

Report of the Ad Hoc Committee of the Society For Cinema Studies, "Fair Usage Publication of Film Stills" by *Kristin Thompson*

Since the mid-1960s, the serious study of the cinema has expanded enormously. Many universities, colleges, and high schools now offer courses in the area. Moreover, scholarly publishing on cinema has burgeoned and gained respectability. Several scholarly presses now regularly bring out books on the subject, and there are refereed film journals.

One important facet of the rise of cinema as an academic discipline has been a new concern to illustrate articles and books with frame enlargements rather than publicity photos. Publicity photos are made on the set with still cameras, to simulate a scene in the film. They almost invariably use different framings and lighting set-ups than are used during the filming of the scene with the motion-picture camera. Some publicity photos even represent actions that are not displayed in the finished film. Such photos can be of use for certain purposes, as when historians study lost footage from films like *Greed* or *The Magnificent Ambersons*. For purposes of analyzing finished films, however, many scholars believe that photographs made from frames of the actual film strip are preferable, since they reproduce an actual composition that appears in a shot.

The legal status of such reproductions of frames has remained problematic. Does the use of a frame enlargement violate copyright? Should the scholar contact the copyright holder to obtain permission to reproduce frames, and, if the firm demands a fee for such permission, does it have to be paid? Similarly, for those scholars who use publicity photographs, there arises the question of whether their reproduction requires permission from and payment to a film company or archive.

Actual practice in the area of illustrating film-related publications has been confused and inconsistent. Some American academic presses and journals do not consider the obtaining of permission necessary, since their authors are using the illustrations for scholarly and educational purposes. Other presses insist that their authors secure such permission. In some cases, authors have been forbidden by the

copyright owner to reproduce the frames and have had to publish without illustrations or use a poor substitute, such as sketches of the original frames. In a few cases, scholars seeking to reproduce large numbers of frames have agreed to pay a permission fee on each, with the total running into five figures. (The fees demanded by major American film companies have typically been in the neighborhood of \$100-\$250 per frame.) Other authors have paid lesser sums for small numbers of frames. Still others have not sought out permissions but have published works copiously illustrated with frame enlargements.

The ad hoc Society for Cinema Studies Committee on Fair Usage Publication of Film Stills was formed in order to devise a policy statement that could provide both authors and presses with information and guidelines to help them with decisions concerning the reproduction of frame enlargements and publicity photographs. The recommendations contained in this report should in no way be considered legally binding. So far no legal precedent has been set that would firmly determine the status of frame reproductions or publicity photos. If litigation were initiated concerning fair use, the judgment would be rendered on the basis of the specific case, and there are no precise rules that would allow an author to predict the outcome. This report simply gathers available information and offers a series of tentative conclusions based on the existing fair-use law, the views of experts in the area of copyright, the policies of a number of prominent scholarly-press and trade editors, and the experiences of scholars who have used-or been denied the use of-frame enlargements and publicity photos in their publications.[1]

Film-related Illustrations and Fair Use. "Fair use" refers to a provision in American law that allows scholars and educators to quote or reproduce small portions of copyrighted works in various media without obtaining permission from the copyright holder. The entire text of the fair-use provision (*United States Code*, title 17, section 107) runs as follows

Limitations on exclusive rights: Fair use Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of 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.[2]

In the United States, for copyright purposes, films are classified as audiovisual rather than literary works, although it is possible to copyright a screenplay. Fair use, as it is generally assumed to apply to films, implicitly takes them to be primarily comparable to visual arts like painting. (Film sound tracks are in fact allowed to be separately copyrighted, while image tracks of sound films are not.) Films consist, in whole (in the case of silent films) or in part (in the case of sound films), of a lengthy series of photographs. Thus a film frame is, in essence, a tiny detail of a larger visual work.

Let us return to the four provisions of the fair-use section quoted above. Most frame enlargements are reproduced in books that clearly fall into the first provision's categories of "teaching," "criticism," "scholarship," or "research," and hence there seems little doubt that such illustrations would qualify as fair use by this criterion. Since most university presses are nonprofit institutions, illustrations in their books and journals would be more likely to fall into the fair-use category than would publications by more commercial presses. The classroom use of frame enlargements in the form of slides would be even more likely to fall under the provisions of the fair-use doctrine, and indeed there has been little or no controversy over such usage.

Thus this provision would tend to favor the scholarly use of frame enlargements. The use of such illustrations in scholarly press, journal, and classroom contexts is clearly intended for educational rather than

profit-making purposes. The United States Supreme Court stated that "every *commercial* [emphasis added] use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege" (*Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 451 [1984]). This does not automatically mean that noncommercial uses are assumed to fall within fair use, but this decision may carry such an implication.

