



## Intellectual Property Law Committee

### E&O INSURANCE FOR DOCUMENTARY FILMS: THE EFFECT OF THE BEST PRACTICE IN FAIR USE

By: Robert Kasunic\*

You have just spent years of your life filming and editing a documentary film only to find that it could not be sold or distributed because you filmed someone turning on the radio in his or her car, thus reproducing a short portion of a song that was being performed on the radio. Or perhaps instead of turning on the radio, someone in the documentary film happened to be watching a ballgame, a television show or sitting next to a copyrighted painting or photograph. The

song on the radio, the broadcast of the ballgame or television show, and the photograph are all copyrighted works, and the reproduction of these works on film could violate the copyright owners' exclusive right of reproduction. Moreover, the distribution or broadcast of your documentary film might implicate other exclusive rights of the copyright owner.<sup>1</sup>

A copyright owner's exclusive rights, however, are not unlimited. The exclusive rights contained in

§ 106 are themselves limited grants<sup>2</sup> and are expressly subject to the limitations contained in §§ 107 - 122. You may have determined that the reproduction of the performance of the musical work and sound recording in your documentary was a "fair use" under the

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<sup>1</sup> The sale of the film would implicate the copyright owner's exclusive right of distribution and the broadcast would implicate the exclusive right of performance to the public.

<sup>2</sup> 17 U.S.C. § 106; § 106. Exclusive rights in copyrighted works Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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## WORD FROM THE CHAIR

As my term as Chair of the TIPS Intellectual Property Committee is winding down, and great new leadership is preparing to take the reigns, I reflect on some of the goals our Committee had set for itself. One such goal was to provide TIPS members with a source of general IP information and notions to assist them in better serving their clients.

In that vein, our Newsletter Editors adopted a format where newsletters would collect articles dealing with one type of intellectual property law only. While our last Newsletter dealt with issues relating to patents, this current issue contains two articles devoted to copyright and insurance related questions and a third covering licensing issues and patents. I hope you find this new collection of articles interesting and useful to your practice of law, and would invite you to write to me or the Committee's Newsletter Editors to provide your comments and suggestions for future Committee Newsletters.

Looking ahead to the 2008 ABA Annual meeting, you have been receiving flyers, publicity and registration forms. I hope you have made your plans to join us in the "Big Apple" for superb CLE programming and wonderful activities to help celebrate TIPS 75<sup>th</sup> anniversary.

In the framework of the ABA Annual Meeting, the Intellectual Property Committee, in conjunction with the TIPS Media, Privacy and Defamation, Admiralty and Maritime Law and International Committees, and the ABA International Section has been hard at work over the last bar year preparing a program entitled "**Ordering Liberty in an International Economy.**" We have an extremely distinguished panel of international speakers that include The Honourable Mr. Justice W. Ian C. Binnie of the *Supreme Court of Canada*, The Honourable Mr. Justice R. Nugent of the *Supreme Court of Appeal from the Republic of South Africa*, Professor Thomas John Schoenbaum from both the *International Christian University* in Japan and *The George Washington University Law School* and Mr. John Brosnan, an insurance industry representative from Financial Services Group - *Professional Risk Solutions*, a Division of *AON Risk Services, Inc.* This panel will address human rights issues in the global economic framework. More specifically, some of the issues that will be discussed are: how to protect international electronic communications, the means available for enforcement of intellectual property rights in foreign nations and the developing world, and how the international economy affects transnational liberties, as well as how the insurance market has evolved to provide protection to companies in this increasingly dynamic global market.

I hope to meet many of you at this very special presentation to round out a summer work week on Friday, August 8, at 2 p.m. at the New York Hilton. ⚖️

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**AMERICAN BAR ASSOCIATION ANNUAL MEETING  
NEW YORK, NY  
August 7-12, 2008**

**FRIDAY, AUGUST 8, 2008**

**2:00 pm – 5:00 pm**

**CLE Program, New York Hilton**

**“Ordering Liberty In An International Economy”**

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**Description:**

Hear an international panel of Justices and experts in the field discuss how to protect international electronic communications, the means available for enforcement of intellectual property rights in foreign nations and the developing world, and how the international economy affects transnational liberties. In addition, they will discuss how the insurance market has evolved to provide protection to companies in this increasingly dynamic global market.

**Moderators:**

David Furlow, Thompson & Knight LLP, Houston, TX  
Nathaly J. Vermette, Vermette Law, Montréal, Québec, Canada

**Speakers:**

The Honorable Mr. Justice Ian Binnie, Supreme Court Of Canada, Ottawa Ontario, Canada  
The Honorable Mr. Justice R. Nugent, Supreme Court of Appeal, Republic of South Africa, Union of South Africa  
Thomas John Schoenbaum, International Christian University, Tokyo and George Washington University Law School, Washington DC  
John Brosnan, Financial Services Group – Professional Risk Solutions, A Division of Aon Risk Services, Inc. of Illinois, Chicago, IL

## INSURING INTELLECTUAL PROPERTY CLAIMS

By: Michelle Worrell-Tilton

*The Second Article in a Series on Intellectual Property With a Special Focus upon Media Liability*

When faced with a copyright, trademark or patent infringement suit, a media defendant's primary concern is whether insurance coverage is available to defray potentially staggering legal expense and exposure to loss. Because a company's intellectual property is a key business asset, threats against its trademarks and copyrights must be protected by the best insurance policy available and never left to chance.

