Spring 3-1-2010

Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices

Anthony Falzone

Jennifer Urban
Berkeley Law

DEMYSTIFYING FAIR USE: THE GIFT OF THE CENTER FOR SOCIAL MEDIA STATEMENTS OF BEST PRACTICES

by ANTHONY FALZONE AND JENNIFER URBAN[1]

I. OVERVIEW

The fair use doctrine is famous for its uncertainty. More than a few lawyers with better than passing expertise in copyright and fair use issues have expressed disbelief that fair use provides anything but fertile ground for litigation. As lawyers who counsel clients making fair use of copyrighted materials, we have experienced the frustration caused by fair use's unpredictability on many occasions. Further, the heavy costs involved in litigating a fair use case — not to mention the costs of losing that case — make risk-taking very difficult for most of our clients, who, as independent filmmakers and other small artists, do not have the same ability to spread risk that large organizational creators such as movie studios or networks enjoy. All of this can leave the fair use doctrine impoverished — unusable by a substantial portion of the creators it should protect.

In this Essay we discuss a more positive piece of the story: the development of Statements of Best Practices in Fair Use for various user communities. The Best Practices, pioneered by Peter Jaszi and Patricia Aufderheide, have helped demystify fair use for specific user groups with-

[1] Lecturer in Law, and Executive Director of the Fair Use Project at Stanford Law School, and Assistant Clinical Professor of Law and Director, Samuelson Law, Technology & Public Policy Clinic, University of California-Berkeley School of Law, respectively. The authors thank the *Journal of the Copyright Society* for the opportunity to provide our thoughts on fair use Statements of Best Practices, Peter Jaszi and Patricia Aufderheide for their pioneering work in developing the Best Practices model, and Katherine Merriam and Bradford LaBonte for excellent research assistance. The authors speak in their independent academic capacities; nothing in this Essay should be attributed to any of their clients, or the clients of the Stanford Fair Use Project or the Samuelson Law, Technology & Public Policy Clinic. While neither author reviewed or contributed to the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, each has since served on the legal advisory board for subsequent Statements. Tony Falzone has served on the legal advisory board for the *Code of Best Practices in Fair Use for Online Video*. Jennifer Urban has served on the legal advisory board for the *Code of Best Practices in Fair Use for Online Video, the Code of Best Practices* in *Fair Use for Media Literacy Education*, the *Code of Best Practices in Fair Use for OpenCourseWare*, and the *Statement of Best Practices in Fair Use of Dance-Related Materials.*

out unduly limiting the flexibility that gives the fair use doctrine its strength, and have helped lawyers and gatekeepers understand important user norms. In doing so, they have proven to be a powerful tool for many who depend on fair use.

II. THE VIRTUES AND VICES OF FAIR USE

While many complain about the uncertainty of the fair use doctrine, there is virtue in its complexity, and that virtue is flexibility.[2] Had fair use been reduced to a laundry list of exemptions, it would lack the ability to adapt to new technologies and new modes of expression. This adaptability is critical given the role fair use plays in copyright policy as one of a suite of limitations that prevents copyright law from stifling the very creativity it was designed to encourage.[3] The benefits of fair use are as familiar to copyright lawyers as its frustrations. Fair use protects basic speech rights. Within boundaries, it ensures the right to speak and create, even where new speech or creativity makes use of copyrighted expression.[4] It supports innovations in consumer electronics, communications platforms, and tools for creating new works.[5] In general, it recognizes social value in what would otherwise be prohibited infringement, and is flexible enough to accommodate new technologies, new forms of speech and creativity, and new social practices without requiring reworking the underlying framework of copyright law. The flexibility and adaptability of fair use are what keep its accommodations from becoming frozen and irrelevant in the face of innovation and social change.[6]

Powerful as this flexibility may be, it creates some of the most difficult problems with fair use, which revolve around its unpredictability.[7] The reasons for this unpredictability are well known and often discussed. The fair use analysis relies on a multi-factor framework. It favors "transforma-

---

[2] *See, e.g.*, Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[3] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994); Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 550 n.3 (1985).

[4] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003) (characterizing fair use as providing "traditional First Amendment safeguards"); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

[5] *See* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008).