The case of trade presses publishing scholarly and educational film books is less clear. There has been no clear test of whether fair use applies in such cases as well. So far, however, the courts do not seem to assume that all such publications are "commercial" and hence not serious scholarship. (See *Maxtone-Graham v. Burtchaell*, 803 F. 2d. 1253 [2d Cir. 1986], cert. denied, 481 US 1059 [1987].) It would appear that the fair-use provision favors all scholarly and educational publications, albeit more strongly in the case of nonprofit presses.

The Register of Copyrights, Ralph Oman, has suggested what "the nature of the copyrighted work" (the second provision in the fair-use law) might imply in this context: "motion pictures, by their nature, require quite substantial amounts of capital investment and consequently they have not been subject to all of the limitations applied to other owners of copyrighted material." He cites House and Senate reports that identify fair use as applying "under appropriate circumstances ... to the performance of a short excerpt from a motion picture for criticism or comment."^[3] This particular idea would be more relevant to educators using film clips in their classes than to scholars seeking to reproduce frames. Still, it establishes that there are situations in which fair use does apply to motion pictures.

A crucial point in relation to this second factor is that motion pictures are almost invariably published works. There have been recent court cases that severely limited the fair-use law as it relates to unpublished works, since their creators cannot be assumed to have placed their creations before the public, thus subjecting them to analysis and comment. Professor Peter Jaszi, a specialist in copyright law, comments on the implications of such decisions: "In the same vein, it seems reasonable to argue that by distributing a motion picture, a copyright owner has chosen to invite criticism and comment. It is hard to imagine that there could be any complaint

about the use of stills to illustrate (for example) newspaper reviews of films currently in release, nor is it easy to see what principle distinction can be drawn between contemporaneous criticism and retrospective criticism." [4] Again, there are grounds for believing that frame enlargements may fall into the provisions of the fair-use law.

As to the third clause quoted above, no guidelines have been formulated, through either legislation or litigation, that specify a number or proportion of frames that may be reproduced from a single film. In an individual case, qualitative as well as quantitative factors would weigh in a final decision on fair-use status. At twenty-four frames per second, a ninety-minute feature would consist of around 129,600 frames; it seems possible that even the reproduction of a hundred frames (less than one tenth of 1 percent) would be considered too small a portion to be infringing on copyright protection.

It might be argued by the copyright holder that each shot is a single image and hence the proportion should be counted on the basis of total number of shots rather than number of frames in a film. Thus if a film contained five hundred shots in ninety minutes, the reproduction of one hundred frames would be claimed to constitute 20 percent. This argument seems dubious, however, since scholars often reproduce several frames from a single shot, to show the changes that occur within it. Moreover, since many films contain long takes of several minutes, a single shot can hardly be counted as equivalent to a small basic unit of measurement (comparable to, say, individual words as the basis for measuring fair use in literary works). Otherwise, by the logic of counting shots as the unit of measurement, a scholar who used a hundred frames from Hitchcock's *Rope* would have reproduced around a thousand percent of the film's images. Another aspect of this issue is raised by the fact that some films (for example, Dziga Vertov's *Man with a Movie Camera*) contain many shots consisting of a single frame. Since it is impossible to make a shot that consists of less than one frame, the single frame would seem to be the unit of measurement most useful to the issue of fair use.

A copyright holder suing an author on the grounds of copyright infringement would have to show that, under the fourth provision quoted above, the author's illustrations had harmed the "potential

market for or value of the copyrighted work." This crucial provision also weighs heavily in favor of fair use for frame enlargements. It seems highly unlikely that a film company could demonstrate that people looking at frame enlargements, in no matter what quantity, reproduced in a scholarly book or article, would as a result be less inclined to see the film in question. Indeed, it can be argued that scholarly and educational publications that discuss films and use frame illustrations arouse interest in the original film and hence act as a form of publicity. When teachers and professors choose to use a book or article containing such illustrations in a classroom situation, they are also presumably more likely to rent a copy of the film to show to their students. The fact that several film distributors (mostly small companies and importers) in this country cooperate in assisting writers of educational and scholarly works suggests that they see such a potential advantage for themselves in the form of additional rentals. Moreover, some scholarly and educational books list distribution sources for the films they discuss, further reinforcing the idea that such works add to, rather than detract from, the commercial value of the films discussed.

Indeed, it seems clear that copyright laws pertaining to motion pictures were intended to protect filmmakers against illegal copying and performances of films rather than against the publication of frames on paper. In the very early years of the cinema, producers wished to copyright motion pictures in order to prevent the duping of films by unscrupulous distributors. Film piracy has remained a problem over the intervening decades, usually because duped prints or extra prints made by laboratory employees in the United States have been sold abroad before legal distribution contracts could be made in far-flung markets. Today, with the spread of video reproduction, the problem has intensified. Not only are illegal 35mm prints struck and sold in such markets as the Far East, but thousands of video copies are made and sold here and abroad even before the wide release of the film. All such practices are clearcut violations of copyright protection.

