

Society for Cinema and Media Studies Statement of Fair Use Best Practices for Media Studies Publishing

Introduction

This Statement of Best Practices identifies what media scholars consider to be fair use of copyrighted works within media studies publishing in the United States. It provides a reference for media scholars to follow when considering whether or not their inclusion of media in a publication meets the standards of fair use. In 1993, the Society for Cinema and Media Studies (SCMS) (then the Society for Cinema Studies) issued a similar statement making the fair use argument for the scholarly use of film stills in publications.¹ This document updates the 1993 statement to account for changes in media publishing and in copyright fair use analysis.

The 1993 statement has been widely influential, and it has facilitated the use of film stills in publishing since its publication. A number of academic publishers, including Oxford University Press and Columbia University Press, have adopted a policy of reprinting film, television, and Internet images in books and print journals of media scholarship and in Media Studies textbooks without asking permission. Since the 1993 statement was published sixteen years ago, SCMS has not discovered any lawsuits filed against authors or publishers who have adopted this policy involving the use of film stills.

Since 1993, scholars' methods of using copyrighted material in publications have multiplied. SCMS members use a wide range of copyrighted materials, including posters, advertisements, photographs, sound files, and video files, in addition to film stills. SCMS members also publish in a variety of venues including books, textbooks, print and online journals, videos included on DVDs, blogs, and personal Web sites, among other possible outlets. Fair use is applicable across all of these media and venues. In addition to changes in scholarly

1 Kristin Thompson, "Fair Usage Publication of Film Stills," 1993, http://www.cmstudies.org/index.php?option=com_content&task=view&id=72&Itemid=122#c1 (accessed April 14, 2009).

publication, the legal interpretation of fair use has evolved since 1993. Accounting for both changes in scholarly practice and in copyright law, this document updates the 1993 statement.

In addition to updating the 1993 statement, this document builds on the models of fair use best practices documents initiated by the Statement of Best Practices in Fair Use for Documentary Filmmakers² and the many similar statements that have followed, including SCMS's own 2006 Statement of Best Practices in Fair Use for Film and Media Educators.³ Each of these statements describes what responsible professionals in each media field believe qualifies as fair use within their area of expertise. The opinions of responsible professionals are important because U.S. courts often take note of industry practices, and because creating and articulating customary industry practices helps media scholars shape the future of fair use within their own industry.⁴ Updating the 1993 statement is necessary to ensure that media scholars play an active role in shaping the field's future.⁵

This document identifies four categories in which fair use claims may be based when using copyrighted work in publication, while noting limits on those categories. It also identifies and debunks common fair use myths. This is a declaration of what the members of SCMS believe to be fair use in their academic field. Many of the principles below are widely applicable, but the document is intended to speak for and about media scholars and scholarship. It is important to remember that this document is only a set of general principles, designed to serve as a guide to authors, editors, and publishers.

What Is Fair Use?

Fair use is an important element of U.S. copyright law that allows for the use of copyrighted work without asking permission of the copyright holder, especially when the copyrighted work is used for criticism, scholarship, and education.

Fair use is permitted because some uses of copyrighted works offer greater value to society than they do harm to the copyright holder; fair use is decided on a case-by-case basis by balancing a variety of issues. In Section 107 of the Copyright Act,⁶ four factors⁷ are listed that courts should consider when analyzing whether using a copyrighted work will be considered fair use. However, since the fair use factors were codified, judges have consistently weighted two of the factors more heavily than the others. Through the development of case law and a pivotal Supreme Court case,⁸

2 See http://www.centerforsocialmedia.org/resources/fair_use/ (accessed April 19, 2010).

3 See <http://www.cmstudies.org/documents/SCMSBestPracticesforFairUseinTeaching-Final.pdf> (accessed April 19, 2010).

4 Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 *Utah L. Rev.* 715, 731–732.

5 *Ibid.*

6 17 U.S.C. §107.

7 The four factors are (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.

8 *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569 (1994).

analyzing fair use often begins by considering two questions derived from those two weighty factors that strike at the heart of the matter:

- (1) Did the user employ copyrighted works with a transformative purpose that differs from the original?
- (2) Did the user employ only as much as necessary for that transformative purpose?

These two questions have developed recently out of the four factors and condense what is at the heart of fair use. The four factors are *not* a checklist that must all weigh toward the fair user for courts to find fair use. The answers provided by the two questions give a clearer picture of whether or not a particular use is a fair use. Answering yes to both these questions is a strong indication that a particular use is fair.

