

Other People's Footage: Copyright & Fair Use—Outline and Study Guide

Synopsis: *Other People's Footage: Copyright & Fair Use* explores the three questions crucial to determining fair use exemptions and presents illustrative examples from nonfiction, fiction, and experimental films that use pre-existing footage, music and sound from other individuals' creations—without permission or paying fees. Through on-camera interviews with noted documentarians, film and legal experts, *OPF* also reviews relevant court cases and clarifies legal issues regarding trademark, parody, and shooting on location or in a controlled setting.

Documentary Objective:

- To clarify and encourage fair use by citing and discussing the three questions crucial to determining fair use,
- To illustrate noteworthy filmmakers' incorporation of fair use in their works through specific examples,
- To explore additional legal issues impacting filmmakers' work, and
- To cite significant court cases dealing with fair use.

Other People's Footage: Copyright & Fair Use

Title cards on screen within the documentary are in bold type. *OPF* running times are in brackets. Total running time is 75 minutes.

Major Concepts and Fair Use Tests

Michael Donaldson: Fair use comes out of the first amendment. Your right to tell your story your way. It's the right to create new works out of old works. It applies to all media across the board: to nonfiction and fiction film under certain circumstances, and to use of photos, music, sculpture, paintings, etc.

Three Questions must be answered with a rock solid "Yes" for an assertion of fair use to be in the Safe Harbor, 100% comfort zone. For the preexisting footage or item you are using:

1. Are you using this asset to illustrate a point that you're already making in your film?
2. Are you only using what is reasonably appropriate for the demonstration?

3. Is the connection between what you're using and the point that you're illustrating clear to the average viewer?

It follows from these three questions that you move out of 100% safe harbor if you go a little long, the connection is unclear, or the illustration doesn't work, but you do not move out of fair use.

[2:45] The critical test: Is your use of an asset transformative? Are you re-using this existing work for some new purpose? If so, the new purpose is within the law unlicensed because the law exists to permit new culture to happen. —Pat Aufderheide

[3:31] We have a constitutionally based right to fair use—Peter Jaszi
In the copyright statute, fair use is identified as a right: Section 108(f)(4)
Congress has made that determination.

[5:26] **Documentary Films**

Betsy McLane: Documentary filmmakers are historians.

Throughout *OPF*, all of the interviewees discuss their use of fair use with clips from their films illustrating its application.

Aaron Greer: *Flying Away*

Scott Hamilton Kennedy: *The Garden*

Rodney Ascher: *Room 237*

[10:56] Carl Deal: *Bowling for Columbine* and *Fahrenheit 9/11*

Tia Lessin: *Fahrenheit 9/11*

[14:01] **Best Practices for Fair Use**

Betsy McLane on *Documentary Filmmakers' Statement of Best Practices in Fair Use*, November 18, 2005

Jan Krawitz and Pat Aufderheide comment on *Best Practices*

[14:53] Michael comments on a clip from *This Film Is Not Yet Rated* which included 134 film clips illustrating fair use

[15:56] Alexis Krasilovsky: *Women Behind the Camera*

People are more cooperative since *Best Practices in Fair Use*

[17:51] **Employing Fair Use in Documenting History**

Alex Rotaru—comments on fair use
Tia Lessin: *Trouble the Water*

[20:51] Carl Deal on Fox News in *Citizen Koch*

[23:27] Jorge Oliver: *Free to Love* including fair use of incidental music
Michael Donaldson's comments on fair use of incidental music

[25:12] **Fair Use of Voice, Music and Sound**

Betsy McLane on history of riffing on music

Haskell Wexler: *Who Needs Sleep?* Coors ad and clip from *Who Needs Sleep?*

[28:06] Michael Donaldson on fair use of music from John Lennon's
Imagine in *Expelled – No Intelligence Allowed*

[31:17] Michael Donaldson on *Twenty Feet from Stardom*

[32:32] Yvonne Welbon: *The New Black*
Scott Hamilton Kennedy: *Fame High*

[34:43] **Fair Use in Experimental Works of Art**

Scott Blumberg: *Nam June Paik: Lessons from the Video Master*

Michael reiterates the basic three questions and their application

[36:23] **Fiction Films**

Michael: no difference in the law between nonfiction and fiction films

[36:51] **Fictional Films**

**The Further You Move From Reality
The Harder It Is to Justify Fair Use**

True Stories

You Can Treat Them Like Documentaries

Donaldson on Ed Sullivan in *Jersey Boys* with clip

Clip from *No*

[38:15] **Fictional Films**

Shot on Rented Locations

Donaldson with clips from *Waiting for Ophelia* and *He's Such a Girl*

[38:53] **Totally Fictional Films Shot on a Set**
Donaldson on the Faulkner quotation in *Midnight in Paris* with clip

