

# The Lawyer's Role in Promoting the Use of Fair Use

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*A third party's ability to exploit a literary work, photograph, film, song, or database will depend on the nature of the copyright owner's work and the third party's usage. This article provides an introductory standardization to help lawyers answer questions regarding the contours of copyright, fair use, and select limitations on copyright in order to provide a simple guide to reduce a bit of the uncertainty. The purpose is to provide a framework for how a lawyer can respond to the common question of whether a particular use of copyrighted works is permitted by a third party and to place the framework for the answer in the context of an opinion letter. In this way, the third party user will have an answer that can be relied upon when seeking publication or Errors & Omissions Insurance for distribution and exhibition.*

“Reality changes; in order to represent it, modes of representation must change.”

—Bertolt Brecht\*\*

## I. INTRODUCTION

Over the past few decades, the global economy has transformed into a multinational, highly networked information economy. Regardless of whether the wealth is transferred through goods, labor, or services, it is the

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\*\* Bertolt Brecht, *Popularity and Realism* (1938), in THEODOR ADORNO, ET AL., *AESTHETICS AND POLITICS* 82 (London: New Left Review of Books 1977).

quality of information which fuels the transaction and adds to its value.<sup>1</sup> All of this information is affected by copyright. While mere factual data is not protected by copyright law in the United States, lawyers and courts must still look to the Copyright Act to determine the point where such collections of information become compilations of protected property. Similarly, depictions, descriptions, and other information transition from the realm of the unprotected data to the dominion of copyright based on the nature, character, and use of the data. At the other end of the creative spectrum, even the most expressive works are sometimes available to another author because of fair use or explicit statutory limitations on the owner's rights.

Enter the lawyers. Because a third party's ability to exploit a literary work, photograph, film, song, or database will depend on the nature of the copyright owner's work and the third party's usage, the answer invariably is that "it depends." This may be an ideal response while in law school, but it is hardly the transparent and efficient solution sought by most clients. This article provides some introductory standardization to help lawyers answer questions regarding the contours of copyright, fair use, and select limitations on copyright in order to provide a simple guide to reduce a bit of the uncertainty. Rather than provide a comprehensive restatement of copyright, the purpose is to provide a framework for how a lawyer can respond to the common question of whether a particular use of copyrighted works is permitted by a third party. Moreover, since the lawyer's private response is often insufficient for the third party user, this article attempts to go one step further and place the framework for the answer in the context of an opinion letter. In this way, the third party user will have an answer that can be relied upon when seeking publication or Errors & Omissions Insurance for distribution and exhibition.

## II. INITIAL RIGHTS ACQUISITION

Guiding attorneys who represent "authors" requires broad generalizations. The category of authors includes novelists, playwrights, computer programmers, choreographers, sculptors, lawyers, academics, photographers, film directors, and musicians.<sup>2</sup> As used in this article, all

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1. MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE VOLUME I*, 108 (2010) ("the knowledge component of goods and services becomes decisive in terms of value added").

2. See Russ Versteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1332 (1996) ("the contemporary, majority definition of 'author' is clear, because the majority of cases decided under the 1976 Act hold that an author is someone who contributes something that is copyrightable on its own."); *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991). *C.f.* *Garcia v. Google, Inc.*, 786 F.3d 733, 741 (9th Cir. 2015) (A claim by an actress in a motion picture scene failed to establish copyright authorship. The Ninth Circuit then adopted "longstanding practices [of

these creators of copyrighted materials will be included under the term “author” even though the creative process will differ greatly from one category to another, and the scope of the copyright will vary as a result.

As discussed below, the author seeking representation will be both asking for assistance in establishing the copyright ownership of her original work and seeking to show that the source material incorporated into the new work was permitted under the Copyright Act. In other words, every author needs to use the Copyright Act as both sword and shield, asserting rights against some potential third parties while defending claims against other potential parties.<sup>3</sup> This should generate a very balanced view of copyright based on a “divide and choose”<sup>4</sup> approach to copyright ownership, but unfortunately that is not typically the case.<sup>5</sup> Since an author will be both asserting and defending the scope of each copyright in some hypothetical future, the author should seek the most equitable rules. However, copyright owners with large portfolios of works are more likely to be asserting copyright, while creators of fan fiction, factual works, and documentary filmmakers will be more likely to be defending the unauthorized use of copyrights owned by others.<sup>6</sup> Authors seek interpretations to copyright that further their creative and economic interests.<sup>7</sup> Lawyers also tend to align towards these economic approaches based on the needs of their clients.

In developing the preliminary assessment, this balance is reflected as well. The purpose of the approach is to help assure the author she has sufficient rights to commercially exploit the work. An author seeking non-commercial exploitation, such as a fan writing fan fiction<sup>8</sup> or an academic using material for the classroom, would need fewer rights.<sup>9</sup>

For purposes of this article, the assessment will focus on the needs of a documentary filmmaker. The documentary filmmaker best illustrates the

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the Copyright Office which] do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.”).

3. See Steven M. Brams, *Fair Division*, in BARRY R. WEINGAST & DONALD WITTMAN, HANDBOOK OF POLITICAL ECONOMY (2005), [http://www.nyu.edu/gsas/dept/politics/faculty/brams/fd\\_handbook.pdf](http://www.nyu.edu/gsas/dept/politics/faculty/brams/fd_handbook.pdf).

4. See *id.* In the “divide and choose” methodology, one child slices the pie at the source of the conflict and the other child selects the preferred piece.

5. See Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 45 CORNELL L. REV. 1278, 1281 (1996).

6. See *id.* at 1281-82.

7. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 319 (2013) (discussing the “intensity with which interested parties across the copyright spectrum sometimes make their views known—and the public’s confusion, if not aversion, when it comes to copyright issues . . .”).

8. See *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (upholding injunction of commercial publication based on extensive, commercialized fan fiction publication).