[6] *See id.*

[7] *See, e.g.*, Michael Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (characterizing fair use as "the right to hire a lawyer").

tive" uses above others, but this touchstone can raise as many questions as it answers.[8] Lawyers and judges are forced to step into the uncomfortable role of literary or artistic critic, looking for new purpose and meaning (or the absence of it) in the new work, as well as physical transformation and how this transformation (or the absence of it) might inform the first question of purpose and meaning. Whether or not a use is commercial must be considered as well, but even that may raise difficult questions,[9] to say nothing of the controversy over whether good faith should play any role in the fair use analysis. And this only scratches the surface of the *first* factor. At least three more follow, including the very important question of how a particular use, if it were to become widespread, might affect the market for the original work.

And then there is the expense. Litigating a fair use question is both expensive and time-consuming — some would say needlessly so — and the risks of losing may be significant. Financially, an unsuccessful fair use defendant faces the prospect of paying actual or statutory damages, and the portion of her profits attributable to any infringement.[10] Attorneys' fees, which are also in play, may exceed damages and profits combined.[11] In addition to this financial risk, the unsuccessful fair use defendant faces the risk that the product of her hard work — her artistic creation — will be wiped away by an injunction, whether permanently or even temporarily pending the resolution of the lawsuit.[12]

---

[8] *See, e.g.*, Tushnet, *supra* note 4, at 552 ("In general, the line between reworking and repeating is difficult to sustain. Many of the ways in which people use copyrighted works creatively involve both copying and reworking.").

[9] Defining "commercial" use is notoriously difficult. *See, e.g.*, 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1] (2008); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price,"); CREATIVE COMMONS CORPORATION, DEFINING "NONCOMMERCIAL": A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS "NONCOMMERCIAL" USE (2009), *available at* http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf (attempting to define "noncommercial" for purposes of the Creative Commons community).

[10] 17 U.S.C. § 504 (2006).

[11] *Id.* § 505.

[12] The extent to which injunctions follow automatically from a finding of infringement (or likely infringement) is unclear. Doctrinally, they should not. *See* eBay v. MercExchange, L.L.C., 547 U.S. 388 (2006); Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (vacating district court order for preliminary injunction and remanding to apply the eBay standard). Yet it is unclear whether the consideration of additional factors, as required by *eBay* and *Salinger*, have made it harder to obtain injunctions in practice. *See, e.g.*,

Combining uncertainty with substantial downside risk, if a fair use defense is to fail, leaves the doctrine very murky for lawyers. For clients, it's something between a mystery and a nightmare. Useful as its flexibility may be, the complexity of fair use analysis and the uncertainty it creates has left its promises unkept,[13] especially for independent and amateur creative communities. Many creators don't understand fair use. They can't find answers to their questions. They don't know the boundaries. They don't know what fair use lets them do and what it doesn't let them do. But they do understand the substantial penalties that may arise from getting the answer wrong, and they are subject to demands from risk-averse gatekeepers, such as publishing houses, distributers and insurance companies. So they steer around the problem by using second-best sources. They err on the side of caution, and seek permission whether it's legally required or not. Sometimes they receive it. But many times the answer is no, or the price is far too high.[14] In these situations, risk aversion leads to self-censorship and other failures of the balancing system in copyright; it squelches the creativity copyright is intended to incentivize.

For example, Peter Jaszi and Patricia Aufderheide have found that documentary filmmakers are forced over and over into making difficult choices. To avoid including works that would prove too expensive to license, filmmakers have altered the reality of their films by asking subjects to turn off background music, by obscuring the full context of a shot, and by removing elements after filming.[15] They have cut out scenes that would improve their films.[16] They are hesitant to tackle historical topics because of the costs of finding and acquiring archival footage.[17] And they must frequently choose between retaining certain scenes and releasing their films on home video or in certain markets.[18]

This risk aversion builds its own momentum. The more consistently artists seek licenses and permission for anything and everything whether

Jake Phillips, *eBay's Effect on Copyright Injunctions: When Property Rules Give Way to Liability Rules*, 24 BERKELEY TECH. L.J. 405, 422 (2009) (noting that "[o]f twenty-eight post-eBay copyright injunction decisions, only two denied injunctive relief upon findings of infringement," despite most courts applying traditional equitable principles).

