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# Fair Use Frequently Asked Questions

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## **1) The Documentary Filmmaker's Statement of Best Practices is great, but does it actually carry any weight with broadcasters and insurance companies?**

It certainly does carry weight! The Statement has provoked dramatic change in the industry since it was released in November 2005. PBS and ITVS have used the Statement to release programs, and so have cable casters including IFC. All four of the national errors and omissions insurers now issue fair use coverage, if a lawyer says that the use is within the terms of the Statement. As more gatekeepers endorse the statement, the stronger the statement becomes. Practice makes practice. Practice changes practice.

## **2) I have found something I want to fair use according to the statement, how do I go about doing this? Am I required to ask permission, give credit, or use a disclaimer?**

You do not have to ask permission or alert the copyright holder when employing fair use. If you are confident that your fair use claims will hold, bolstered by the Documentary Filmmaker's Statement, then assert your rights! However, in some cases, courts have found that asking permission and then being rejected has actually created a case for fair use. So asking permission doesn't mean that you necessarily give up the right to use fair use if you are denied.

As far as a statement to put at the beginning/end of your piece- there is no one phrase that people generally put to indicate their fair use. In fact many people don't put anything at all! However, consideration for the creators of work is always appreciated and can sometimes cool heads that would otherwise be hot.

## **3) What is the appropriate length of a clip to fair use? I heard that if you use ten percent of the original length then it's okay.**

According to the law, there is no exact percentage that you are allowed to fair use. The Statement suggests that you can use the material long enough to make your point but no further.

The question always is: how and why are you using the material. According to the documentary filmmakers who created the statement, you must contextualize the clip somehow-- it can't just be the original material without you clearly illustrating how it is relevant to the story.

## **4) Does it matter if you are a non-profit organization vs. a commercial organization?**

It makes no difference in the law whether or not you are using other people's copyrighted material on behalf of a nonprofit. Fair use is just as viable within a commercial context as in a

nonprofit context. Your organization must either rely on fair use or license the material, unless it is in the public domain.

### **5) Is fair use stealing?**

Clearly fair use isn't stealing; people who treat all unlicensed use as stealing have forgotten that copyright ownership is a clearly limited right, as part of the basket of incentives to create more culture. The limits are as important as the ownership rights.

It's not surprising though that people get confused. Not only do we live in a world where many things are more completely owned, but also large media corporations have continuously told people that any unlicensed use is "stealing" ever since file sharing became popular.

Nobody wants to open the door to piracy, and this statement certainly doesn't. This statement specifies under what limited circumstances users' rights take precedence over owners' rights, within today's law.

This Statement of Best Practices will certainly affect documentary filmmakers equally as users and as owners. In fact, that's one of the reasons why a statement of what is considered fair by documentary filmmakers has such credibility. They benefit from the owners' rights in copyright and from the users' rights in the same law. A filmmaker who, for example, took footage of a public event would be expected to allow access by others in situations prescribed the Statement.

### **6) I want to use footage, but don't have access to it. Can fair use help me out?**

Sadly, fair use is unusable in a case where you do not have independent access to material. If the owner is the sole-source of the material, fair use will be of little help.

### **7) Does fair use apply to still photos, book covers, newspapers, and other non-film items? What about things I find on the web?**

The statement applies to all copyrighted works, not just film, no matter where you find them.

For example, if you wanted to illustrate a growing interest in the relationship between science in religion, you might find it necessary to show several book covers and newspaper headlines. If you are reproducing book covers and newspaper articles/headlines not so that people can read the articles again, or learn about, say, The Tao of Physics, but because you want to show people that this was a hot topic, then you have a good case for fair use.

### **8) Does the Filmmakers' Statement of Best Practices apply to fiction film?**

The Filmmakers Statement is tailored to the environment of documentary filmmaking, and can be applied in similar documentary based genres.

## **9) How does fair use work in an international context?**

Your project will be governed by the copyright law of your nation when distributed in your nation. For international distribution there are different issues.

Fair use is a uniquely American right, although all copyright regimes have some exemptions that keep copyright from being private censorship. What is accepted as fair use within the US may indeed not fall under accepted copyright practice in another regime, e.g. the EU. This is something that is driving anyone who works in coproduction or in international distribution crazy at the moment. Some filmmakers are talking about doing research in the EU environment on the consequences of not being able to use copyrighted material in Europe the way filmmakers can in the U.S. But it's just beginning. Filmmakers met in Rome and came out with a declaration to begin this process. We are excited to see what EU filmmakers come up with!

Meanwhile, other regimes are showing great interest in fair use. Canadians are in the process of reinterpreting "fair dealing" (a long long list of very specific exemptions) in a way that makes it much more like fair use. Australians have rewritten their law to introduce "flexible dealing," which could be something more like fair use but hasn't really been used much yet. Still, getting "harmonization" on copyright exemptions is a far way from anything that will make your life easier. So far "harmonization"--the U.S. government likes it—has really favored ownership rights. But the U.S. push for harmonization may also eventually favor fair use rights. It would really help for European producers in particular to understand the importance of balancing features of copyright in order to demonstrate what is at stake creatively, as that discussion goes forward.

## **10) How does fair use apply to release forms and all that stuff?**

Privacy issues concerning permission to film individuals and release forms are a separate part of the law and do not deal with copyright or fair use. Please read "Yes, You Can! Where You Don't Even Need 'Fair Use'" to find out more about this, and to learn what else is legal and free! ([http://www.centerforsocialmedia.org/files/pdf/copyright\\_backgrounder.pdf](http://www.centerforsocialmedia.org/files/pdf/copyright_backgrounder.pdf))

Also, Michael Donaldson, an entertainment lawyer who was on the advisory board for the Statement has written a reliable guide, *Clearance and Copyright*. The book clearly stipulates what responsibilities filmmakers have when dealing with privacy issues.

## **11) Can you recommend a lawyer or service to give me legal advice?**

The Center is not in a position to recommend any particular lawyer to you. But...

The beauty of the code of practices approach used by doc filmmakers, in fact, is that you can use the good judgment of the consensus in your field and not have to depend on lawyers to make the fair use assessment on their own.

A lawyer's job is to be as cautious as humanly possible on your behalf, and caution always leads to licenses, which are utterly uncontestable. Fair use is a right, and like any free speech right, it's possible you might guess wrong. But every day people use many free speech rights without really thinking twice about them. (You don't really spend much time fretting about the legal consequences of public speaking, because you kind of know where the boundaries are, right?) Every day people who regularly use fair use (for instance, historical scholars, or broadcast news folks) make instant judgments about what's reasonable. That's because they have internalized norms for their field. The Statement makes explicit what those understandings are for doc filmmakers. That's why it's actually helpful to lawyers, archivists, judges and everyone else who would make a judgment about your judgment.

If you still have questions about whether your fair use was appropriate after reading the Statement of Best Practices, please contact your local lawyers for the arts organization (<http://www.vlany.org/legalservices/vladirectory.php>).

Many of these organizations' lawyers are new to their profession, so I would encourage you to bring along a copy of the Statement of Best Practices in Fair Use if you invoke fair use in your film.

In addition, all of the attorneys who worked on the legal advisory board for the fair use statement are well versed in fair use, and all take clients (though the academics take clients only occasionally), but other lawyers may well be well qualified. Some lawyers have not encountered the statement yet and will benefit greatly from knowing about this tool.