9. See, e.g., 17 U.S.C. § 110(1) (2016) (copies for classroom instruction).

author at the center of the copyright balance. She is creating a highly expressive, time-intensive factual work. The author has very strong incentives to assert strong copyright ownership against unauthorized reproduction or distribution of the work. There is a theatrical distribution market and a market for the works in television and online distribution. At the same time, the documentary is often composed of archival footage, unauthorized clips, and filming at locations where clearance of all preexisting copyright is impractical.

Step one is for the lawyer to be sure that he represents the right party or parties. Working with filmmakers and other collaborative artists, it is very common to learn that during the development of the project there had originally been a different team of writers and creators.<sup>10</sup> Prior agreements, whether oral or in writing, could give rise to the claim of joint authorship.<sup>11</sup> “Joint authors co-owning copyright in a work ‘are deemed to be tenants in common,’ with ‘each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.’”<sup>12</sup>

Under the general articulation of the co-authorship rule, “[a] co-authorship claimant bears the burden of establishing that each of the putative co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.”<sup>13</sup> The requirement of an independently copyrightable contribution provides an excellent evidentiary step, but the Seventh Circuit has limited the requirement in certain situations.<sup>14</sup>

The lawyer should be very direct, preferably with a written questionnaire, asking about earlier collaborators, incomplete earlier projects, or other opportunities for third parties to make ownership claims regarding

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10. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 197-98 (2d Cir. 1998) (Broadway musical *Rent* “began in 1989 as the joint project of Billy Aronson and composer Jonathan Larson. Aronson and Larson collaborated on the work until their amicable separation in 1991.” Lynn Thomson was later hired as dramaturg and ultimately wrote approximately 25% of the musical’s book, but was denied any co-authorship copyright.).

11. 17 U.S.C. § 201(a) (2016) (“Initial Ownership. — Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”).

12. *Cnty for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff’d*, 490 U.S. 730 (1989).

13. *Thomson v. Larson*, 147 F.3d at 200. See *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991).

14. *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (not requiring independent creative element and endorsing the approach of David Nimmer that “if authors A and B work in collaboration, but A’s contribution is limited to plot ideas that standing alone would not be copyrightable, and B weaves the ideas into a completed literary expression, it would seem that A and B are joint authors of the resulting work” (quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.07 (2003))).

the material. Even if there is no valid copyright claim, there may be valid contractual rights that require clarification to allow the author to provide a valid chain of title for distribution of the project.

Step two is to determine whether the documentary filmmaker is required to secure underlying rights to the story.<sup>15</sup> “True stories cannot be ‘owned’ by anyone.”<sup>16</sup> However, if the documentary has used the facts from a book or other single source of research, the filmmaker may need to acquire the right to adapt that source into a documentary film.<sup>17</sup> Since copyright protects the order, selection, and arrangement of facts and other information that is otherwise outside the scope of copyright, the author of the underlying work may be able to claim copyright in that expression.<sup>18</sup> At the same time, copyright does not extend to either the facts or ideas involved in portraying a true story,<sup>19</sup> so the documentary filmmaker does not need to license or “clear” every possible resource.

Similarly, plagiarism is not an actionable tort under federal law and authors of source material do not generally need to be cited in documentary films.<sup>20</sup> Plagiarism is distinct from copyright infringement.<sup>21</sup> Legal liability for violations of plagiarism rules are generally limited to academic and research settings, such as student submissions, researchers, or academic submissions.<sup>22</sup> A documentary film, however, may be created in such

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15. See MICHAEL C. DONALDSON & LIST A. CALLIF, *COPYRIGHT & CLEARANCE* 135 (4th ed. 2014) (“[a]n underlying property is the source material used as the basis for a script that is not wholly original with the author”); JON M. GARON, *THE INDEPENDENT FILMMAKER’S LAW & BUSINESS GUIDE* 50 (2d ed. 2009) (“The First Amendment grants the filmmaker the right to retell a true story using his own expression. Whether presented in documentary form or dramatized, true stories have a natural resonance for audiences, which in turn provide excellent marketing opportunities.”).

16. GARON, *supra* note 15, at 50.

17. See, e.g., Bernard Weinraub, *Plagiarism Suit Over “Amistad” is Withdrawn*, N.Y. TIMES, Feb. 10, 1998, at A10 (Barbara Chase-Riboud, withdrew her lawsuit against the historical drama *Amistad* produced by Dreamworks SKG. “Ms. Chase-Riboud herself became the target of attacks, by Dreamworks lawyers who said she had ‘lifted entire passages’ and ‘directly taken’ from a book by William A. Owens about the Amistad uprising.”).

18. See 17 U.S.C. § 103 (2016) (“(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

19. 17 U.S.C. § 102(b) (2016).

20. See Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 199 (2002) (“Plagiarism is prohibited by various codes of academic and professional ethics.”); see also *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009).

21. Green, *supra* note 20, at 201 (“the rule against plagiarism departs from the fundamental concept in copyright law that only the “expression” and not the “idea” or “facts” that underlie such expression is protected.”).

22. See Ralph D. Mawdsley, *The Tangled Web of Plagiarism Litigation: Sorting Out the Legal Issues*, 2009 B.Y.U. EDUC. & L.J. 245, 246 (2009) (“The enforcement of academic penalties against

settings. In those instances, the author is under additional obligations to identify and properly attribute all source material.<sup>23</sup>

Because factual works could be based on a large range of sources, the author will not be able to prove that she did not use a particular source. To overcome this evidentiary difficulty, the author should keep a careful log of the source material actually used. The evidence of the sources utilized will go a long way to diminish claims that a particular source was used without attribution.<sup>24</sup>

Step three involves a review of the project itself. It is preferable that this work is done at least twice—first at the script stage and again at the final cut stage.<sup>25</sup> The first instance of clearance is to help drive the decisions regarding the project towards content that is free from ownership and title disputes.<sup>26</sup> “[S]cript clearance identifies all the script elements that may give rise to third-party ownership claims. It will identify the potential legal issues, and will instruct the film company to consult with the production attorney to resolve those issues.”<sup>27</sup>

Even a documentary filmmaker can often choose what locations to select when creating film footage. The choice of camera location will impact whether third party copyrighted works, trademarked products, and other protected elements are included or excluded from the shots.<sup>28</sup> In many instances, these elements are fundamental to the documentary; but in other shots, these complications can be avoided simply by understanding the nature of the location and the purpose of the scene.<sup>29</sup> Each clearance problem adds to the transaction costs and reduces the potential to commercialize the project.<sup>30</sup> Lawyers should help the authors avoid those clearance issues that are not relevant to the essence of the work.