The commercial exploitation of films typically involves their being projected in such a way as to create the illusion of movement. Traditionally such projection has occurred in theaters, with light thrown from a projector through a print onto a screen. More recently,

projection has also come to include the scanning back-projection mechanism of the television monitor and front-projection video technologies. Frame enlargements, however, do not duplicate the film in this way. A film frame, when printed on a page, cannot be projected as a portion of the original. It cannot create the illusion of movement, nor does it reproduce the sound that most films still in copyright involve. Even if we were to print every single frame of a film in a book, the result would in no way replicate the viewing experience. It is hard to imagine a person who has seen even thousands of frames reproduced deciding that he/she had "seen" the film and as a result had no need or desire to see it projected.[5]

It is interesting in this context to note the history of the forms in which films have been copyrighted. From 1895 to 1912, the famous "paper prints" were the main form of copyright deposit material. That is, every frame of the original film was printed as a photograph on a long roll of paper. This practice arose because films could not be copyrighted as such and had to be copyrighted as a series of photographs.[6] Motion pictures became copyrightable in 1912, though there was no specific deposit law until 1942. At that point, a submission for copyright had to be accompanied by a print of the entire film (identical or very close to the version projected in theaters). Submissions of film prints remain the standard means of copyright to this day. The implication of this change may be that photographs of the original film reproduced on paper, even though they duplicate every frame, are not the equivalent of the film itself. Library of Congress policy assumes that only a projectable film strip is such an equivalent. The medium of film is thus quite different from that of literature, where any quotation of the work (even, say, in braille) is a literal reproduction of a portion of the work.

It could be argued that, if a writer uses frame enlargements to illustrate a scholarly or educational publication, and if that publication finds a market, then its sales prove that there is a "potential market" for this type of use of film illustrations. In other words, the market value of the original film could be considered to be unlimited, depending only on the ways people find to exploit it. In practice, the courts have proceeded on the assumption that the copyright holders should be protected in those primary, secondary, and ancillary markets from which they could reasonably expect to gain their

income. So far there is no basis for thinking that the copyright holders of motion pictures have ever included the scholarly use or licensing of frame enlargements as part of their predictable stream of income from their films. Such income is not part of the estimated revenues from a film, and so far, whatever money production firms have taken in by granting "permissions" for the publication of frame enlargements has been collected on an occasional, informal basis. Even if copyright holders were to gain some regular income from the exploitation of frame enlargements, scholarly uses of such illustrations might still fall within the fair-use guidelines, since they would not necessarily impinge on that income.

Again, all this suggests that, for educators and scholars, the question of actual competition with motion pictures as such would relate more to the replication of small stretches of the film in a form capable of being projected to create the illusion of movement. Such uses might include a professor's duplication of a short scene from 16mm film in order to show it repeatedly from semester to semester, in a classroom context. This issue, however, lies outside the scope of this report.

Frame Enlargements as Derivative Works. Ralph Oman has suggested another aspect of this question of commercial competition: "For noncommercial uses, the burden is on the copyright owner to show 'by a preponderance of the evidence that some meaningful likelihood of future harm exists.' A copyright owner generally has the exclusive right to make a derivative work, such as a frame enlargement from a motion picture. The courts, in making a fair use analysis, would look at the market for derivative works in determining potential commercial harm." The implication of this view is that the making of frame enlargements should not be considered potential competition with the commercial value of the film itself. Rather, in Oman's opinion, frame enlargements are *derivative works* made from the film, and their fair-use status should be considered in relation to their potential competition with any comparable derivative works made by the studio itself for commercial purposes. Thus if the making of frame enlargements had a commercial value, and if film companies printed such illustrations and sold them in some fashion, then scholarly reproduction of frames might be harmful to the studio's market for their own illustrations.

It is plausible that certain uses of frame enlargements might have a commercial, noneducational value that might someday conflict with the studios' rights to make derivative works from their films. If, for example, an individual took a frame enlargement and printed it on T-shirts and sold them, that action might violate copyright, since the studio that made the film might someday choose to market such shirts itself. Even if the studios were to make such shirts, however, it is unlikely that the same frame enlargements, previously published in scholarly articles, would harm the commercial value of studio-produced T-shirts bearing frame enlargements. Because of the provision concerning commercial value, however, publishers--even those that do not seek permission to reproduce frames inside the book--will sometimes pay a fee for the right to print a frame on the cover. This is because the cover design is presumed to function mainly to publicize the book; that particular illustration is not vital to the analysis in the text, while the photos inside are.