In analyzing the first question, case law suggests that a use is transformative when it repurposes copyrighted material and adds something significant to it. To determine whether a use is transformative, a court would consider the purpose of the original work and compare it to the purpose of the use by the media scholar. For example, if a media scholar used a film clip or a still to illustrate a particular lighting technique, a court would begin by considering the purpose of the film (e.g., to entertain). The court would then compare that purpose with the purpose of the media scholar's use of the copyrighted film clip or still (e.g., to educate about lighting techniques).

The court would also consider the differing audiences and markets. In the above example, filmgoers and film students are clearly different audiences. Since the media scholar's purpose was different from the filmmaker's purpose and the intended audiences of the two works are different in nature, the use is transformative. Typically, media scholars add new value and meaning to copyrighted work through repurposing copyrighted works in a manner that educates, critiques, and provokes the audience to view the works in a new light. The categories in this guide are simply an elaboration of the types of repurposing of media that scholars regularly engage in.

Analyzing the second question requires a closer look at the media scholar's project. Determining whether the fair user has only used as much of the original copyrighted work as necessary varies case by case. In some cases, a media scholar may only need to use one film still to express a particular principle. In other instances, use of the entire work may be necessary. The analysis focuses on how much of the original copyrighted work is needed to fulfill the transformative purpose of the fair user. The author should be the best judge of whether he or she has used more than is necessary to make his or her point.

Following are four typical categories of media scholar uses of copyrighted material that typically fall under fair use. These are not the only situations in which you might claim fair use, but they are the most common ones. For each of these categories, media scholars believe that their purpose for use of the copyrighted work is different from the purpose of the copyright holder of the original work. They address a market audience that wants to learn about media rather than an audience of consumers. And they add significant value—the contributions of the media scholars themselves—to whatever material is taken. Therefore, media scholars believe these uses are transformative. For each category, limitations are included to guide your reasoning.

Categories

I. Use of Copyrighted Material to Illustrate Historical, Theoretical, or Aesthetic Arguments

Description: Media scholars need to use still and moving images and other copyrighted work for illustration in publications. In many cases, media scholars' written arguments are much stronger and clearer with examples than they would be without meaningful illustration. Media scholars use these images to illustrate both criticism and commentary. Often the critical ideas put forward by scholars are nearly impossible to convey without examples of copyrighted works. Such publications follow the presentational model used by film and media scholars in the classroom and in public lectures, where still and moving images and sound are central to explanation and criticism.

Principle: Because the use of examples of copyrighted work within academic publications is generally transformative in purpose and audience, media scholars believe that such use constitutes fair use.

Limitations: Media scholars should only employ as much of the copyrighted work as necessary to illustrate the point or argument. It should be clear in the body of the text or the caption why this work has been chosen.

II. Use of Copyrighted Material to Stimulate Discussion

Description: Media scholars, particularly when writing textbooks, use copyrighted work to stimulate further reflection on or investigation of the arguments in the text. Several images might be displayed on a page, for example, with a question or caption at the bottom, causing the readers to compare the images in light of the book or article.

Principle: Media scholars believe that such uses are transformative, scholarly, and educational, and that they qualify as fair use.

Limitation: Media scholars should use only as much of the copyrighted material as they need to provoke the analysis or discussion they want to elicit.

III. Multimedia Scholarship, Including Video Essays, DVD Extras, and Blog Posts

Description: Increasingly, media scholars use copyrighted works in works of multimedia scholarship—a category that includes though is not limited to online journal essays, blog posts, video essays, and documentaries. These forms of academic expression are akin to writing essays and books, extending the critical and commentary functions of scholarship into new media formats.

Principle: Media scholars believe that uses of copyrighted works in multimedia scholarship are transformative, and so constitute fair use.

Limitations: Media scholars should only use the amount required and in the minimal format and resolution necessary to make their points.

IV. Use of Copyrighted Material When Bundled with Scholarship and Teaching Materials

Description: Moving image, sound, and high-resolution still images are often necessary to illustrate the arguments in a printed Media Studies article or book. In order to provide multimedia illustrations, they must be distributed in separate formats such as on companion discs or online sites to supplement the printed works.

Principle: Media scholars believe that this kind of use is just as transformative as when they quote from copyrighted material within a text.

Limitations: Media scholars should to the best of their ability link the multimedia illustrative material with the text. They should discourage readers/viewers from separating or redistributing the images without regard to the necessary connection of the original scholarly work.

Fair Use Myths

In the absence of clarity about a community's creative practice, myths have sprung up about fair use. This section seeks to debunk the following myths.

If it's entertaining, I should stay away from it. Simply because a copyrighted work has significant entertainment value does not negate fair use of the material. As long as the copyrighted work is transformed and given new meaning, its use is likely to be a fair use.