The final clearance review should be a scene-by-scene, or frame-by-frame, review of the final cut of the documentary to identify each third party right being used in the final project. Billboards, tee-shirts, background music, product labels, recognizable faces, individuals’ names, background artworks, operating televisions, and computer screens all may involve

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plagiarists has resulted in an increasing number of lawsuits with a surprisingly wide range of legal claims.”).

23. See GARON, *supra* note 15, at 255-57

24. *Id.*

25. See generally DONALDSON & CALLIF, *supra* note 15, at 403-65.

26. See GARON, *supra* note 15, at 224 (discussing script clearance).

27. *Id.* at 224-25.

28. *Id.* at 225.

29. *Id.* at 226.

30. *Id.*

intellectual property or other third party rights that must be addressed.<sup>31</sup> Either the author has express permission to use the right, preferably in a written signed agreement, or the author will seek an exemption from the claim that can be made by the third party.<sup>32</sup> Typically, there is some give-and-take with the clearance attorney. Scenes may be shortened, coverage shots may be substituted, or other steps may occur to resolve various clearance issues before the final version of the film is locked as complete.<sup>33</sup>

### III. JUDGMENT CALLS NEEDED TO MAP THE COPYRIGHT LANDSCAPE

To sell the work to a distributor, the author will need to prove she has the necessary rights. If all the rights have been acquired through the use of express, written, and signed agreements, then a summary of the rights acquired and corresponding signed documents will complete the process.<sup>34</sup> If, instead, some or all of the rights are not acquired through written agreements, then she will require evidence that the rights are not needed.<sup>35</sup> For documentary filmmakers, this generally takes the form of an opinion letter.<sup>36</sup> In a typical Errors & Omissions application, for example, the insurer will ask, "If the production is a documentary, are you relying on the Fair Use Doctrine? If yes, please attached a copy of an opinion letter from your clearance attorney that states they have reviewed the final production and the use of the clips."<sup>37</sup>

Similarly, the Errors & Omissions application will reference the insurance company's "clearance procedures" to assure that all the material is wholly original.<sup>38</sup> This standard cannot actually be met. Every author stands upon the shoulders of the giants who preceded them, relying on some combination of unprotected ideas, facts, and other public domain materials as the basis of their work; most incorporate a significant amount of source

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31. See Ted Gerdes, *A Legal Checklist of Basic Clearance Procedures*, GERDES LAW, <http://www.gerdeslaw.com/wp-content/themes/gerdes/inc/checklist.pdf> (last visited Sept. 26, 2016) ("You and your attorney should monitor the production or other work to be insured at all stages, from inception through final cut or edit, with a view to eliminating all material that could give rise to a claim.").

32. *Id.* ("You have to have written agreements between you and the creators, authors, writers, and owners of all material. This includes getting authorization for quotations from copyrighted works that are used in the work.").

33. See GARON, *supra* note 15, at 224-27.

34. *Id.*

35. *Id.* at 235-36.

36. See DONALDSON & CALLIF, *supra* note 15, at 425-36.

37. *Id.* at 436 (form of Hiscox Insurance Company Inc.).

38. See *id.* at 437.

material.<sup>39</sup> As a result, an admonition to an author to use only original material stands as both naïve and impractical.<sup>40</sup>

The Errors & Omissions application is buttressed by a distribution agreement that requires a similarly overbroad warranty and guarantee:

The Writer hereby represents and warrants that all of the work (and the Property, if any) shall be wholly original with Writer and none of the same has been or shall be copied from or based upon any other work unless assigned in this Agreement. The reproduction, exhibition, or any use thereof of any of the rights herein granted shall not defame any person or entity nor violate any copyright or right of privacy or publicity, or any other right of any person or entity. . . .<sup>41</sup>

Although such a warranty is common, the author required to sign such an agreement cannot truly fulfill the promise that the work is wholly original. Instead, the author is guaranteeing that no party has legal rights to challenge the content of the work and claim authorship or ownership.<sup>42</sup> Nonetheless, the “wholly original” phrasing remains a common form for the author’s representation and warranties.

For an attorney providing a copyright opinion letter in this transaction, the opinion must be limited to identifying areas where a third party is most likely to assert rights and then explain why such assertions are without merit. The Copyright Act provides that copyright protects works of original

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39. See Bradley W. Grout, *Wobbling on the Shoulders of Giants: The Supreme Court’s Failure in Lotus v. Borland*, 4 J. INTELL. PROP. L. 77, 121 (1996) (“This phrase comes from Isaac Newton’s famous statement: ‘If I have seen farther than other men, it is because I have stood on the shoulders of giants.’”). Newton, in fact, was paraphrasing an earlier quotation attributed to John of Salisbury from 1159. See *Standing on the Shoulders of Giants*, PHRASE FINDER, <http://www.phrases.org.uk/meanings/268025.html> (last visited Sept. 26, 2016).

40. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 48 (2008).

[I]nformation products are often made up of fragments of other information products; your information output is someone else’s information input. These inputs may be snippets of code, discoveries, prior research, images, genres of work, cultural references, or databases of single nucleotide polymorphisms—each is raw material for future innovation. Every increase in protection raises the cost of, or reduces access to, the raw material from which you might have built those future products.