### COVERAGE FOR PATENT INFRINGEMENT

Not all policies are created equal with respect to coverage for intellectual property disputes. First, it is unlikely that *any* policy with the exception of a special patent policy will extend to claims for patent infringement or inducement to infringe a patent. Most courts have consistently held that patent infringement claims are not covered under comprehensive general liability ("CGL") policies, and even most media liability policies, which intend to cover intellectual property claims, consistently exclude coverage for patent infringement. Media policies cover content – not the protected design that helped create it. Companies whose primary exposure is in the design, development and licensing of inventions should procure a patent policy that provides coverage for not only the defense of patent infringement actions, but also provides coverage for the insured to initiate an action as a plaintiff to enforce a patent. These policies are very expensive with

high self-insured retentions and often co-insurance provisions.

### THE CGL POLICY

If coverage for specific intellectual property exposures is not part of the risk management arsenal, defendants often turn to their CGL policy which is the "catch all" policy for businesses. The 2003 CGL policy provides coverage for infringement of copyright, trademark or trade secret or "personal and advertising injury liability"<sup>1</sup> as long as the claim arises from the insured's advertising of its own products and services *and* as long as the insured is *not* engaged in the media business. The relevant language from the 2003 CGL policy that excludes coverage for media businesses is as follows:

### EXCLUSIONS

This insurance does not apply to:

\* \* \*

#### Insureds in Media and Internet Type Businesses

"personal and advertising injury" committed by an insured whose business is:

1. Advertising, broadcasting, publishing or telecasting;
2. Designing or determining content of websites for others; or
3. An Internet search, access, content or service provider.

\* \* \*

For the purposes of this exclusion, the placing of

frames, borders or links, telecasting or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

\* \* \*

*ISO Properties, Inc., 2003*

This CGL form also specifically excludes coverage for "personal and advertising injury" arising from electronic chatrooms or bulletin boards controlled by the insured, as well as the unauthorized use of another's name in the insured's e-mail address, domain name or metatag. In other words, the intellectual property cover in the CGL extends to the advertising of a non-media business through relatively traditional means. The CGL policy may vary significantly in respect to coverage based upon ISO form number and by endorsement. Therefore, it is incumbent upon the risk manager to thoroughly review the coverage on an annual basis with a knowledgeable broker and to ask specific questions as to how the policy might respond to intellectual property exposures. It is always best to know about a policy's shortcomings up front rather than to find out after a claim has been denied.

### THE MEDIA LIABILITY POLICY

A media liability policy is a necessity for any company that

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<sup>1</sup> Coverage Part B of the 2003 CGL policy provides coverage for false arrest, detention or imprisonment; malicious prosecution, trespass, defamation, invasion of privacy, the use of another's advertising idea in your "advertisement" or infringing upon another's copyright, trade dress or slogan in your "advertisement."

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## THE COLLISION LICENSING PROVISIONS AND PATENT LAW

By: [Vasilios Peros](#)<sup>1</sup> and [Munachi Nsofor](#)<sup>2</sup>

*Lawyers and non-lawyers are routinely faced with negotiating, executing and enforcing their rights under a contract dealing with a variety of transactions. When such a contract deals with intellectual property, such as patent license scenario, the interpretation of the contractual terms will not likely be determined by applying only contract law principles. The collision of the licensing contractual provisions with intellectual property law principles requires different analysis. In this article, we discuss the decision issued on June 9, 2008, by the U.S. Supreme Court regarding a patent infringement case involving patent rights, licensing provisions and the exhaustion doctrine. The Court's opinion directly affects the amount of royalties that can be collected by the patent holder, as licensor, from end users downstream of the licensee.*

The success of today's high technology companies is greatly dependent on the acquisition, protection and commercialization of technology. These technology companies may attain such protection when they file for and are granted patents for their inventions. As a

part of their commercialization approach, these companies grant to third parties the right to license their inventions and technology. The high technology company, as the licensor, and the third party, as the licensee, negotiate and enter into a license agreement that sets

forth the terms and conditions of the licensing deal. When patents are involved in any such contract, the licensor must be careful to understand what patent rights are granted or retained. The failure to clearly and carefully delineate the respective rights of the parties

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could lead to the unintended exhaustion of patent rights of the licensor. In *Quanta Computer v. LG Electronics*, 553 U.S. \_\_\_ (2008), the U.S. Supreme Court recently issued its opinion regarding a patent infringement case involving patent rights, licensing provisions and the exhaustion doctrine. The outcome of this case has significant ramifications on the interpretation of patent license agreements and the ability of patent licensors to seek royalties from third parties.

LG Electronics, Inc. (“LGE”) owns several patents relating to the computer components and assemblies. Some of LGE’s patents cover components such as microprocessor chips and chipsets, while other patents covered the systems and methods associated with these components and assemblies. LGE entered into a patent license agreement with Intel Corporation (“Intel”) for use of LGE’s components in Intel’s products. The parties also entered into a separate master agreement under which Intel agreed to give notice to its purchasers that the license granted to Intel by LGE did not authorize third parties to combine the products with non-Intel products. Quanta Computer Inc. (“Quanta”) purchased products from Intel and installed them in computers in combination with non-Intel products. Pursuant to the separate master agreement between Intel and LGE, Intel notified Quanta that such license grant does not extend to combining the products with non-Intel products. LGE brought suit against Quanta for patent infringement asserting that Quanta infringed upon the claims of LGE’s patents – not for the components themselves – but rather for systems and methods of combining licensed components

with non-Intel components in its computers.