13 *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004).

14 PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 7 (2004), *available at* http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

15 *Id.* at 17.

16 *Id.* at 18.

17 *Id.* at 19.

18 *Id.* at 18.

they need to or not, the more people within that community assume everything requires permission. A feedback loop develops. Norms change. So do assumptions. A permission culture takes hold under which creativity is limited unnecessarily, inappropriately and inefficiently.[19] For example, in the poetry world, poets routinely pay permissions for quotes used directly in critical commentary and scholarship.[20] The documentary filmmakers discussed above also grew to accept and even perpetuate the clearance culture, paying permissions regardless of legal merit; filmmakers did this for a variety of reasons, including their anticipation of gatekeeper demands, because they perceived themselves to lack bargaining power, out of a desire to be collegial and ethical, and out of a desire to preserve their reputations with insurers.[21]

Over time, we have seen a variety of attempts to alleviate the consequences of uncertainty around fair use. Various proposals have surfaced over the years that would introduce quantitative guidelines, or durations or percentages — rules of thumb as to the amount of copyrighted material a creator can borrow.[22] These are doomed to fail for several reasons. First, they are inaccurate. The publisher-educational institution negotiated "Classroom Guidelines," for example, assert that no more than 250 words of even the longest poem may be used.[23] Yet when it comes to quantity, fair use does not necessarily accept or reject specific percentages; it examines (among other things) the purpose of the use, and whether the amount used was reasonable in relation to that purpose. There simply is no cutoff for either maximum allowable amounts or minimum allowable amounts. This leads to the second problem with this approach: quantitative guidelines generally do not account for the different needs of different creative uses. In addition, guidelines that were originally intended as "floors" — i.e., as a statement of the absolute safest approach to fair use, without opinion as to more expansive uses — morphed, perhaps inevita-

---

19 James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 895-98 (2007). *See also* Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property Law*, 93 VA. L. REV. 1899, 1955 (2007).

20 HARRIET MONROE POETRY INSTITUTE, REPORT OF THE POETRY AND NEW MEDIA WORKING GROUP, POETRY AND NEW MEDIA: A USER'S GUIDE 12-13 (2009), *available at* http://www.poetryfoundation.org/downloads/Poetry_and_New_Media.pdf. This effect is likely intensified by the fact that publishers do not pay the permissions; rather, the scholar herself does. *See id.*

21 AUFDERHEIDE & JASZI, *supra* note 14, at 23.

22 *See, e.g.*, Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Safe Harbors*, 93 VA. L. REV. 1483 (2007).

23 H.R. REP. NO. 94-1476, at 67-68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681-82.

bly, into "ceilings" that described the only claimed fair uses that institutions were willing to support.[24] This causes them to be unduly limiting.

The problems identified above are familiar, and persistent. Though the legal fact of fair use's uncertainty has recently been questioned by some helpful and comprehensive scholarly work,[25] communities of users are still unsure of the doctrine's boundaries, and lawyers must still advise them of the high cost of getting it wrong. And yet we have long been stymied in finding a solution to fair use's uncertainty, because most obvious solutions — minimum guidelines, as discussed above; enumerated exceptions, as used in a number of countries other than the United States; or "safe harbors" for certain favored uses — bear with them a serious risk of sacrificing the flexibility that is the fair use doctrine's great strength. We are left with case-by-case review in the courts. This is certainly the most appropriate method for managing the overall development of fair use law — courts can take into account incremental (or broader) changes in creative uses, technologies and markets for copyrighted works, preserving both flexibility and balance in the doctrine over time. Yet case law develops slowly, and sometimes not at all. One of the hallmarks of giving advice on fair use is the fact that many uncontroversial uses — precisely *because* they seem so likely to be adjudicated fair or because they are unlikely to attract the ire of a copyright holder — are unsupported by specific cases.[26] This leaves both lawyers and creators frustrated, and the fair use doctrine limited in its effectiveness.

III. THE POWER OF COMMUNITY-BASED BEST PRACTICES

The problems outlined above are exactly the ones Statements of Best Practices have helped solve. But first, what are the Statements, and what are they not?