*Id.* at 48. See also Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 361-62 (2016).

41. *PublicFilmWorks Writers Agreement*, PUBLICFILMWORKS, [http://www.sec.gov/Archives/edg-ar/data/1108730/000104746904015641/a2135186zex-10\\_3.htm](http://www.sec.gov/Archives/edg-ar/data/1108730/000104746904015641/a2135186zex-10_3.htm) (last visited Sept. 26, 2016).

42. In this example, the author is required to make the guarantee regarding ownership of copyright, publicity rights, trademark interests, and privacy rights as well as guarantee that the author has not defamed any person through the creation and distribution of the work. See KELLY CRABB, *THE MOVIE BUSINESS: THE DEFINITIVE GUIDE TO THE LEGAL AND FINANCIAL SECRETS OF GETTING YOUR MOVIE MADE* 35 (2005).

authorship which have been fixed in a tangible medium of expression.<sup>43</sup> The law, however, then immediately excludes categories of information and data that are statutorily excluded from copyright, including facts, ideas, processes, or discoveries.<sup>44</sup>

- Ideas are not protected by copyright, but the expression of those ideas will be, so the telling of a true story is copyrightable, but the copyright will not stop another party telling that same story as long as the second story is not copied from the first;<sup>45</sup>
- Facts are not protected by copyright, but the creative order, selection, and arrangement of facts may be protected as a compilation;<sup>46</sup>
- A copyrighted work may not be copied or reproduced without permission, but another party who makes a similar work without resorting to copying has a copyright in her work as well;<sup>47</sup>
- Titles to literary works are not protected by copyright,<sup>48</sup> though they may sometimes be protected by trademark;<sup>49</sup>

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43. 17 U.S.C. § 102 (2016). *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

44. 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985) (“No author may copyright his ideas or the facts he narrates.”).

45. Mazer v. Stein, 347 U.S. 201, 217 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”); Autoskill v. National Educational Support Systems, Inc., 994 F.2d 1476, 1487 (10th Cir. 1993) (“Separating idea from expression, then, is one of the basic parts of a substantial similarity analysis.”); Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49 (2d Cir. 1936), cert. denied, 298 U.S. 669 (1936); Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 400 (D. N.J. 2012).

46. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350-51 (1991) (“A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.”); Baker v. Selden, 101 U.S. 99 (1880).

47. Sheldon v. MGM Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s ‘Ode on a Grecian Urn,’ he would be an ‘author,’ and if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

48. 37 C.F.R. § 202.1 (“The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained: (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents . . .”).

49. *See* Heirs of Estate of Jenkins v. Paramount Pictures Corp., 90 F. Supp. 2d 706, 711 (E.D. Va. 2000), *aff’d sub nom.* Evans v. Paramount Pictures Corp., 7 F. App’x 270 (4th Cir. 2001); Rogers v. Grimaldi, 875 F.2d 994, 998 (2d Cir. 1989) (“[I]t is well established that where the title of a movie or a book has acquired secondary meaning . . . the holder of the rights to that title may prevent the use of the same or confusingly similar titles by other authors”); Warner Bros. Pictures

- Choreography is protected by copyright, but mere dance steps are not;<sup>50</sup>
- Characters may be protected by copyright, but only if they are fully developed and somewhat independent of the stories in which they are expressed;<sup>51</sup>
- Including a fleeting or indistinct reproduction of another's work is often *de minimis* and therefore too insubstantial to give rise to copyright infringement;<sup>52</sup>
- A work that is no longer protected by copyright because the term has expired is free for any party to use, but the author who creates a derivative work from that source may claim copyright in her contribution;<sup>53</sup> and
- Otherwise exclusive rights to copyright are not infringed by fair use, including reproduction “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . .”<sup>54</sup>

When writing an opinion letter regarding clearance for a documentary, there may be a variety of distinction questions asked by the insurance carrier or the distributor: title clearance; music clearance; clip (re-use) clearance; and personal rights clearance.<sup>55</sup> The distributor will typically require that the clearance documentation take into account the different legal standards

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v. Majestic Pictures Corp., 70 F.2d 310, 311 (2d Cir.1934) (titles “may not be used by a competitor to deceive a public which has long attributed [the title] to complainant’s moving pictures”).

50. Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986) (“The Act does not define choreography, and the legislative reports on the bill indicate only that ‘social dance steps and simple routines’ are not included.” (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 53–54, reprinted in 1976 U.S. Code Cong. & Ad.News 5659, 5666–67).

51. Warner Bros. Entm’t v. X One X Prods., 644 F.3d 584, 597 (8th Cir. 2011) (“It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves, to the extent that such characters are sufficiently distinctive.”); Gaiman v. McFarlane, 360 F.3d 644, 661 (7th Cir. 2004) (“[A] stock character, once he was drawn and named and given speech . . . became sufficiently distinctive to be copyrightable.”).

52. Newton v. Diamond, 388 F.3d 1189, 1192–93 (9th Cir. 2004) (“For an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement.”); La. Contractors Licensing Serv., Inc. v. Am. Contractors Exam Servs., Inc., 13 F. Supp. 3d 547, 552 (M.D. La. 2014), *aff’d*, 594 F. App’x 243 (5th Cir. 2015) (“The *de minimis* doctrine provides that if unauthorized copying is sufficiently trivial, the law will not impose legal consequences.” (internal quotations omitted)).

53. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33 (2003) (“The right to copy, and to copy without attribution, once a copyright has expired, like “the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public.” (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964); *Warner Bros. Entm’t*, 644 F.3d at 596 (“[F]reedom to make new works based on public domain materials ends where the resulting derivative work comes into conflict with a valid copyright.”)).

54. 17 U.S.C. § 107 (2016).

55. See Gerdes, *supra* note 31.

regarding copyright and personal clearance rights for each geographic territory acquired.<sup>56</sup> Some of these interests focus on areas outside copyright, but the approach is similar for those legal issues.