The United States District Court for the Northern District of California granted summary judgment of non-infringement to Quanta holding that Intel’s sale to Quanta generally exhausted LGE’s patent claims, but the court declined to find that LGE’s method claims were exhausted. The court also held that Quanta could not infer a license from Intel’s sale of LGE-licensed components because Intel expressly notified Quanta that the license did not cover non-Intel product combinations. On appeal, the Court of Appeals for the Federal Circuit reversed in part, concluding that the exhaustion doctrine does not apply to an expressly conditional sale or license, and that the notice provided by Intel to Quanta created a conditional sale, therefore the exhaustion doctrine did not apply. *Quanta Computer v. LG Electronics*, 453 F.3d 1364 (Fed. Cir. 2006), *rev’d*, 553 U.S. \_\_\_ (2008).

A review of the exhaustion doctrine is required to understand the issues of this case. The exhaustion doctrine (also known as the “first sale doctrine”) is common under copyright and patent law. Under copyright law, once a copyrighted work is sold to any party, such party can sell, distribute or lend that one copy to another party without infringing any copyrights. For example, if you purchase a DVD of a movie, you have the right to lend or resell that copy of the DVD of the movie to a friend.

Under patent law, the exhaustion doctrine generally provides that a patent holder’s exclusive rights, as derived from a patent claim, end at the first sale of a patented product. The patent

exhaustion doctrine is triggered by an unconditional sale. An unconditional sale of a patented product exhausts the patentee’s right to control the purchaser’s use of the product. The theory is that a patent holder has bargained for and received an amount equal to the full value of the products and that he gives up the right to restrict that use.

The patent exhaustion doctrine also applies to an incomplete product that has no substantial use other than to be manufactured into a completed patented and allegedly infringing article. *Cyrix v. Intel Corp.*, 846 F. Supp. 522 (E.D. Tex. 1994), *aff’d without op.*, 42 F.3d 1411 (Fed. Cir. 1994) (holding that the patent holder’s microprocessors could not be used for any commercially viable purpose without necessarily forming a combination covered by the patent claims); *United States v. Unis Lens Co.*, 316 U.S. 241 (1942) (holding that the sale of eyeglass lens blanks that partially practice a patent exhausted the method patents that were not completely practiced until the blanks were ground into fully completed eyeglass lenses). The unconditional sale of an uncompleted product which embodies a claimed invention, or in other words, contains essential features of a patented invention, exhausts the patent holder’s rights so far as it may be embodied in a particular product without other substantial use. *Univis*, 316 U.S. at 248-251.

However, the patent exhaustion doctrine may not negate a lawful express restriction. An unconditional sale, required for patent exhaustion, cannot exist where there is a lawful express restriction. In such a transaction, one may reasonably infer that the parties negotiated a price that reflects only the

value of the use rights conferred by the patent holder. As a result, express conditions accompanying the sale or license of a patented product are generally upheld. *B. Braun Med. Inc. v. Abbott Labs*, 124 F.3d 1419 (Fed. Cir. 1997). However, it must be clear that the purchaser fully understood the restriction and agreed to such restriction. Such express conditions are contractual in nature and are subject to contract and any other applicable law.

Furthermore, a licensor may seek to exclude the rights to combination claims where the component and the combination are separate and distinct. Accordingly, a computer manufacturer may not obtain a right to the combination claims merely by purchasing or licensing a component. The patent holder may argue that these combination patents would not be exhausted until a full royalty is recovered for the combination via the sale of the component. A patent holder may take the position that the component patents are separately enforceable from the combination patents. Under this position, a patent holder could seek additional royalties.

The application of the patent exhaustion doctrine has been determined by the U.S. Supreme Court's interpretation of the above principles. The Court held that the patent exhaustion doctrine extends to patent method claims. Although patented methods may not be sold in the same way as a component, the methods nonetheless may be embodied in a product, the sale of which exhausts patent rights. LGE failed in its attempt to make a distinction between the components which Quanta purchased from Intel and LGE's patented systems and methods and failed in its argument that a sale of a patented component

does not exhaust rights in the independently patented systems and methods to which the component belongs. LGE argued that it had granted Intel a license to manufacture and sell the components and another license to practice LGE's systems and method patents. In making its decision, the Court recognized that eliminating exhaustion for method claims would seriously undermine the exhaustion doctrine. Patent holders could avoid the exhaustion doctrine by simply including method claims in their patents. For example, although a licensee would be authorized to sell a computer assembly, the downstream purchasers could nonetheless be liable for patent infringement. Such a result would violate longstanding principles.

The Court further held that the sale of the microprocessors and chips was essentially a sale of an uncompleted product which contained essential features of a patented invention, and such sale exhausted the patent holder's rights so far as they may be embodied in a particular product without other substantial use. Quanta successfully argued that the sale of the microprocessors and chips exhausted LGE's patent rights in the same way as the sale of the eyeglass lens blanks exhausted the patent rights in the *Univis* case. The microprocessors and chips had only one real use which was as a part of a computer. The Intel products cannot practice the LGE patent claims until they are combined with other components and assemblies in a computer. The patent exhaustion doctrine is triggered by the sale of components that essentially, even if not completely, embody the invention. Otherwise, patent holders could

authorize the sale of computers that are complete with the exception of one minor step and extend their rights through each downstream purchaser all the way to the end user.

The Court finally found nothing in the license agreement that limited Intel's ability to sell its products practicing the LGE patents. Such restrictions were not included in the license agreement between LGE and Intel. Quanta did not dispute that patentees can engage in conditional sales; however, Quanta argued that patent holders can and should negotiate specific contracts with purchasers if they want to impose restrictions on their products. LGE unsuccessfully argued that notice, as required under the separate master agreement between LGE and Intel, was given by Intel to its purchasers that the license granted to Intel by LGE did not authorize third parties to combine the products with non-Intel products. Because Intel was authorized to sell Intel's products to Quanta, the patent exhaustion doctrine prevented LGE from asserting its patent rights with respect to Intel's products. The Court acknowledged that LGE may have other contract rights, but refused to express an opinion as to whether contract damages might be available even though exhaustion operates to eliminate patent damages.