The concept and structure of a Statement of Best Practices is simple at its core, though it takes time and rigor to create. The Statement translates principles of fair use, informed by and tied to an examination of the

---

[24] Gibson, *supra* note 19, at 892 (discussing restrictive fair use policies of universities).

[25] *See, e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Samuelson, *supra* note 2.

[26] *See, e.g.*, William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 756 (2004) (suggesting that the potential loss of future licensing revenue discourages copyright holders from bringing suit or avoiding settlement). *Cf.* Beebe, *supra* note 24, at 579 (noting that owners of valuable copyrights "have a stake in establishing a *reputation* for being aggressive litigants in order to benefit from the 'chilling effects' that such a reputation may generate," and that disputes may thus be resolved at the cease-and-desist stage).

norms and creative practices of the relevant creator community,[27] into the vocabulary and experience of that community. Statements speak creators' language, not ours. And because they grow out of community discussion and community practice, Statements of Best Practices make fair more understandable and less abstract to the relevant community than do general explanations that simply walk through the four factors and give a few example cases.

Each Statement of Best Practices proceeds by giving some brief background information about fair use — no more than a few pages — along with some description of its relevance to the practice community and where it does not apply. For example, the *Documentary Filmmakers' Statement* notes that fair use does not provide relief for the problem of so-called "orphan works," or for the problem of inaccessible archival footage,[28] and the Media Literacy Educators' Statement notes that fair use does not address contractual limitations that may cover licensed materials.[29] Statements then proceed to their key component: a set of "principles" (scenarios that the relevant community has determined constitute reasonable fair use in most circumstances), each with attendant limitations (again determined by the community, with an eye toward the legal boundaries of fair use).[30] By focusing on this limited set of example circum-

[27] This is usually done through a series of structured focus group discussions with cross-sections of artist or other users in the relevant community. The Media Literacy Education Statement, for example, drew upon conversations with more than 150 educators. *See* ACTION COALITION FOR MEDIA EDUCATION ET AL., CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION 2 (2009), *available at* http://www.centerforsocialmedia.org/files/pdf/Media_literacy.pdf, and the Documentary Filmmakers' Statement drew from focused discussions with forty-five documentary directors, editors, and producers. AUFDERHEIDE & JASZI, *supra* note 13, at 5. In comparison, because no "stable, broad-based associations of [online video practitioners] had yet arisen," a "high-level interdisciplinary committee of experts" in popular culture and copyright law was formed to develop fair use best practices for online video. The group met, via conference calls and e-mail, over a period of four months. Patricia Aufderheide & Peter Jaszi, *Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video*, 6 I/S: J. L. & POL'Y FOR INFO. SOC'Y 13, 37-38 (2010).

[28] ASS'N OF INDEPENDENT VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 3 (2005) [hereinafter DOCUMENTARY FILMMAKERS' STATEMENT, *available at* http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

[29] CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION, *supra* note 26, at 3.

[30] The Statements are reviewed by a panel of copyright lawyers. Although the Statements are not intended or billed as a reflection of the legal boundaries of fair use, this step serves as a basic check for the community on whether the relevant Statement is out of step with the law.

stances tied directly to community practice, the Statements can provide information about fair use that is directly applicable to a documentary filmmaker, a media studies teacher, or a dance archivist. By focusing on circumstances that the community considers reasonable "best practices," the Statements provide this more concrete information without unduly limiting the fair use doctrine, and without unduly expanding it to cover uses that are questionable within the community. And by being clear that each Statement covers only certain widely encountered situations within a community, and does not describe all of fair use for the community, the Statements, by their own terms, do not circumscribe fair use more generally.[31] To be sure, this method has limitations, which we discuss further below, but overall it provides an elegant compromise to the "uncertainty vs. flexibility" conundrum.

