id.* at 1.

¹⁹¹ *Id.* at 4.

¹⁹² *Id.* at 4.

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.* at 5.