The Supreme Court's decision has reaffirmed the patent exhaustion doctrine and clarified the extent of a patent holders' license rights. The Court's decision in favor of Quanta, finding exhaustion upon LGE's first sale to Intel, reasonably limits a patent holders' rights. Patent holders are prevented from circumventing the patent exhaustion doctrine by simply including method claims in their

patents so that they can exercise control over post-sale use of their patented components. The Court made clear that a sale of an uncompleted product, which contains essential features of a patented invention, exhausts the patent holder's rights so far as they may be embodied in a particular product

without other substantial use. The patent holders are not able to collect royalties from downstream users unless the licensor and licensee mutually consent to express contractual provisions in their license agreement. A decision for LGE would have potentially expanded patent holders' rights by severely

undermining the patent exhaustion doctrine and allowing the patent holder to collect royalties from multiple users as a product works its way from manufacturer to the end user. These increased costs would have most likely been passed down to the end user consumers. 

## INSURING...

*Continued from page 5*

publishes, broadcasts or advertises because media companies are specifically excepted from coverage under the CGL policy. It is for this reason that media companies require a special professional liability policy. The media liability policy is an essential risk management component for companies that are in the business of gathering, creating or disseminating original or third party content – whether news, entertainment or advertising. The public's insatiable appetite for content has resulted in a proliferation of infringement claims, especially copyright infringement. The best possible media liability coverage provides coverage on an "open peril" or "all risk" basis, yet also specifically enumerates intellectual property perils – infringement of copyright, plagiarism, piracy, misappropriation of ideas or information, infringement or dilution of trademark, title, slogan, trade name, trade dress, service mark or service name – so there is little room for disagreement as to what the policy covers.

Specialty insurers provide an advantage in the defense of intellectual property claims because they employ experienced claims counsel, who provides meaningful insight and assistance in the

defense of the claim. In-house counsel is unlikely to react like the proverbial deer in the headlights when presented with an intellectual property claim. Experienced insurance counsel is important because he or she will have input in respect to the selection of outside defense counsel, as well as other important decisions that will impact the insured. Knowledgeable insurance counsel will also help the insured manage legal expense, which may climb well into the six figure range and beyond.

A media liability policy will also provide broad definitions of "claim" and "loss," which are important terms in the intellectual property arena. It is important for the definition of "claim" to include a demand for equitable relief, such as a request for a temporary restraining order or other injunctive relief. If the definition of "claim" does not include equitable relief – but only a monetary demand – the coverage agreements may not be triggered under the policy. While most media policies will not cover the cost of complying with an injunction, i.e., the costs of recall, redistribution or correction, these policies will provide coverage for defense costs, which are often the lion's share of the exposure. Statutory damages, multiplied damages, and attorneys' fees may be awarded to a prevailing plaintiff in a copyright or trademark suit. It

is important for the definition of "loss" to clearly address the insurer's intent in respect to damages that are ordinarily part of a plaintiff's recovery.

There are certain standard exclusions that limit coverage under media policies. As set forth earlier in this article, media policies specifically exclude coverage for patent infringement. Media policies also exclude coverage for infringement claims brought by music licensing associations, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and others, on behalf of the musical artists, writers or composers they represent. These entities collect licensing fees on behalf of the music creators they represent for public performances and distribute royalties. The procurement of such music licenses by radio broadcasters, in particular, is considered a usual and ordinary cost of doing business that will not be assumed by the insurer.

It should also be noted that many media liability *advertiser* policies, i.e., policies for companies that advertise their own products or services, specifically exclude coverage for trademark infringement. It is perceived as a moral hazard to provide trademark coverage for an advertiser who can profit by creating confusion in the

marketplace as to the origin of its goods or services. Trademark coverage can be added back by endorsement for additional premium if the advertiser has a distinct brand. For example, while a company like McDonald's, which is a brand leader, would not have incentive to create confusion in the fast food market, a new hamburger establishment named McDoogle's just might try to

capitalize on the well established McDonald's trademarks.

Because media policies contain various exceptions to coverage, it is crucial that media companies employ and practice sound loss prevention techniques to better insulate themselves from expensive and time consuming litigation. Companies must be vigilant with respect to procuring and complying with licenses for unoriginal content,

such as for music or film clips. The creation of original content should be documented with a paper trail from inception. Companies also need to establish a policy for dealing with unsolicited idea submissions from third parties to avoid costly misappropriation claims.

Next month's *InsideTrack* article will discuss the limited applicability of the defenses of "fair use" and "public domain." 

## E&O INSURANCE...

*Continued from page 1*

Copyright Act, but the producers and publishers of the documentary believe that the fair use privilege, codified in § 107 of the Copyright Act, is much too uncertain to rely upon.<sup>3</sup>

Fair use is an equitable doctrine that has been developed by the courts to limit the strict application of the exclusive rights of copyright owners in situations where the use is reasonable under the circumstances. In the Copyright Act of 1976, Congress codified this judicial doctrine in order to endorse its importance in the American copyright scheme. On enacting the fair use privilege in § 107, Congress stated that it did not intend to constrict or expand the doctrine, but intended the courts to develop the doctrine on a case-by-case basis. For purposes of guidance,

Congress enacted a Preamble that provided illustrative examples of traditional fair uses, such as criticism, comment, news reporting, teaching and scholarship, but stated that in any particular case, whether or not a particular use would be deemed fair must be determined by consideration of, at a minimum, four statutory factors. These factors – the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the potential market for or value of the copyrighted work – were viewed by Congress as the key considerations that had historically been applied in the courts when assessing fair use determinations. As codified, fair use may be a limit on all of the copyright owner's exclusive rights and may be applicable for any type of copyrighted work. The breadth of fair use and the four-factor approach impart the

fair use privilege with great flexibility. But, because the factual situations in which fair use assertions may arise are so varied, fair use is often viewed as dysfunctionally uncertain.