Consider for instance, the *Documentary Filmmakers' Statement.* It has been available the longest, and as it is most directly tied to our work counseling documentarians who wish to make fair use of copyrighted materials, we use it as our primary example. The *Documentary Filmmakers' Statement* includes four principles: "Employing Copyrighted Material as the Object of Social, Political, or Cultural Critique"; "Quoting Copyrighted Works of Popular Culture to Illustrate an Argument or Point"; "Capturing Copyrighted Media Content in the Process of Filming Something Else"; and "Using Copyrighted Material in a Historical Sequence." Each principle includes relevant limitations, drawn from fair use law and, importantly, from community norms regarding what is reasonable. For example, Principle Three (incidentally capturing copyrighted material when filming something else) is limited by requirements that ensure the captured content is integral to, but not the primary focus of, the scene, is not a substitute for a license synch track, and the like.[32]

The principles and limitations included in the *Documentary Filmmakers' Statement* were drawn directly from the documentary community's experience with clearance issues and its normative judgment regarding what practices are reasonable and fair.[33] This allows the Statement to cover, with greater specificity than a generalized description, individual circumstances that actually arise for documentary filmmakers. Returning to Principle Three as an example, incidental capture of copyrighted material is a specific problem that documentary filmmakers identi-

---

[31] For example, the *Documentary Filmmakers' Statement* notes that "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." DOCUMENTARY FILMMAKERS' STATEMENT, *supra* note 28, at 3.

[32] *Id.* at 5.

[33] AUFDERHEIDE & JASZI, *supra* note 14, at 5.

fied during the focus group sessions.[34] Filmmakers in the study reported that they had often been prevented from using incidentally captured works because gatekeepers (such as distributors or insurers) required that each and every copyrighted work in a shot be cleared, and because permissions fees for incidentally captured works were sometimes prohibitively high.[35] The effect was to limit the vision of the film or, in some cases, to leave the filmmaker feeling pressured to alter the recorded reality. Filmmaker Jon Else, for example, when making his documentary Sing Faster, decided to substitute the incidentally captured television shows actually being watched backstage by opera stagehands — *The Simpsons* and a major league baseball game — with entirely different material that he pasted into the TV set in the shot.[36]

Unpacking the reasons why filmmakers felt unable to rely on fair use[37] for incidental captures reveals exactly the concerns arising from uncertainty and downside risk described above. Limited case law left "the law" unclear.[38] Filmmakers were unsure of the boundaries, even though their sense of reasonableness was challenged by the idea that permissions had to be obtained for incidental captures.[39] Distributors' and insurers' practice of requiring permissions for everything meant that gatekeepers stood in the way of filmmakers taking a risk with fair use, even if they would have taken the risk, themselves. Without the knowledge or vocabulary to challenge gatekeeper decisions, filmmakers had little recourse but to seek permission or change the film.[40]

---

34 *Id.* at 16-18.

35 *Id.*

36 *Id.* at 17.

37 In cases of sufficiently limited display, an argument that the use was de minimis might also apply. *See* Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998) (affirming dismissal of copyright infringement claim because defendant's use was de minimis).

38 *Compare, e.g., id. with* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70 (2d Cir. 1997) (holding that use of poster as set decoration in film was for same decorative purpose for which poster was sold and thus weighed against a finding of fair use, despite incidental use). After the Statement was written, the court in *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), reviewing an incidental use of music, stated that copyright holders must consider fair use before issuing takedown notices under § 512 of the DMCA.

39 Filmmaker Vivian Kleiman summarized this thought in the *Untold Stories* report: "How can I, as a documentary filmmaker who is documenting my reality or somebody's reality, be restricted from using [incidental] music? It's like saying I can't film the clouds." AUFDERHEIDE & JASZI, *supra* note 14, at 29.

40 *Id.* at 9, 17.

Here is where the power of the Best Practices Statement comes in. It lies in the Statement's ability to address all of these problems together. Because the Statement's covered principles are limited to situations that filmmakers encounter on a regular basis, and because they are described in terms drawn from the community's practice and vocabulary (for example, a limit on Principle Three states that incidentally captured material should not be "requested or directed"[41]), they can be much more easily applied by filmmakers to the situations they encounter. Because they are designed to be understandable to filmmakers and gatekeepers, they give filmmakers a starting point for negotiating with gatekeepers. Because they are limited to commonly occurring situations that a community believes are truly reasonable fair uses, they can help limit practical risk by avoiding especially avant garde or challenging uses.