According to Oman, the final determination in the case of both university and commercial presses would rest on whether their reproduction of frames "would threaten the potential market for any work that the copyright owner wants to publish--for example, a book about the film by the copyright owner--even if the copyright owner has never released such a book in the past."^[7] Authors and publishers must judge for themselves, first, whether film studios are likely to publish books about their own films using frame enlargements and, second, whether such hypothetical books would lose market value as a result of competition from scholarly or educational material of the sort now available. In the past, publications created by the studios themselves, such as souvenir programs, or approved by them, such as "official" studio histories and "making of" books related to individual films, have usually been illustrated with publicity photos rather than frame enlargements.

Publicity Photographs. Indeed, the fair-use arguments applying to scholarly and educational uses of publicity photos from films are less clear. Reproducing such a photo involves showing the whole work, or at least a substantial portion of it. The photograph is not a derivative work based on a film, but a separately copyrightable work.

Many such photos, however, were never copyrighted and hence can

be reproduced at will. As Gerald Mast points out, "According to the old copyright act, such production stills were not automatically copyrighted as part of the film and required separate copyrights as photographic stills. The new copyright act similarly excludes the production still from automatic copyright but gives the film's copyright owner a five-year period in which to copyright the stills. Most studios have never bothered to copyright these stills because they were happy to see them pass into the public domain, to be used by as many people in as many publications as possible." Mast believes that there is thus no reason for scholars to pay permission fees to publish such photographs: "There is no question that publishers have paid thousands (perhaps hundreds of thousands) of dollars to film companies for precisely this purpose on public domain material." [8]

Some original photos of film scenes released during the classical age of Hollywood filmmaking bear a specific notice at the bottom releasing the rights of reproduction to newspapers and magazines. For example, an original publicity photo for *Singin' in the Rain* carries this notice: "Copyright 1952, Loew's Inc. Permission granted for Newspaper and Magazine reproduction. Made in U.S.A." This notice implies a recognition of the publicity value of such reproduction, and film journals might plausibly be considered "magazines." It might be argued that, as with frame enlargements, the reproduction of publicity stills in a scholarly context enhances rather than detracts from the commercial value of the original film. Persons wishing to use such illustrations would do well to examine the fine print at the bottom of the photograph. Unfortunately, most scholars work with copies of publicity stills, and in these the original copyright notices and other information have usually been eliminated from the lower white border. In past practice, however, many scholarly and educational publications have used publicity stills without obtaining permission from the original copyright holder.

Ralph Oman points out that there may be restrictions on such photographs:

However, many of these works are presumably "unpublished" in accordance with the definition in the Copyright Act of 1909 because limited distributions were held not to constitute publication. No copyright notice was required for unpublished works. So conceivably

many publicity stills that were without copyright notice did enjoy common law protection, though that protection may now have expired (see 17 U.S.C. 303). It was not necessary to secure protection for unpublished works by registering with the Copyright Office. Again, the facts of the distribution of the publicity still will be determinative of the issue of copyright protection for each case.[9]

In many cases, studios have deposited large numbers of publicity photographs in archives, and many of these photos have never been published. The studios may or may not have specified in the terms of the deposit any restrictions on the use of those photographs. If there is no proviso forbidding reproduction by scholars, it might be that such deposit implies an assumption of unlimited distribution, since the studio is presumably aware that such archives make these materials available to researchers. Again, scholars and publishers must use their best judgment in dealing with such cases.

One important argument has been made concerning the publication of publicity photographs. If such a photograph has been circulated for publication at some point and reproduced without a copyright notice accompanying it, it should then fall within the public domain. Throughout the history of the cinema, many publicity photos have appeared in newspapers and magazines without such notices. If a scholar or educator were to publish a publicity photo, the burden of proof would then fall on the studio or distributor to prove that the still had never been published without the copyright notice. Given that many publicity photos reproduced in scholarly books and articles have previously appeared in journalistic contexts, it would seem that these often fall into the public domain.

Reproducing a publicity still might be argued as being somewhat comparable to reproducing a painting or other single copyrighted art work. In his book on copyright, William A. Strong does not address the issue of publicity stills (or frame enlargements). What he says about painting may, however, be relevant: "These principles of moderation also apply to scholarly use of visual works. Reproduction of an entire painting, even if reduced and in black and white, would generally infringe the artist's copyright. However, reproduction as necessary to analyze the artist's technique (or to teach Pac-Man strategy) would probably constitute a fair use. Display of works of art

in a classroom situation is fair use, as is incidental display or performance in a news broadcast." [10] Strong's opinion would suggest that a publicity photo could be reproduced in toto as long as such reproduction is clearly necessary to the analytical or technical argument. In recent years there has been a move to analyze publicity photos as aesthetic or cultural artifacts in their own right, as well as to study advertisements and other graphic material relating to films. Strong's opinion suggests that, for such scholarly purposes, even the reproduction of whole pictures might fall within fair use.