I can only use 10 percent of the original work. The amount of the copyrighted work you may use depends on how much you need. When using stills, photographs, or video, authors may use the whole copyrighted still or clip to illustrate their points or stimulate discussion among their audience. There is no limitation on the amount of a copyrighted work an author may use as long as the author has not taken more than he or she needs and the use is transformative.

If I do three alterations on it, it's fair use. Simply modifying a copyrighted work is not enough to make the new work transformative. Moreover, a work may be transformative even if the original work is not modified but simply incorporated into a new work. But modifying a copyrighted clip or still image is often an important step in transforming a work. Changing the image resolution, size, or color, adding commentary or voice-over narration, or reediting to convey a scholarly argument through juxtaposition, can all aid in the transformation of a copyrighted work. Scholars can follow the lead of artists who reuse copyrighted works to make a new transformative object by using the tools of editing and video/sound manipulation to create new forms of digital scholarship, where the goal of reuse is to make a work of scholarly criticism and analysis. In the end, however, use of an entire, unmodified work may still be a fair use if the context is transformative and the scholar has not taken more than he or she needs.

Frequently Asked Questions

Can I obtain images or clips to use in my own work by bypassing copyright protection measures on a DVD or other digital media if my use of the image or clip will be a fair use?

No. When a user's copy was obtained illegally or in bad faith, by breaking encryption or in any other way, that fact may affect fair use analysis.

Media scholars may not bypass the copy protection on a DVD or other protected digital media (such as an iTunes television episode) in order to take a frame grab or clip, even if they are using it under fair use. Bypassing copy protection for any reason, even a legal one, is at the moment illegal. Section 1201 of the Digital Millennium Copyright Act makes it illegal to break the copy protection on all digital media for any reason, except for groups that have won narrow exceptions for fair use (including film and media scholars).

Section 1201 is one of the greatest impediments to fair use for media scholars in the Digital Age. Media scholars have won an exemption for clips used in their classrooms, and they may one day win an exemption for publishing purposes as well. Scholars may legally copy the material through both digital and nondigital means that do not require circumvention of copy protection.

Can I use copyrighted works in marketing materials for my book/DVD?

Permission is generally required to use copyrighted works for the purpose of marketing. Using all or part of a copyrighted work on the cover of your book, on promotional posters, or in any other marketing format will weigh against your claim of fair use. While using copyrighted images in your marketing materials will not automatically negate your fair use claims, it would be a large strike against you. Besides copyright issues, it may even expose you to other types of liability such as trademark infringement.

If I or someone I know owns a DVD, can I use material on that DVD freely?

Not necessarily. Ownership of a physical copy of a copyrighted work does not entitle the owner of the physical copy to use the copyrighted work as he or she pleases. A distinction should be recognized between the physical object and the copyrighted work. Fair use, however, can be employed whenever there is a legal copy available, including your friend's old VHS copy. Where a copy is legally available, it is irrelevant when making a fair use judgment whether the source of the content you are considering was a copy made from an over-the-air broadcast, a personal copy of a video, or a rented or borrowed piece of media. Furthermore, don't be deterred in deciding for fair use by labels on commercial media products proclaiming that they are "licensed for home (or private or educational or non-commercial) use only." These labels are written for consumers, and they do not affect in any way the educator's ability to make fair use of the contents. They have no legal effect on the fair use determination.

If the copyrighted work I want to use is not readily available to the public, and the owner of the physical work will not give me access to it so that I can use it, can I use “fair use” to gain access?

No. If the only copy of the copyrighted material you want to use is in the hands of someone who does not want to give it to you under terms that would allow you to employ fair use, then you cannot employ fair use.

What can I do if my work is taken down from a Web site for “infringement” if I think fair use applies?

Even if an author properly contextualizes (transforms) copyrighted work and posts it online under fair use, a copyright holder might still demand that the online service provider (for instance, YouTube) take it down. This request falls under Section 512 of the Digital Millennium Copyright Act, which releases online service providers from legal responsibility for copyright infringement if they do comply with such requests. However, in many cases, the copyright holder makes such demands without any awareness of the actual use. It often happens because of an automated process, not because any person made a decision about infringement. The subjects of the takedown also have the right to challenge it, although they then put themselves at risk of a lawsuit if the person who objected also objects to the reinstatement. (Most online video sites have information on how to do this; YouTube’s is clear and authoritative.)

Do I have to alert the author of the original work if I’m going to use part of his or her work?

No. There is no obligation to do so, but acknowledging and informing the author that you are using his or her work may be an ordinary act of politeness. It is always a good idea to provide recognition, through a reference or in a caption, of the source of the material. This demonstrates clearly that you understand you are using others’ work in the process of making your own. *