We, and others, have encountered all of these positive effects when advising our filmmaker clients. Clients who have access to the Statement of Best Practices can make useful decisions about fair use before they complete a film and ask for an attorney's review. As such, creators using the Statement can make pre-production and production decisions that are informed by a better understanding of permissions and fair use, saving editing later. They can use the Statement as means of discussing risk management with gatekeepers, giving them better ability to negotiate to avoid unnecessary clearance costs. Perhaps the most important practical benefit of the *Documentary Filmmakers' Statement*, specifically, is that errors and omissions insurance providers have proven willing to insure films whose makers claim fair use under the Statement (so long as a lawyer agrees that the uses are likely covered by the Statement). This breaks the permissions logjam — distributors and other gatekeepers can move forward with a film that is insured—and allows the filmmaker to rely on fair use.[42]

Examples abound. The authors of this article have helped dozens of documentary filmmakers review their films in light of the *Documentary Filmmakers' Statement* and to secure the errors and omissions insurance necessary to distribute their work. Prior to 2007, it was difficult — if not simply impossible — to secure such insurance for any use of unlicensed material, whether protected by fair use or not. But once the *Documentary Filmmakers' Statement* was available, one forward-looking insurnce company decided to help tear down that wall. In collaboration with Los Angeles entertainment attorney Michael Donaldson, and the Stanford Law School Fair Use Project, Axis Pro (then known as Media/Professional) embraced the *Documentary Filmmakers' Statement*, and began offering er-

[41] DOCUMENTARY FILMMAKERS' STATEMENT, *supra* note 28, at 5.

[42] Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, Oct. 2007, *available at* http://www.iptoday.com/articles/2007-10-aufderheide.asp.

rors and omissions policies that covered unlicensed material so long as that material was reviewed by a qualified attorney.[43] When Axis Pro announced its new approach at a reception for documentarians at the Academy of Motion Picture Arts & Sciences, it received a standing ovation from the crowd.[44]

And the insurance solution has worked, even in a worst case scenario. When Yoko Ono Lennon and EMI Records sued the producers of *Expelled: No Intelligence Allowed* for using fifteen seconds of John Lennon's *Imagine*, their policy kicked in. Since this was the first time anyone had made a claim that implicated Axis Pro's new approach to errors and omissions insurance, The Fair Use Project contributed pro bono representation along side the producer's regular counsel. After we defeated preliminary injunction motions that aimed to halt nationwide distribution of the film in state and federal court, Lennon and EMI abandoned their claims.[45]

No filmmaker wants to be sued. But insurance is designed precisely to protect against that possibility. The new approach to errors and omissions insurance that Axis Pro introduced has now become the industry norm, and the Best Practices made an important contribution to that change. And for the great majority of filmmakers, who are never sued, available insurance helps them move forward with their films by providing confidence to distributors and other gatekeepers.

We have also experienced another benefit: community-developed Statements of Best Practices demystify fair use for creators, but they also help demystify community practices and norms for *lawyers*. They reflect the experience of the community, helping lawyers understand how the community approaches its creative practices and the situations in which fair use questions commonly arise for that community. Importantly, Statements of Best Practices can give lawyers a basic sense of a community's normative judgments — what it considers reasonable. Such information helps a lawyer understand where the community sees extra risk or where it has opined on ethical choices. This understanding can both help a lawyer discuss practical risks, especially the likelihood of suit, with a client, and help the lawyer place the case law in the most appropriate context.

These are powerful positive effects. They can quite literally move a community from finding little practical benefit in fair use to being able to rely upon it in appropriate situations.

---

[43] Dave McNary, *Insurance for Documentary Fair Use*, VARIETY, Feb. 22, 2007, *available at* http://www.variety.com/article/VR1117960027.html?categoryid=18&cs=1.

[44] *See id.*

[45] Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008).

IV. ADDRESSING BEST PRACTICES' LIMITATIONS

When Peter Jaszi and Patricia Aufderheide began to work on the documentary Statement, they were met with skepticism by some copyright lawyers.[46] We were somewhat skeptical, ourselves. After all, describing fair use with specificity carries at least two risks: unintentionally overstating the protection fair use gives to creators; and on the other side of the coin, unduly limiting its practical protection by specifying parameters that creators will naturally stay within (the Classroom Guidelines problem).