Traditionally, when gatekeepers demanded more certainty than fair use provided, there were few options available to documentarians. They could seek a license to use the work in the film, but a license for the use of a song in a film, even a portion of a song, can be prohibitively expensive, particularly if the documentary was made on a limited budget.<sup>4</sup> In some cases, documentarians could not even get copyright owners to respond to their requests for licenses, because of relatively smaller scale and their budget restrictions. Documentary filmmakers could also opt to delete the scene from the film, but such an option could affect the creative purpose if that

<sup>3</sup> 17 U.S.C. § 107 (1992): § 107. Limitations on exclusive rights: Fair use notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>4</sup> Consider that the song "Happy Birthday" still receives licensing revenues of approximately \$ 2 million per year for uses of this song. There are, however, many questions about whether the work is still protected by copyright. See, Robert Brauneis, Copyright and the World's Most Popular Song, forthcoming, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1111624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1111624) (last visited 3/1/08). It has been claimed that Warner/Chappell may charge documentary filmmakers up to \$10,000 for use of the song in a film. See, e.g., [http://en.wikipedia.org/wiki/Happy\\_Birthday\\_to\\_You](http://en.wikipedia.org/wiki/Happy_Birthday_to_You) (last visited 3/1/08).

scene contributed to the expressive goal of the filmmaker. Short of a licensing agreement or deletion of a scene, they could replace the copyrighted work with a public domain work or create an original work in order to avoid potential liability. However, such editing of reality compromises the filmmaker's goal of portraying events faithfully in order for them to speak for themselves.

Given the inherent problems raised by these alternative options, copyright can become an obstacle to the creativity of the filmmaker, which is ironic, because the very purpose of copyright law is to encourage creativity, not to stifle it. The exclusive rights of copyright owners are expressly limited by the fair use doctrine and other limitations in the Copyright Act, but since fair use is determined by a case-by-case consideration of the statutory factors, the outcome is inherently uncertain. It appears that often copyright owners and users disagree on the application of the fair use privilege. This appearance of uncertainty is intensified by the volatility of fair use cases in the courts where it is not uncommon for lower court decisions to be reversed on appeal. Faced with such judicial uncertainty, Professor Larry Lessig stated that “[f]air use in America simply means the right to hire a lawyer to defend your right to create.”<sup>5</sup> Thus, despite the fact that a fair use of a copyrighted work does not require permission or payment of a license to the copyright owner, and the potential

monetary liability that could result from such an error, many viable fair uses of the copyrighted works are abandoned.<sup>6</sup> This is particularly true when risk-averse intermediaries, or “gatekeepers,” such as publishers, broadcasters and distributors, are injected into the creative process. Given the legal and monetary risk of reliance on fair use, gatekeepers often simply instructed documentarians to license the use of other works or remove the works if they want the film to be publicly distributed or publicly performed.

The growing fear of relying on fair use undermined the value of this important American doctrine. Fair use has been an integral part of copyright law for over 150 years and has served as an essential free speech safeguard.<sup>7</sup> If filmmakers could not rely on fair use in some reasonable manner due to its uncertain nature, the creative product would suffer and, as a result, so would the benefit to the public. But how could this situation be remedied?

Typically, in situations of uncertainty, the answer has been to attempt to create negotiated guidelines. For instance, during the last major revision of the copyright law that led to the enactment of the 1976 Copyright Act, Congress instructed interested parties to negotiate some safe harbors for educational uses of copyrighted works. In essence, copyright owners and educational groups were brought together to hammer out a

compromise that both could live with. The result was the *Agreement on Guidelines for Classroom Copyright in Not-For-Profit Educational Institutions with Respect to Books and Periodicals and the Guidelines for Educational Uses of Music*.<sup>8</sup> While these guidelines provided some certainty, the negotiated nature of their creation resulted in a relatively narrow safe harbor. Other attempts to create guidelines and consensus agreements on fair use failed.<sup>9</sup> The lack of consensus limited the usefulness and minimized reliance on many guidelines as a functional safe harbor. Attempting to assist documentarians with such a negotiated strategy would have been likely to lead to a similar fate: either the discussions would have broken down or the guidelines would have been so narrow and specific that they would not flexibly serve the needs of documentary filmmakers.

Faced with this fate, the Center for Social Media in the School of Communication at American University and the Program on Intellectual Property and the Public Interest in the Washington College of Law at American University facilitated a new approach. Rather than develop guidelines in an adversarial negotiation with traditional copyright owner representatives, documentarians and filmmakers were brought together to develop reasoned and reasonable practices for themselves. The result was the *Documentary Filmmakers' Statement of Best Practices in Fair Use*<sup>10</sup> (the “Statement”). To many,

<sup>5</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology to Lock the Law* (2004).

<sup>6</sup> Some documentarians, broadcaster and other gatekeepers did utilize fair use to justify use of others' works in films, but they typically did so quietly and were reluctant to publicly discuss their practices. This further led to the view that fair use could not be used, even if, in fact, it was being used by some.

<sup>7</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>8</sup> See U.S. Copyright Office Circular 21, p.7 – 10, available at: <http://www.copyright.gov/circs/circ21.pdf>.