Apart from the immediate question of whether a scholar has the legal right to use a publicity photograph, there is the question of fees paid to archives or photo services for permission to reproduce such a photo. Several film archives charge a basic fee for the copying of photographs and add a higher fee if the photograph is to be reproduced in a published work. Other collections sell photographs but emphasize that by doing so they are not granting rights for reproduction. Ordinarily such archives specify that, if the photo is printed in an article or book, the author should attribute its source. In many cases, when authors obtain photographs from archives, they simply acknowledge that archive as the source, without paying a permission fee to the archive or any supposed copyright holder. Indeed, unless the archive has somehow become the holder of the photograph's copyright, it has no legal basis for requiring a reproduction fee. In other cases, the author already owns a photograph that he/she reproduces, and in the publication the author cites it as "from the collection of the author."

In general, etiquette would dictate that scholars and educators attribute the sources for publicity photographs in their publications, especially in cases where individuals or archives have preserved otherwise inaccessible images. Existing practice suggests, however, that, over the years, there has developed a tacit acknowledgment that publicity stills may be used in scholarly works without permission. Again, authors and presses should consider each specific case in judging whether a publicity photo is likely to be legally reproducible.

Conclusions. The legal situation concerning the reproduction of film frames and publicity stills remains undetermined. There has been no litigation or legislation to set precedents for fair use of frame

enlargements and publicity photos. It appears, moreover, that this situation will persist. Legal decisions based on future court cases might help illuminate this question, but, given the difficulty of proving that such illustrations diminish the commercial viability of a film or of derivative products, it seems unlikely that such a case will be initiated. In the meantime, authors and publishers must go on making decisions about the use of frame enlargements and publicity photos. Still, based on the many books and articles that have included such illustrations, one might argue that a long-standing common practice has been established that could be drawn upon in arguing any case for the application of fair-use guidelines to cinematic images.

Even if the author and press do not seek permission to reproduce illustrations, it is a good idea to be both cautious and courteous by listing in the publication the original copyright holder. This can be done in the captions to the photographs or in a separate section at the beginning or ending of the book. For example, a frame enlargement or publicity photo from *Laura* could be credited "Copyright 1944, 20th Century-Fox." There is no specific legal requirement for such a citation, but its use does indicate that the author is drawing attention to the owner of the copyright and hence helping to publicize the film. In responding to an inquiry from David Bordwell and Kristin Thompson concerning fair use of frame enlargements in scholarly publications, Acting Deputy Librarian of Congress Winston Tabb expressed this opinion (in relation to *Film Art: An Introduction*):^[11] "The work in which you are engaged seems clearly to be of the scholarly kind envisioned in the 'fair use' provisions of the copyright law." He approved their practice of "crediting copyright owners of photographs."^[12]

Many publishers have brought out scholarly works that utilize visual material, frame enlargements, and publicity stills. At the 1986 Society for Cinema Studies conference in New Orleans, a round-table discussion of publishing was held. Members of the panel included two editors who had been involved in publishing scholarly books on cinema that used frame enlargements. Joanna Hitchcock, then of Princeton University Press (now of the University of Texas Press), and William Germano, then of Columbia University Press (now of Routledge), both expressed the opinion that it is not necessary for authors to request permission to reproduce frame enlargements.

Other university presses operate with similar policies. Some trade presses that publish educational and scholarly film books also take the position that permission is not necessary for reproducing frame enlargements and publicity photographs.

Nevertheless, some publishers demand that all photos be "cleared," whatever their copyright status. Authors may then be faced with the prospect of trying to contact companies, filmmakers, or photographers long out of business or dead. In many cases, the images were never in copyright, and hence finding someone who "owns the rights" is impossible. In other cases, the current copyright status is dubious, and permission is at any rate not necessary for scholarly use. Authors thus waste time and energy, when permission is most likely unnecessary for the reproduction of the photographs. Some authors are unable to use adequate illustrations simply because they cannot find anyone with the right to sell or grant them the permission for such reproduction. The Library of Congress's Copyright Office provides a search service (involving a fee) to help determine whether a work is currently in copyright; researchers wishing to determine the copyright status, say, of a publicity photograph, may wish to make inquiries there. Researchers may also do their own searches, free of charge, by visiting the Copyright Office.

So far, educational and scholarly books utilizing frame enlargements and publicity stills without permission have met with no legal challenge. Such illustrations have become common practice, and common practice has an effect in setting legal precedent. If more books and articles on the cinema appear using illustrations for which no permissions have been obtained, such practice will grow. Similarly, authors and editors should consider whether asking for permission "just to be safe" might make it more difficult for others to use illustrations from films with impunity. Mast has offered this opinion: "The publisher or author who asks permission to publish a production still or frame blow-up provides a *de facto* admission that permission is required and that the principle of fair use does not apply. The legal solution, then, is for authors and publishers to articulate their applications of the fair use principle in advance, perhaps in a letter of understanding between them, and *then not seek permission* from any copyright owner to publish any production still or frame enlargement from a film." Thus in negotiating the publication

of a book or article, authors who are committed to the use of frame enlargements and/or publicity stills should determine before signing a contract whether their prospective press requires the obtaining of permission to reproduce such illustrations. Presses should make clear their policies to authors and should consider in formulating those policies whether requesting such permission is necessary.