Titles provide a good example of how these rights overlap. Even though titles are not protected by copyright, and are only protected by trademark if they have acquired secondary meaning, the distributor may still require an opinion letter. The Motion Picture Association of America maintains the Title Registration Bureau, a title registry that binds MPAA members and other distributors that have joined the agreement.<sup>57</sup> Even if the author has not elected to join the registry, the potential distributor of the film may have done so, and as a result, the MPAA registry must be reviewed prior to the selection and marketing of the title. Similarly, non-film uses may trigger claims of trademark infringement. For example, the film *Drop Dead Gorgeous* had originally hoped to use the title "Dairy Queens" for its story of a Minnesota beauty queen competition, but the proposed title raised objections from the restaurant chain owning a similar trademark.<sup>58</sup> The lawyer and the clearance service must look to trademark searches, MPAA Title Registration Bureau registry searches, copyright office searches for literary works using the title in a series, and similar sources to create the factual evidence that the distributor is not contractually obligated not to use the title and there is no likelihood of confusion with an owner of a similar trademark.

The opinion letter for copyright will tend to balance the analysis between concerns that a third party cannot assert a lawful copyright and concerns that a third party who owns a lawful copyright cannot assert that right because of fair use or another exemption under the statute.

#### IV. THE ANATOMY OF THE OPINION LETTER

The opinion letter allows both the insurance company and the distributor to rely on the facts specified and the conclusions of law related to scope of the law covered and the facts reviewed. Although there is a paucity of published opinions on copyright issues, there is useful litigation to help understand opinions from patent law cases:

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56. *See id.* ("All necessary rights must be obtained that cover domestic and foreign territories, including any extensions and renewals for all literary material (other than original or unpublished material) contained in the insured production.").

57. *See* Tom Isler, *The Art of the Movie-Title Steal*, PENN LAW: DOCS & THE LAW BLOG (Apr. 16, 2014), <https://www.law.upenn.edu/live/news/4690-the-art-of-the-movie-title-steal> (discussing the 1916 silent short entitled *The Butler* retained precedence so that a Weinstein Company film was permitted only to use *Lee Daniel's The Butler* as its title).

58. Kate Brown, *How to Advertise a Movie Without Getting Sued*, DOTTED LINE REP. (Mar. 27, 2014), <http://dlreporter.com/2014/03/27/how-to-advertise-a-movie-without-getting-sued>.

One can evaluate whether a written opinion is detailed, includes an analysis for each claim of the patent at issue, and demonstrates diligent search of the prior art and a review of prosecution history as well as possible counter arguments that will likely be faced and the probability of their success in litigation. A written opinion may additionally reflect the completeness of the data provided to counsel which is discoverable from the client and attorney without implicating more difficult problems of waiver of underlying work product.<sup>59</sup>

Building from this example, a thorough copyright law opinion will similarly provide an analysis of each copyright scope or fair use claim, clearly identify the scope of the research involved in the legal and factual search, and expressly identify the limitations of the opinion.<sup>60</sup> The factual research need not be original. “The lawyers responsible for preparing an opinion letter usually do not have personal knowledge of the factual information necessary to support the information in the letter. Instead, the lawyers rely on information that they obtain from others, especially the client company’s officials and public records.”<sup>61</sup> Provided the opinion letter specifies that the opinion relies upon the records of the author, the opinion can verify the form of the copyright releases obtained and the parties who executed such releases without checking the surrounding facts and circumstances of each signature.

Copyright and patent differ in many key respects, so overreliance on the jurisprudence involving patent opinions may overstate the confidence an attorney can have in copyright opinion practice. Nonetheless, patent opinions have some standardized forms that may help the copyright opinion draftsman. These include “freedom to operate letters” and “non-infringement opinion letters,” among others.<sup>62</sup> “A freedom-to-operate opinion letter typically involves a ‘product clearance’ investigation to proactively identify and dispose of issues arising from patents in the area.”<sup>63</sup> The non-infringement opinion seeks to distinguish the clients’ product or service from those of competing claimants.<sup>64</sup> Reference to such patent forms may be beneficial to copyright attorneys and add some consistency across

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59. *K.W. Muth Co. v. Bing-Lear Mfg. Grp.*, 219 F.R.D. 554, 563 (E.D. Mich. 2003).

60. See A. SIDNEY HOLDERNESS, JR. & BROOKE WUNNICKE, *LEGAL OPINION LETTERS FORMBOOK* §§ 3.01-3.13 (A. Sidney Holderness, Jr & Brooke Wunnicke eds., 3rd ed. 2010).

61. *Id.* at § 3.03, at 37.

62. Suneel Arora, *Preparing or Evaluating Non-Infringement and Other Patent Opinions*, in *THE 2006 MIDWEST INTELLECTUAL PROPERTY INSTITUTE 1* (Minn. Continuing Educ. ed., 2006) (other categories include “pre-litigation infringement opinion letters” and “invalidity opinion letters”).

63. *Id.* at 2.

64. *Id.*

areas of expertise within a firm. Both copyright and patent share enough similarities to help develop common limitations.

The standard limitations on the opinions are further bolstered by the customary practice involving opinion letters.<sup>65</sup> “[C]ertain assumptions do not [need to be expressly stated] because they have a general application not limited to particular circumstances, for example assumptions that: copies of documents are identical to the originals; signatures are genuine; and parties other than the client are authorized to enter into the subject transaction.”<sup>66</sup>

The patent field also provides some guidance on the possible benefits of a well-drafted opinion letter. Under patent law doctrine, a sufficiently complete opinion letter can negate a finding of willfulness on the part of an infringer.<sup>67</sup> At the same time, the lawyer’s “concern over exposure to claims and liability [is] resulting in more defensive practice.”<sup>68</sup>

Balancing the benefits of a thorough opinion which provides robust information upon which a third party can rely and realistic concerns that the opinion letter has the potential to open the opining attorney to claims and liability, some initial suggestions may prove helpful.