<sup>9</sup> See, e.g., proposed guidelines for multimedia (<http://www.utsystem.edu/ogc/INTELLECTUALPROPERTY/ccmcguid.htm>) under the Conference on Fair Use (<http://www.utsystem.edu/ogc/INTELLECTUALPROPERTY/confu.htm>) that was generally regarded as a dismal failure with little consensus achieved.

<sup>10</sup> The full Statement is available at: <http://centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf>. Related material is available on the Center for Social Media website at: [http://www.centerforsocialmedia.org/resources/publications/statement\\_of\\_best\\_practices\\_in\\_fair\\_use/](http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/).

this was a radical concept. How could a group of “users” be expected to achieve a moderate and fair result? Why wouldn’t their desire for broad use lead to an extreme position?

Despite these fears and to the surprise of many, the experiment worked. It succeeded for a number of reasons. For one thing, documentarians are not merely users. Documentary filmmakers are creators who care deeply about the works they create. When excesses arose in the discussion of best practices, filmmakers became aware that whatever best practices were developed for the use of others’ works would equally apply to other creators’ use of their documentaries. This twist on the Golden Rule – use from others only to the extent that you would have your own work used by others – was significant in moderating excesses. Additionally, if these best practices were going to have any value, they would have to be generally perceived and accepted as reasonable. The goal of best practices was for others, and ultimately the courts, to agree that they represented reasoned and reasonable custom and practice within the documentary filmmaking community. In order to succeed, the best practices had to be objectively reasonable.

Another implicit basis for the best practices was that not all fair uses need be controversial. The statement that fair use is nothing more than the right to hire a lawyer is inherently wrong. Fair use is used by individuals, businesses,

and technologists every day. The vast majority of fair uses are never questioned or litigated. The transparent nature of fair use in our copyright system goes largely unnoticed, whereas it is the unusual situations where fair use goes to trial and receives wide publicity. But these hard cases, involving difficult balancing of equitable interests, are not the heart of fair use. If fair use was eliminated, we would quickly realize just how important it is to the everyday working of our copyright system and our society. The Statement focused on principles of objective and transformative social value. The principles established, and the illustration of the principles revealed, that some unauthorized uses of copyrighted works under certain circumstances can be generally accepted. Not all fair uses are intrinsically controversial.

What followed the development of the best practices surprised everyone: rapid change. Most expected a grassroots acceptance of the principles having a positive effect among documentary filmmakers. It was also expected that “courts would respect the views of responsible professionals about what kinds of uses are fair in their area of practice.”<sup>11</sup> The practices leveraged what had already begun in the courts – the judicial trend toward focusing on transformative uses as a determinative factor in the fair use analysis – and built upon that legal foundation for the practical benefit of documentary filmmakers. It enabled documentarians

to more confidently assert reasonable uses and thereby reduce unreasonable clearance costs or artistic censorship. But the Statement did not only affect documentary filmmakers.

Quickly after their release, gatekeepers also began to embrace documentarians’ uses based on the Statement. Three films that justified fair uses based on the Statement were shown at the Sundance Film Festival.<sup>12</sup> As a result of the Sundance screenings, all three received television screenings.<sup>13</sup> Filmmakers were also able to negotiate lower clearance costs using the Statement as leverage.<sup>14</sup> Television programmers, such as WGBH, use the Statement and provide it to their producers.<sup>15</sup> But perhaps most importantly, the insurance industry joined in as well.<sup>16</sup> As the ultimate, risk-averse gatekeeper, the insurers’ acceptance of the Statement as prudent custom and practice led the way to widespread and rapid acceptance in the marketplace.

Before the Statement, it was virtually impossible to distribute or show a film without clearing every work used within the film and then obtaining errors and omissions (“E&O”) insurance to indemnify theatres, broadcasters, and distributors.<sup>17</sup> In less than two years after the release of the Statement in November 2005, four insurance companies announced programs to cover fair use claims. Although a number of insurers had been willing to insure films on a case-by-case basis, because following the

<sup>11</sup> Pat Aufderheide and Peter Jaszi, Fair Use and Best Practices: Surprising Success, *Intellectual Property Today* (October 2007) available at: <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf> (last visited 4/2/08). See also Peter Jaszi, Motion Pictures and Copyright Discipline, forthcoming in the *Utah Law Review* and the *Oxford Handbook of Film and Media Studies* and available at: [http://www.centerforsocialmedia.org/files/pdf/fairuse\\_motionpictures.pdf](http://www.centerforsocialmedia.org/files/pdf/fairuse_motionpictures.pdf).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> William McGeveran, Insurers Tune in to Fair Use Best Practices, *Info/Law*, <http://blogs.law.harvard.edu/infolaw/2007/02/13/insurers-tune-in-to-fair-use-best-practices>.

<sup>17</sup> *Ibid.*

Statement dramatically reduced risk, these insurance programs were an enormous breakthrough in broad market acceptance. As Professor Larry Lessig stated:

“This is a huge breakthrough. As many of us have been arguing, the real constraint of fair use comes not from the courts, but from those in the market who are trying to avoid any risk of copyright exposure. This market-based solution will now clear the way for many films to be released which before could not secure insurance. And we are eager to use the inevitable cases that will emerge to solidify the fantastic Statement of Best Practices developed by the Center for Social Media.”<sup>18</sup>

What started as quiet acceptance and coverage for particular films gave way to E&O insurers’ express willingness to offer insurance for fair use claims upon a satisfactory legal opinion letter by a lawyer. One insurer, MediaPro, made a special arrangement with Los Angeles lawyers, such as Michael Donaldson, and the Stanford University’s Fair Use Project for *pro bono* or reduced fee representation in case a law suit arises, with MediaPro agreeing to pay legal costs if the defense fails.<sup>19</sup> Other insurance companies require only a legal opinion letter that the fair use meets the standards of the Statement. Although the insurers do not have standard pricing, the presence of multiple insurers in the fair use market creates a competitive environment in which

documentarians can negotiate more effectively with insurers as well as copyright owners.<sup>20</sup>