In commenting on this issue, Professor Jaszi has suggested that such policies would do well to take a generous view of fair-use and the use of frame enlargements:

As a teacher and writer in the field of copyright law, I am firmly convinced that the use of stills to illustrate serious works of film scholarship constitutes "fair use" within the meaning of section 107 of the Copyright Act of 1976, and I would urge the Society, its members, and their cooperating publishers to proceed on the basis of this understanding of the law....

In sum, I think the case for "fair use" in connection with scholarly, analytical, or critical use of frame enlargements is a particularly strong one. I would hope that the archives with which film scholars deal, and the publishers through whom those scholars issue their work, could be persuaded that they do not risk liability by cooperating in the use of such frame enlargements.[14]

As Jaszi suggests, the question of fair use also has implications relating to access to archival prints for making frame enlargements, but, again, that issue lies outside the limits of the current report.

Finally, we would suggest that one further argument arises from the concept of the public good. If film scholars were to be denied the right to reproduce frames from and photographs relating to films, their ability to enlighten readers about the history and aesthetic qualities of motion pictures would be severely diminished. Much is made of the fact that young people today are exposed to far more visual material in the form of films and television than they are to literary works. If educators are to have the ability to teach about such works, they should be able to illustrate their analyses adequately, using images made directly from the original works. If scholars are to be able to add new insights to our knowledge of cinematic art works, they should

have comparable rights.[15]

Appendix

[The Register of Copyrights, Ralph Oman, has requested that the two letters he has written to David Bordwell and Kristin Thompson regarding this issue be published as an addendum to this report. They appear here in their entirety. Since the report has been revised on the basis of information and suggestions supplied by Mr. Oman, some of the passages he refers to here have been altered or eliminated. References to page numbers are to the original letters rather than to the pagination of this published report.]

[Letter from Ralph Oman to David Bordwell and Kristin Thompson, dated 13 June 1990:]

Dear Mr. Bordwell and Ms. Thompson:

First let me apologize for the delay in responding to your letter which somehow got lost in our system. I am happy to provide you with information on the fair use doctrine. Of course, the Regulations of the Copyright Office (CFR, Title 37, Chapter 11) prohibit us from giving specific legal advice on the rights of persons in connection with particular uses of copyrighted works.

In addition, the Copyright Office is not able to give you specific guidelines regarding "fair use" because in general the courts have not developed such specific guidelines nor do they appear in the statute. For certain copying situations, principally involving education, voluntary guidelines have been developed by agreement of associations representing authors, copyright owners, and librarians or educators. These guidelines and the statutory materials are reprinted in the enclosed Circular 21.

The fair use doctrine in this country, now more than one hundred and fifty years old, is codified in section 107 of the Copyright Act. Because Section 107 encompasses the principles of countless cases, it must be understood as shorthand for what it represents. Only a reading of case law can provide the actual application of the statute in each case because ultimately, the courts are charged with the final determination of what is "fair use" under the Copyright Act.

The distinction between "fair use" and infringement may be unclear, and it is difficult to draw distinctions. I can only give you the relevant text and materials but you must decide whether or not to seek permission from the copyright owners for particular uses. Acknowledging the source of the copyrighted materials does not substitute for obtaining permission.

Section 106 of the copyright law provides that copyright owners have the right to:

- (1) reproduce the copyrighted work in copies or phonorecords;
- (2) 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 ownerships, 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; and
- (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 work or other audiovisual work, to display the copyrighted work publicly.

Fair use, found in section 107, is a limitation on the exclusive rights of copyright owners listed above, provided the use is for the purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Section 107 lists four factors to be used in any particular case to determine whether the use made of a work is a fair use. These 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.

With respect to the first factor, your letter describes the making of frame enlargements for two disparate purposes, one a nonprofit educational purpose (classroom teaching) and the other for a commercial venture (reproduction in a book). It is more likely that the courts would determine that making a frame enlargement for the first purpose would be a fair use while the second would be more questionable. Note that the statute specifically mentions nonprofit educational purposes which distinguishes profitable educational uses.

With respect to the "nature of the copyrighted work" being copied, motion pictures, by their nature, require quite substantial amounts of capital investment and consequently they have not been subject to all of the limitations applied to other owners of copyrighted material. The House and Senate reports did identify fair use as applying "under appropriate circumstances ... to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment" H.R. Rept. No. 94-1476, 94th Cong., 2d Sess. 72-73 (1976); S. Rep. No. 94-473, 94th Cong. 1st Sess. 65 (1975). This applies only to the display or performance of the work and is silent regarding the reproduction of these works in whole or in part.