The copyright opinion letter will likely consist of the following sections:<sup>69</sup>

- Role of Counsel<sup>70</sup>
- Qualification circumscribing Counsel’s Due Diligence<sup>71</sup>
- Qualification limiting to terms of Acquisition Agreement
- Qualification limiting Scope of Copyright Law
- Qualification limiting Bankruptcy<sup>72</sup>

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65. See *Statement on the Role of Customary Practice in Preparing and Understanding Third-Party Legal Opinions*, 63 BUS. LAW. 1277, 1277–79 (2008).

66. HOLDERNESS, JR. & WUNNICKE, *supra* note 60, at § 3.03.

67. *K.W. Muth Co.*, 219 F.R.D. at 564 (“Because the issue of willful infringement will only arise if the counsel giving the opinion was wrong, the focus of a jury’s willfulness . . . is not on the legal correctness of the opinion of counsel . . . but rather on whether the opinion was sufficient to instill a belief in the accused . . .”); *Thorn EMI N. Am., Inc. v. Micron Tech., Inc.*, 837 F. Supp. 616, 621 (D. Del. 1993) (“The facts of consequence to the determination of a claim of willful infringement relate to the infringer’s state of mind. Counsel’s mental impression, conclusions, opinions or legal theories are not probative of that state of mind unless they have been communicated to that client.”).

68. HOLDERNESS, JR. & WUNNICKE, *supra* note 60, at § 3.03 (“This trend has been reflected, for example, in greater use of express exceptions, assumptions and limitations and reduced reliance on customary practice, and in resistance to a greater number of particular opinions that historically were not of concern.”).

69. See PETER SIVIGLIA, *COMMERCIAL AGREEMENTS: A LAWYER’S GUIDE TO DRAFTING AND NEGOTIATING* § 13:2 (2015).

70. *Id.*

71. *Id.*

72. *Id.*

- Qualification limiting Non-Copyright Issues (unless separately provided)
- Substantive Discussions<sup>73</sup>
- Use of Ideas and Sufficiency of Research
- Unrestricted Use of Content in the Public Domain
- Fair Use of Film Clips
- Fair Use of Quotations
- Transformative Nature of Author's Work
- Fair use of Capturing Copyrighted Media in the Process of Filming Something Else
- Fair Use for using Copyrighted Material in its Historical Sequence
- Signature Block

It is common for law firms to have practice groups dedicated to opinion letters. This may not be the same for copyright opinions but the sparse published material suggests there is less information about these opinions than in other areas, and firm practice groups may not be as familiar with these concerns.

Without addressing the substance of each provision of the opinion letter, a few key provisions may prove illustrative. For example, here is suggested language for the Qualification circumscribing Counsel's Due Diligence:

[W]e have made such examination of the law and have examined such other documents as we have deemed necessary or appropriate to render this opinion, including, without limitation, the Memorandum and Articles of Association, of the Company. In our examination we have assumed the genuineness of all signatures, the authenticity and completeness of all documents submitted to us as originals, the conformity to original documents and completeness of all documents submitted to us as copies, and the authenticity of the originals where copies have been submitted. We have no reason to believe that these assumptions cannot be made.<sup>74</sup>

The scope of the research is quickly and thoroughly limited by the reasonable assumptions for the documents reviewed. To the extent that due diligence is reliant on searches and outside review, these limitations should also be stated. “[T]he freedom-to-operate opinion letter can never guarantee . . . a clear path to market. . . . It is necessarily limited by the effectiveness of the product clearance search, and the conclusions of the

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73. See generally *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CTR. FOR MEDIA & SOCIAL IMPACT, <http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use> (last visited Sept. 26, 2016) [hereafter *Documentary Best Practices*].

74. SIVIGLIA, *supra* note 69, at § 13.2.

opinion letter should reflect this lack of complete certainty.”<sup>75</sup> The search strategies and parameters should be explained, which has the benefit of limiting the third party to its independent assessment regarding the sufficiency of the search.<sup>76</sup>

For documentary filmmakers, most of the substantive sections rely heavily on the *Documentary Filmmakers' Statement of Best Practices in Fair Use*.<sup>77</sup> “In 2005, a coalition of lawyers, law schools, and film industry advocates came together to help outline many of these principles. The effort served both to clarify the practices commonly used by professional documentary filmmakers and to help advocate that those practices met the legal guidelines for fair use.”<sup>78</sup>

Attorneys drafting opinion letters are very well served by placing opinions on these matters within the context of the *Statement of Best Practices in Fair Use*. “[T]he work is premised on the observation that over time, courts have tended to defer broadly to the views of practice communities about what constitutes reasonable and appropriate unlicensed use of copyrighted materials in their own fields of activity.”<sup>79</sup> More importantly, “[b]roadcasters and insurers accepted fair use terms within normal business practice.”<sup>80</sup> This means that opinions buttressed by the language and limitations of the *Statement of Best Practices in Fair Use* will have credibility with the relevant third parties and make the opinion more likely to support the requests of the author for insurance and distribution.

Having the support of the *Statement of Best Practices in Fair Use* will assist the attorney in drafting very fact-specific, judgment-laden opinions. In addition to the comment, criticism, news reporting, teaching, scholarship, and research,<sup>81</sup> additional broad categories have been carved out by the courts.<sup>82</sup>

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75. ARORA, *supra* note 62, at 4.

76. See, e.g., DONALDSON & CALLIF, *supra* note 15, at 419 (providing sample title opinion letter which lists details of title, copyright, and trademark search upon which the opinion is based).

77. See *Documentary Best Practices*, *supra* note 73; 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, 40 (2010); Peter Jaszi, *Copyright, Motion Pictures and Fair Use*, 2007 UTAH L. REV. 715 (2007).