[40:15] **Totally Fictional Films Shot
In a Realistic Setting**

Donaldson, clip from *Once*
Donaldson discusses using natural settings, posters, billboards,
advertisements that the filmmaker didn't place on the set

Donaldson on two additional issues: Trademarks and Logos
Trademark -- *Thanks for Sharing* clip
As long as you don't confuse the viewer or misrepresent, you can use the
trademark
Donaldson on copyright and logos: idea that it's an ad does not negate the
possibility of fair use

[42:37] **Additional Legal Issues**
Alex Rotaru comments on financial gain or lack thereof
The issue is creating new works not finances

[43:42] Mitchell Block on ethical issues, *Carrier project* clip

[46:11] Mitch Block and Michael Donaldson on the opening to *Blackfish*
with clip
Fair use—transformative use of the footage with voiceover 911 call

[48:35] Yvonne Welbon on shooting on a public street for *Sisters in
Cinema* with clip
Michael Donaldson with more comments on trademark laws
Why we have trademark—to protect the public by affirming the origin of the
product or service. If the filmmaker uses the product in the way it was
intended to be used, it is allowed. The filmmaker cannot misrepresent the
trademark itself without legal liability.

Donaldson on the Slip-n-Slide use in *Dickie Roberts: Former Child Star*
with clip

[51:51] Donaldson on Disneyland and *Escape from Tomorrow* with clip

[53:41] *Super Size Me* Michael comments on

[54:47] Donaldson on Push back: Two wellsprings
generalized fear and risk aversion, fear of being sued
legitimate commercial reasons such as network with big advertiser
maligned in your film or someone they have a good relationship with

[55:47] Tia Lessin: *Behind the Labels*

[58:43] Jan Krawitz: *Drive-in Blues*

ABC Good Morning America Sunday example—no attribution, no licensing
Carl Deal: CNN using *Trouble the Water*

[1:01.05] Jan Krawitz *Drive-In Blues*, entire film, except first two minutes
and credits, uploaded to YouTube

[1:01.52] Michael Donaldson: protecting yourself vis-à-vis fair use

[1:02.25] **Court Cases Involving
Fair Use**

Over 80 decided cases regarding nonfiction works

Lawyer Andrew Berger and court cases:

Bill Graham Archives vs. Dorling Kindersley Ltd. (publisher) 2006

Grateful Dead posters case--Transformative, fair use, historical artifacts

[1:04.00] Blanch v. Koons case 2006

[1:05.49] Mattel Inc. v. Walking Mountain Prods.

Tom Forsythe defendant—Barbie doll case Fair use and Parody

Michael on parody as subset of fair use, can use more of the underlying
work because parody must always comment directly on the work being
parodied

[1:07.00] Roy Orbison and 2-Live Crew parody of *Oh, Pretty Woman*

[1:08.09] **Google Books**

In 2004 Google teamed up with research libraries and began digitally
scanning millions of books. This led to a 10-year court case affirming fair
use in the Google Books case.

Peter Jaszi comments on with example of scanners

Commercial or nonprofit entities, doesn't matter

2nd point: in general, the stronger the argument for the use being genuinely transformative, the less you have to worry about the economic analysis

for a new purpose, to new audience, with added value
Court says everything we thought before is true

[1:10.43]

Self-Censorship and Concluding Thoughts

Comments from Tia Lessin, Claire Aguilar, Yvonne Welbon, Alex Rotaru, Carl Deal, Scott Blumberg, Pat Aufderheide, Michael Donaldson

Assignments for students

1. What are the three questions requiring a "yes" for the asset used to be considered fair use?
2. What does transformative mean?
3. Find and analyze an example of fair use in a fiction film, a nonfiction film, or a television program. Is the fair use safe harbor or fair use in a gray area?
4. Find and analyze an example of music and/or sound that is fair use in a nonfiction film, fiction film, or television program.
5. Identify at least two uses of trademark in a film or television series. Explain what makes the use of the trademark legal?
6. Describe one use of parody and explain why it is fair use.
7. Describe one court case after 2005. What was the rationale argued against fair use? How was the case decided and with what justifying rationale for fair use?