This rapid market acceptance of the Statement has been a boon not only to documentary filmmakers (and thereby the public), but it has also been the impetus for a host of similar projects in support of other creators and culturally significant users. The Statement blazed a trail that others now seek to follow and build upon. Projects have begun to address fair use in user-generated content sites, such as YouTube.<sup>21</sup> Another project was begun to address the use of copyrighted works by teachers of media literacy and the need to inform teachers of reasonable fair use practices.<sup>22</sup> These are but a few of the examples of a movement still in its nascent stage. The Statement proved that fair use can serve a vital role in our society and that its flexibility need not be an impediment to its use, but is in fact its greatest asset. The Documentary Filmmakers’ Statement of Best Practices of Fair Use also provided a model for other creators to follow in the pursuit of reasoned and reasonable reliance on fair use.

### **Documentary Filmmakers’ Statement of BEST PRACTICES IN FAIR USE**

#### **PREAMBLE**

This Statement of Best Practices in Fair Use is necessary because documentary filmmakers have found themselves, over the last decade, increasingly constrained by demands to clear rights for copyrighted material. Creators in other disciplines do not face such demands to the same extent, and

documentarians in earlier eras experienced them less often and less intensely. Today, however, documentarians believe that their ability to communicate effectively is being restricted by an overly rigid approach to copyright compliance, and that the public suffers as a result. The knowledge and perspectives that documentarians can provide are compromised by their need to select only the material that copyright holders approve and make available at reasonable prices.

At the same time, documentarians are themselves copyright holders, whose businesses depend on the willingness of others to honor their claims as copyright owners. They do not countenance exploitative or abusive applications of fair use, which might impair their own businesses or betray their work.

Therefore, documentarians through their professional organizations, supported by an advisory board of copyright experts, now offer the statement that follows.

#### **BACKGROUND**

“Fair use” is a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture. We have chosen to encourage creators by rewarding their efforts with copyright. To promote new cultural production, however, it also is important to give other creators opportunities to use copyrighted material when they are making something new that incorporates or depends on such material. Unless such uses are

<sup>18</sup> Larry Lessig, Major News: Fair Use and Film, [http://lessig.org/blog/2007/02/major\\_news\\_fair\\_use\\_and\\_film.html](http://lessig.org/blog/2007/02/major_news_fair_use_and_film.html).

<sup>19</sup> Pat Aufderheide and Peter Jaszi at b.

<sup>20</sup> *Ibid.*

<sup>21</sup> Recut, Reframe, Recycle, [http://www.centerforsocialmedia.org/resources/publications/recut\\_reframe\\_recycle/](http://www.centerforsocialmedia.org/resources/publications/recut_reframe_recycle/) and The Good, The Bad, and The Confusing: User-Generated Video Creators on Copyright: [http://www.centerforsocialmedia.org/files/pdf/good\\_bad\\_confusing.pdf](http://www.centerforsocialmedia.org/files/pdf/good_bad_confusing.pdf).

<sup>22</sup> The Cost of Copyright Confusion for Media Literacy,

possible, the whole society may lose important expressions just because one person is arbitrary or greedy. So copyright law has features that permit quotations from copyrighted works to be made without permission, under certain conditions.

Fair use is the most important of these features. It has been an important part of copyright law for more than 150 years. Where it applies, fair use is a right, not a mere privilege. In fact, as the Supreme Court has pointed out, fair use helps reconcile copyright law with the First Amendment. As copyright protects more works for longer periods, it impinges more and more directly on creative practice. As a result, fair use is more important today than ever before.

Creators benefit from the fact that the copyright law does not exactly specify how to apply fair use. Creative needs and practices differ with the field, with technology, and with time. Instead, lawyers and judges decide whether an unlicensed use of copyrighted material is “fair” according to a “rule of reason.” This means taking all the facts and circumstances into account to decide if an unlicensed use of copyright material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner. Fair use is flexible; it is not uncertain or unreliable. In fact, for any particular field of critical or creative activity, such as documentary filmmaking, lawyers and judges consider professional expectations and practice in assessing what is “fair” within the field. In weighing the balance at the heart of fair use analysis, courts employ a four-part test, set out in the Copyright Act. In doing so, they return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?
- Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?

Among other things, both questions address whether the use will cause excessive economic harm to the copyright owner.

If the answers to these two questions are affirmative, a court is likely to find a use fair. Because that is true, such a use is unlikely to be challenged in the first place. Documentary films usually satisfy the “transformativeness” standard easily, because copyrighted material is typically used in a context different from that in which it originally appeared. Likewise, documentarians typically quote only short and isolated portions of copyrighted works. Thus, judges generally have honored documentarians’ claims of fair use in the rare instances where they have been challenged in court.

Another consideration underlies and influences the way in which these questions are analyzed:

Whether the user acted reasonably and in good faith, in light of general practice in his or her particular field. In the future, filmmakers’ ability to rely on fair use will be further enhanced by the Statement of Best Practices in Fair Use that follows. This statement serves as evidence of commonly held

understandings in documentary practice and helps to demonstrate the reasonableness of uses that fall within its principles.

Documentarians find other creator groups’ reliance on fair use heartening. For instance, historians regularly quote both other historians’ writings and textual sources; artists reinterpret and critique existing images (rather than merely appropriating them); scholars illustrate cultural commentary with textual, visual, and musical examples. Equally important is the example of the news media: fair use is healthy and vigorous in daily broadcast television, where references to popular films, classic TV programs, archival images, and popular songs are constant and routinely unlicensed.