The third fair use factor is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." If the reproduction of a single frame enlargement for classroom use is a fair use, the making of additional frame enlargements from the same motion picture will at some point infringe that work.

There is no specific number of images or words that may be safely taken without permission. The courts have also looked at the qualitative taking in addition to the quantity, so that the taking of the most valuable portions of a particular work even if a relatively small portion, can be an infringement.

The last factor in the fair use analysis is the effect of the use on the potential market for, or value of, the copyrighted work. Using the market effect inquiry the Supreme Court has held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

For noncommercial uses, the burden is on the copyright owner to show "by a preponderance of the evidence that some meaningful likelihood of future harm exists." A copyright owner generally has the exclusive right to make a derivative work, such as a frame enlargement from a motion picture. The courts in making a fair use analysis, would look at the market for derivative works in determining potential commercial harm.

In addition to section 107, the copyright law provides another important limitation on the reproduction and distribution rights of copyright owners when a library or archive is the user. Section 108 exempts certain copying of library or archival materials but only for a "small part" of a copyrighted work and only if the copy "becomes the property of the user, and the library or archive has had no notice that the copy ... would be used for any purpose other than private study, scholarship, or research" 108(d) (1). Notwithstanding these provisions, the person requesting such a copy can be liable if the use exceeds fair use.

Finally, I should say that "fair use" would not be the only bar to use of the Library's materials. Library policy can prohibit certain uses of materials if such use would damage the Library's collection. As I understand it, some of the frame enlargement techniques involve putting film into an attachment on a camera which can potentially damage the film. Any policy to prevent such uses is clearly within the domain of the Motion Picture, Broadcasting and Recorded Sound Division and I would suggest you contact them with any changes you wish to see in their policy.

I hope that this letter and the attached materials help to clarify the "fair use" doctrine.

Sincerely, Ralph Oman Register of Copyrights

[Letter from Ralph Oman to David Bordwell and Kristin Thompson, dated 7 January 1992:]

Dear Mr. Bordwell and Ms. Thompson:

Thank you for sending me a copy of the draft report of the Society for Cinema studies regarding frame enlargements of motion pictures and the "fair use" doctrine.

Regarding your request to quote me in your report, I would prefer that, if appropriate, you reproduce, in their entirety, my letters (June 13, 1990 and this one) in the appendix of your report. Otherwise, you have my permission to quote from these letters.

Trying to summarize the judicial doctrine of fair use found in the Copyright Act 17 U.S.C. 107 in a short report is a very difficult task. As you can tell from my letters, there are no easy answers. I have a few comments and clarifications which may help in the preparation of the final report. Ultimately, the courts, and not the Copyright Office, decide each case according to the particular facts of the case, weighing the totality of the factors set out in section 107.

Fair use is a legal defense that is only considered after a determination is made that there is an infringement. There is no infringement where the taking is from works not subject to copyright, due, for example, to the expiration of the copyright (including for post-1978 works for failure to renew or for the publication without adequate copyright notice) or for the taking of uncopyrightable portions of protected works (such as facts). Those materials can be freely reproduced and used for any purpose. For example, films created and published over seventy-five years ago are in the public domain and can be freely used.

The report in discussing the first factor of a fair use analysis (page 5)-"the purpose and character of the use"--should emphasize the differences in educational uses. For example, you might mention the use of a few frame enlargements to illustrate a classroom lecture versus the reproduction in a book of frame enlargements. The latter would be construed with less latitude from the user's standpoint in a

"fair use" analysis than the former. The fact that a university press is "non-profit" will not be dispositive if the work in question would threaten the potential market value for any work that the copyright owner wants to publish--for example, a book about the film by the copyright owner--even if the copyright owner has never released such a book in the past.

The four factors are weighed in their totality when courts make their fair use analysis.

In addition, the nature of the taking is immaterial--frame enlargements are reproductions of the original copyrighted film. The making of frame enlargements is not "paraphrasing" as your report suggests (pages 13-16), but rather the making of a derivative work protected under the Copyright Act 17 U.S.C. 106(2).

Even paraphrasing would be subject to an action for copyright infringement, as recent court decisions indicate. In *Twin Peaks Productions v. Publications International* (91 Civ. 0626, S.D.N.Y., November 1991) the District Court found a book publisher had infringed the film's copyright when it "directly copied or *paraphrased* substantial portions" (emphasis added) of the copyright owner's work. The court in *Time Inc. v. Bernard Geis Associates* 293 F.Supp. 130 (S.D.N.Y. 1968) found no infringement by the fact of that particular decision but held that the making of charcoal sketches of frames of a copyrighted film was the making of "copies of the copyrighted film. That they were done in charcoal by an 'artist' is of no moment.... There is thus an infringement by defendants unless the use of the copyrighted material in the Book is a 'fair use' outside the limits of copyright protection" (Id. at 144). The discussion on page 15 about what the Copyright Office requires for registration purposes should not be confused with what the courts have determined is necessary for copyright protection.