78. GARON, *supra* note 15, at 243.

79. Aufderheide & Jaszi, *supra* note 77, at 14.

80. *Id.* at 16.

81. See 17 U.S.C. § 107 (2016).

82. See GARON, *supra* note 15, at 240-41 (“[F]air use has also developed to include the rights of researchers—such as documentary filmmakers—to make personal copies of entire works for their research archives, backup copies of materials, and to allow consumers to temporarily copy music, television and film for enjoyment at a later time or place.”); Jaszi, *supra* note 77, at 719 (“[B]roadly speaking, fair use comes in two varieties—one relating to personal or private end uses of copyrighted material and the other to reuses that are arguably ‘productive’ in nature.”).

The general preamble to fair use is further clarified by four factors which can be weighed by the court in determining whether a particular use constitutes a fair use:

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.<sup>83</sup>

No single factor is determinative. Despite the codification of the provision, fair use is the quintessential common law doctrine, with the rules developing slowly and separately in each medium.<sup>84</sup> Musical compositions are treated somewhat differently than sound recordings;<sup>85</sup> narrative commercial films are treated differently than documentaries;<sup>86</sup> and non-commercial video uploads are a world unto themselves.<sup>87</sup>

When writing opinion letters, the reference to existing factual litigation serves as the signposts for accepted fair use practices. But at the same time, some decisions have come under fierce criticism for either their outcome or their analysis, so the practitioner must be wary of assuming every case is

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83. 17 U.S.C. § 107 (1992).

84. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2541 (2009) (“[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters.”) Professor Samuelson develops a broader matrix for fair use coherency beyond the role of fair use in commercial and consumer publication:

The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and the privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.

*Id.* at 2537. This broader approach may prove very helpful in particular opinion letters and certainly serves as an excellent guide for identifying the underlying beauty and coherence in copyright fair use.

85. Jaszi, *supra* note 77, at 738-39.

86. *See id.* at 728.

87. *See id.* at 714-16.

good law.<sup>88</sup> As part of my larger project on independent filmmaking, I have previously addressed the four fair use factors for documentary filmmakers:

Broadly speaking, the law favors documentary film's goals of public comment, so the first prong of the four-factor test will generally weigh in the favor of the filmmaker. This does not mean that the documentary need be ponderous or academic to benefit from the clause. Irreverent or polemic, comical or studious, all works improve public knowledge and thereby benefit the public. However, the first prong also specifies that to be considered fair use, a work's appropriation of copyrighted material must be *transformative* in nature. Merely reproducing the content without comment does not transform it. Thus, if the documentary provides insight or criticism through the context in which the material is used, it is much more likely to be fair use.

The second prong of the test reflects the fact that stronger copyright protection is [often] given [more] to fictional or highly creative works than to those that are factual. While ideas, facts, formulas, and processes are not even protected by copyright, the manner in which facts are expressed is given modest copyright protection. Fair use offers very wide latitude to make use of such factual expressions, because the copyright should never create a monopoly over the facts or ideas.

For most documentary filmmakers, the most important aspects of the fair use test are the last two prongs. Under the third prong, the law makes clear that less is more. The smaller the portion of a copyrighted work one uses, the greater the chance it is considered fair use. Short quotes are more likely to be fair use than recitation of extensive passages; 30-second clips are more likely to be fair use than 5-minute sequences.

Similarly, the fourth prong balances the economic interests of the copyright holder with those of the documentary filmmaker or others who seek to use copyrighted works without permission. To the extent that the documentary film serves as a competing product with the copyright holder's own work, it is less likely to be considered fair use. If the documentary filmmaker's work does not threaten to replace the copyright owner's work in the market, the documentary will more likely be considered fair use.<sup>89</sup>

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88. See, e.g., *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (inexplicably 25 of artist's 30 paintings were held transformative as a matter of law and thus constituted fair use of the copyrighted photographs, but what distinguished the fair use works from the potentially infringing works was incomprehensible); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (overstating copyright interest in sound recording samples); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (obvious parody of Dr. Seuss's lyrical style upheld as copyright infringement even in the absence of any particular literal infringement).

89. GARON, *supra* note 15, at 240-43.

The important aspect of this approach is its normative power to shape expectations of all the participants in the creative economy. “[C]ommunities of cultural practice can and do make predictive judgments on a more systematic basis. Thus, over time[,] each community evolves a shared understanding of fair use for its own practices—powerful testimony to the power of interpretation of fair use by a creative community.”<sup>90</sup>

The usefulness of the normative research provided by the Center for Media & Social Impact and other institutions is particularly helpful in the context of the many factual situations that do not have examples of litigation that is on point. They are even more important when the courts struggle to understand the medium or the works and create false landmarks that often take years for the creative community to erase.

Building on the fair use clause, the *Statement of Best Practices for Documentary Filmmakers* provides specific guidance in areas likely to require opinion letters:

ONE: Employing Copyrighted Material as the Object of Social, Political, or Cultural Critique

Description: This class of uses involves situations in which documentarians engage in media critique, whether of text, image, or sound works. In these cases, documentarians hold the specific copyrighted work up for critical analysis.

Principle: Such uses are generally permissible as an exercise of documentarians’ fair use rights. This is analogous to the way that (for example) a newspaper might review a new book and quote from it by way of illustration. Indeed, this activity is at the very core of the fair use doctrine as a safeguard for freedom of expression. So long as the filmmaker analyzes or comments on the work itself, the means may vary. Both direct commentary and parody, for example, function as forms of critique. Where copyrighted material is used for a critical purpose, the fact that the critique itself may do economic damage to the market for the quoted work (as a negative book review could) is irrelevant. In order to qualify as fair use, the use may be as extensive as is necessary to make the point, permitting the viewer to fully grasp the criticism or analysis.

Limitations: There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience’s taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work (or other works like it).

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90. Aufderheide & Jaszi, *supra* note 77, at 20-21.