The statement that follows describes the actual practice of many documentarians, joined with the views of others about what would be appropriate if they were free to follow their own understanding of good practice. In making films for TV, cable, and theaters, documentarians who assert fair use often meet with resistance. All too frequently they are told (often by nonlawyers) that they must clear “everything” if they want their work to reach the public. Even so, some documentarians have not been intimidated. Unfortunately, until now the documentarians who depend on fair use generally have done so quietly, in order to avoid undesired attention. In this statement, documentarians are exercising their free speech rights—and their rights under copyright—in the open.

This statement does not address the problems that result from lack of access to archival material that is

best quality or the only copy. The statement applies to situations where the filmmaker has ready access to the necessary material in some form.

The statement also does not directly address the problem of “orphan works”—works presumably copyrighted but whose owners cannot be located with reasonable effort. Generally, it should be possible to make fair use of orphan works on the same basis as clearly sourced ones. Sometimes, however, filmmakers also may wish to use orphan works in ways that exceed fair use. A more comprehensive solution for orphan works may soon be provided through an initiative spearheaded by the U.S. Copyright Office (for more information, see [www.copyright.gov/orphan](http://www.copyright.gov/orphan)).

This statement finally does not concern “free use”—situations when documentarians never need to clear rights. Examples of types of free use are available in documents at [www.centerforsocialmedia.org/fairuse.htm](http://www.centerforsocialmedia.org/fairuse.htm).

### THE STATEMENT

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

The four classes of situations, with their informing principles and limitations:

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

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

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

**LIMITATIONS:** There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience’s taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work (or other works like it).

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

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

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

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

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film’s final credits;

- to the extent possible and appropriate, quotations are drawn from a range of different sources;
- each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.

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

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

**PRINCIPLE:** Fair use should protect documentary filmmakers from being forced to falsify reality. Where a sound or image has been captured incidentally and without prevision, as part of an unstaged scene, it should be permissible to use it, to a reasonable extent, as part of the final version of the film. Any other rule would be inconsistent with the documentary practice itself and with the values of the

disciplines (such as criticism, historical analysis, and journalism) that inform reality-based filmmaking.

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

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

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

occasion, however, the licensing system breaks down.

**PRINCIPLE:** Given the social and educational importance of the documentary medium, fair use should apply in some instances of this kind. To conclude otherwise would be to deny the potential of filmmaking to represent history to new generations of citizens.

### **FOUR: USING COPYRIGHTED MATERIAL IN A HISTORICAL SEQUENCE**

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

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

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

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

### FAIR USE IN OTHER SITUATIONS FACED BY DOCUMENTARIANS

The four principles just stated do not exhaust the scope of fair use for documentary filmmakers. Inevitably, actual filmmaking practice will give rise to situations that are hybrids of those described above or that simply have not been anticipated. In considering such situations, however, filmmakers

should be guided by the same basic values of fairness, proportionality, and reasonableness that inform this statement. Where they are confident that a contemplated quotation of copyrighted material falls within fair use, they should claim fair use.

### SOME COMMON MISUNDERSTANDINGS ABOUT FAIR USE

As already indicated, two goals of the preceding statement are to encourage documentarians to rely on fair use where it is appropriate and to help persuade the people who insure, distribute, and program their work to accept and support documentarians in these choices. Some common errors about fair use and its applicability may stand in the way of accomplishing these goals. Briefly, then, here are some correctives to these misunderstandings:

- *Fair use need not be exclusively highminded or “educational” in nature.* Although nonprofit or academic uses often have good claims to be considered “fair,” they are not the only ones. A new work can be “commercial”—even highly commercial—in intent and effect and still invoke fair use. Most of the cases in which courts have found unlicensed uses of copyrighted works to be fair have involved projects designed

to make money, including some that actually have.

- *Fair use doesn’t have to be boring.* A use is no less likely to qualify as a fair one because the film in which it occurs is effective in attracting and holding an audience. If a use otherwise satisfies the principles and limitations described in the Statement of Best Practices in Fair Use, the fact that it is entertaining or emotionally engaging should be irrelevant to the analysis.
- *A documentarian’s failed effort to clear rights doesn’t inhibit his or her ability to claim fair use with respect to the use in question.* Everyone likes to avoid conflict and reduce uncertainty. Often, there will be good reasons to seek permissions in situations where they may not literally be required. In general, then, it never hurts to try, and it actually can help demonstrate the filmmaker’s good faith. And sometimes (as in connection with Principle Four) it can be critically important. ⚖️

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## 2008-2009 TIPS CALENDAR

### August

7-12      ABA Annual Meeting      Waldorf~Astoria Hotel  
New York, NY

### September

30 – Oct 5      TIPS Section Fall Meeting      The Westin Resort  
Hilton Head Island  
Hilton HeadIsland, SC

### November

6-7      Fidelity and Surety Law Committee      Renaissance Harbor Place  
Fall CLE Program      Baltimore, MD

## 2009

### January

22-23      Fidelity and Surety Law Committee      Waldorf~Astoria  
Midwinter Meeting      New York, NY

### February

11-17      ABA Midyear Meeting      TBD  
Boston, MA

26-28      2009 Insurance Coverage Litigation      Millennium Biltmore  
Committee Meeting      Hotel  
Los Angeles, CA

### March

5-6      Transportation MegaConference IX      Sheraton New Orleans  
New Orleans, LA

### April

2-3      Emerging Issues Motor Vehicle Litigation      Arizona Biltmore  
Phoenix, AZ