The only question that remains, then, given the four factors of the fair use analysis, is whether or not the making of frame enlargements a [sic] fair use? That question must be decided in each instance on the facts of the case using the four factors-and there are to date no decisions on point. The reprinting of the four factors in your report will be a useful guide for film historians and scholars as they decide these

issues for themselves.

As your report notes, the issue of publicity stills raises different legal issues. Photographs are protected under copyright and the reproduction of these works is not a fair use--it is a reproduction of the entire work. The primary issue is whether or not the works were in fact published without notice and were therefore copyrighted at all. If they were published with notice, then you are correct (page 9) that they are not protected by copyright and may be reproduced.

However, many of these works are presumably "unpublished" in accordance with the definition in the Copyright Act of 1909 because limited distributions were held not to constitute publication. No copyright notice was required for unpublished works. So conceivably many publicity stills that were without copyright notice did enjoy common law protection, though that protection may now have expired (see 17 U.S.C. 303). It was not necessary to secure protection for unpublished works by registering with the Copyright Office. Again, the facts of the distribution of the publicity still will be determinative of the issue of the copyright protection for each case.

Finally, I would suggest that you inform your members that they can search the copyright status of works they intend to use by visiting the Copyright Office, or they can have the Office do a search for them, for a fee.

Thank you for giving me the opportunity to review these materials. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Ralph Oman Register of Copyrights

Notes

This report was drafted by the committee chairperson, Kristin Thompson, and revised with the aid of the committee members, John Belton, Dana Polan, and Bruce F. Kawin. Our thanks to the Acting Deputy Librarian of Congress, Winston Tabb, and to the Register of Copyrights, Ralph Oman, for their help and their permission to quote

them. Thanks also to Robert W. Kastenmeier, chairman of the National Commission on Judicial Discipline and Removal, and former chairman of the United States House of Representatives Committee on Copyright. We are particularly grateful to Professor Peter Jaszi, of Washington College of Law of the American University, a specialist in copyright law, who offered invaluable comments on the penultimate draft of the report.

1. The reader is urged to examine the letters from the Register of Copyrights, Ralph Oman, reproduced in the appendix. Oman understandably takes a cautious view of fair use, based on copyright law and some precedent-setting decisions. His letters indicate the complexity of this topic and the many views that may be taken. This report, on the other hand, also makes arguments based partly on actual usage in the field of film studies, even when that usage has not been tested in court. 2. Copyright Office, Library of Congress, *Reproduction of Copyrighted Works by Educators and Librarians Circular 21* (Washington, D.C.: U.S. Government Printing Office, 1988), 8.

3. H. R. Rept. No. 94-1476, 94th Cong., 2d Sess. 72-73 (1979; S. Rep. No. 94-473, 94th Cong. 1st Sess. 65 [1975]), quoted in a letter from Ralph Oman (Library of Congress) to David Bordwell and Kristin Thompson, 13 June 1990. Reproduced in the appendix to this report.

4. Letter, Prof. Peter Jaszi (Washington, D.C.) to Kristin Thompson, 30 July 1992.

5. We should point out, however, that Ralph Oman's letter of 13 June 1990 (see appendix) states: "If the reproduction of a single frame enlargement for classroom use is a fair use, the making of additional frame enlargements from the same motion picture will at some point infringe that work." Such infringement presumably could only occur, however, if the copyright owner could show that the commercial value of the original had been diminished.

6. For more on the paper prints, see Kemp R. Niver, *Motion Pictures from the Library of Congress Paper Print Collection 1894-1912*, ed. Bebe Bergsten (Berkeley: University of California Press, 1967).

7. See Ralph Oman's letter of 7 January 1992, in the appendix.
8. Gerald Mast, "*Film Study and the Copyright Law*," in *Fair Use and Free Inquiry: Copyright Law and the New Media*, ed. John Shelton Lawrence and Bernard Timberg (2d ed., Norwood, N.J.: Ablex, 1989), 87.
9. Oman letter, 7 January 1992 (see appendix).
10. William A. Strong, *The Copyright Book: A Practical Guide* (3d ed., Cambridge, Mass.: The MIT Press, 1990), 138.
11. David Bordwell and Kristin Thompson, *Film Art: An Introduction* (1st ed., Reading, Mass.: Addison-Wesley, 1979; 2d ed., New York: Random House, 1985; 3d ed., New York: McGraw-Hill, 1990).
12. Letter, Winston Tabb (Washington, D.C.) to David Bordwell and Kristin Thompson, 15 April 1991.
13. Mast, "Film Study and Copyright Law," 89.
14. Letter, Jaszi to Thompson.
15. Although this report explores the implications of copyright and fair use laws to film-related illustrations, much of this information may apply to video-related illustrations as well.