Certainly Statements of Best Practices have limitations. The process for creating a Statement that reflects a community consensus is often time-consuming and somewhat complex, requiring, depending on the context, methods such as discussions with multiple focus groups, other investigations into community practices, reporting, analysis, and distillation of the findings into the Statement, and review by experts.[47] As such, the method sacrifices breadth of application for depth of applicability within individual creator communities. Further, there is always some danger that the focus groups and other participants do not adequately reflect a cross-section of the relevant user community, though good methodology can limit this concern. While we believe Statements help user communities tremendously in discussing, negotiating around, and relying on fair use, they do not change the law or completely remove the uncertainty around it. As lawyers, we must still advise our clients of the uncertainty and unpredictability of individual fair use defenses and the harsh remedies that can be assessed against a copyright defendant. And importantly, Statements are regularly somewhat more limiting than fair use law itself is likely to be: first, they cover only a subset of possible fair uses within a community's practice, and second, they sometimes include limitations that grow from the community's sense of ethical norms, rather than from fair use law, itself. For example, principles covered by Statements of Best Practices commonly include reasonable attribution in their "limitations" list.[48] While attribution is not required under Section 107, it is widely considered within creator communities to have normative ethical value.

---

[46] *See, e.g.*, Rothman, *supra* note 19.

[47] *See supra* note 26 (describing examples of the development process for Statements of Best Practices).

[48] *See, e.g.*, DOCUMENTARY FILMMAKERS' STATEMENT, *supra* note 27, at 4; FUTURE OF PUBLIC MEDIA PROJECT ET AL., CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 7 (2008), *available at* http://www.centerforsocialmedia.org/remix; DANCE HERITAGE COALITION, BEST PRACTICES IN FAIR USE OF DANCE-RELATED MATERIALS 12-13 (2009), *available at* http://www.centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials.

The Statements' limitations, however, are quite different from those created by the quantitative Classroom Guidelines. Their limitations are not quantitative in nature — rather, they are usually contextual qualitative limitations that reflect community practice. The Statements themselves are very clear that they do not describe all of fair use — rather, they simply describe some common occurrences that are important in the community. To the extent that the *practical* effect of the Statement is to cause some creators to be overly cautious in their decisions, limiting each Statement to a particular user community helps prevent the limitations considered appropriate by that community from affecting the scope of fair use in other contexts.

It has been working with our creator clients, however, that turned us from friendly skeptics of the idea of "Statements of Best Practices" into believers. The *Documentary Filmmakers' Statement* helps documentary filmmakers understand fair use. They are empowered to consider their strategy for making fair use of materials, to talk with their gatekeepers (and their lawyers) about it, and to make decisions based on an understanding of what the community finds reasonable. And as discussed above, if they comply with the Statement, they can obtain all-important errors and omissions insurance — for filmmakers, this can be the difference between a film being picked up by a distributor and therefore seen by an audience, and a film languishing in obscurity. This is a set of practical benefits that we think far outweighs the possible limiting effects of the Statement. More broadly, Statements of Best Practices seem to provide a truly useful middle ground between the fair use doctrine's bewildering uncertainty and valuable flexibility.

We do think that Statements of Best Practices will be most useful and provide the most benefits to both user communities and copyright holders if certain steps are followed. Statements should be updated and revised as needed to reflect any major changes in the law or new practices. Lawyers advising clients who are using a Statement should take care to explain any differences between the Statement and fair use law, itself, most importantly the fact that reliance on a Statement is not a guarantee of safety from suit or remedies. And creators of Statements should continue to take care to develop them according to a rigorous process so that each community's norms and practices are accurately reflected in the relevant Statement and are not imputed to other communities. Neither recreating the "permissions culture" in microcosm from community to community nor overclaiming with regard to fair use will be helpful to creators.[49]

[49] *See generally* Rothman, *supra* note 19 (discussing the pitfalls of "custom" and norms).

CONCLUSION

In our experience, and that of our colleagues who also work with documentarians, the *Documentary Filmmakers' Statement* has made a critical and very real difference: it has both empowered filmmakers, and provided a common reference point for insurers, distributors and other gatekeepers who might otherwise balk at relying on fair use. It seems very likely to us that the Statements for educators, archivists, and other creative communities can have similar positive effects. In this respect, the Best Practices approach has helped support access to knowledge and to expand the boundaries of creativity. These are perhaps its greatest gifts of all.