## TWO: Quoting Copyrighted Works of Popular Culture to Illustrate an Argument or Point

Description: Here the concern is with material (again of whatever kind) that is quoted not because it is, in itself, the object of critique but because it aptly illustrates some argument or point that a filmmaker is developing—as clips from fiction films might be used (for example) to demonstrate changing American attitudes toward race.

Principle: Once again, this sort of quotation should generally be considered as fair use. The possibility that the quotes might entertain and engage an audience as well as illustrate a filmmaker's argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power, and in analogous situations, writers in print media do not hesitate to use illustrative quotations (both words and images). In documentary filmmaking, such a privileged use will be both subordinate to the larger intellectual or artistic purpose of the documentary and important to its realization. The filmmaker is not presenting the quoted material for its original purpose but harnessing it for a new one. This is an attempt to add significant new value, not a form of “free riding”—the mere exploitation of existing value.

Limitations: Documentarians will be best positioned to assert fair use claims if they assure that:

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film's final credits;
- to the extent possible and appropriate, quotations are drawn from a range of different sources;
- each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.

## THREE: Capturing Copyrighted Media Content in the Process of Filming Something Else

Description: Documentarians often record copyrighted sounds and images when they are filming sequences in real-life settings. Common examples are the text of a poster on a wall, music playing on a radio, and television programming heard (perhaps seen) in the background. In the context of the documentary, the incidentally captured material is an integral part of the ordinary reality being documented. Only by altering and thus falsifying the reality they film—such as telling subjects to turn off the radio, take down a poster, or turn off the TV—could documentarians avoid this.

Principle: Fair use should protect documentary filmmakers from being forced to falsify reality. Where a sound or image has been captured incidentally and without prevision, as part of an unstaged scene, it should be permissible to use it, to a reasonable extent, as part of the final version of the film. Any other rule would be inconsistent with the documentary practice itself and with the values of the disciplines (such as criticism, historical analysis, and journalism) that inform reality-based filmmaking.

Limitations: Consistent with the rationale for treating such captured media uses as fair ones, documentarians should take care that:

- particular media content played or displayed in a scene being filmed was not requested or directed;
- incidentally captured media content included in the final version of the film is integral to the scene/action;
- the content is properly attributed;
- the scene has not been included primarily to exploit the incidentally captured content in its own right, and the captured content does not constitute the scene's primary focus of interest;
- in the case of music, the content does not function as a substitute for a synch track (as it might, for example, if the sequence containing the captured music were cut on its beat, or if the music were used after the filmmaker has cut away to another sequence).

#### FOUR: Using Copyrighted Material in a Historical Sequence

Description: In many cases the best (or even the only) effective way to tell a particular historical story or make a historical point is to make selective use of words that were spoken during the events in question, music that was associated with the events, or photographs and films that were taken at that time. In many cases, such material is available, on reasonable terms, under license. On occasion, however, the licensing system breaks down.

Principle: Given the social and educational importance of the documentary medium, fair use should apply in some instances of this kind. To conclude otherwise would be to deny the potential of filmmaking to represent history to new generations of citizens. Properly conditioned, this variety of fair use is critical to fulfilling the mission of copyright. But unless limited, the principle also can defeat the legitimate interests of copyright owners—including documentary filmmakers themselves.

Limitations: To support a claim that a use of this kind is fair, the documentarian should be able to show that:

- the film project was not specifically designed around the material in question;
- the material serves a critical illustrative function, and no suitable substitute exists (that is, a substitute with the same general characteristics);
- the material cannot be licensed, or the material can be licensed only on terms that are excessive relative to a reasonable budget for the film in question;
- the use is no more extensive than is necessary to make the point for which the material has been selected;
- the film project does not rely predominantly or disproportionately on any single source for illustrative clips;
- the copyright owner of the material used is properly identified.

#### Fair Use in Other Situations Faced by Documentarians

The four principles just stated do not exhaust the scope of fair use for documentary filmmakers. Inevitably, actual filmmaking practice will give rise to situations that are hybrids of those described above or that simply have not been anticipated. In considering such situations, however, filmmakers should be guided by the same basic values of fairness, proportionality, and reasonableness that inform this statement. Where they are confident that a contemplated quotation of copyrighted material falls within fair use, they should claim fair use.<sup>91</sup>

Drafting a useful analysis for each relevant substantive aspect of the opinion letter should combine the considerations listed in these statements with the normative research presented by the Center for Media & Social Impact, and the well regarded opinions published by the federal courts on copyright law. Through the triangulation of these three sources, the lawyer has undoubtedly met the requirements of non-negligent research. By articulating these sources in the opinion, the lawyer has presented both the basis for the opinion and the basis on which the relying party can make its assessment of the veracity of the opinion.

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91. *Documentary Best Practices*, *supra* note 73.

## V. CONCLUSION

“[I]t ‘is not 15 minutes of fame [teenagers] care about, it is about 15 megabytes of fame.’”<sup>92</sup>

Today’s economy is built around information, data, and media, swirling around us in a manner unfathomable and far beyond a mere celestial jukebox.<sup>93</sup> “Horizontal networks of communication built around peoples’ initiatives, interests, and desires are multimodal and incorporate . . . photographs[,] . . . cooperative projects such as Wikipedia[,] . . . music and films[,] . . . and social/political/religious activist networks that combine web-based forums of debate with global feeding of video, audio, and text.”<sup>94</sup> The normative expectations built by the *Statement of Best Practices for Documentary Filmmakers* and similar guidance projects help provide standard expectations for the parties to these complex, ever-changing transactions. The empirical community research adds even more, providing clear guidance that the practices being proposed are, in fact, the practices being adopted by many others.

For authors of copyright law opinions, the need to rely on the case law, empirical data, and guidance projects is greater than most practice areas because there has not yet been significant public disclosure on the terms and standard provisions expected of the opinion letters.

To bring this goal even farther forward, lawyers should work with their clients and begin to share these opinion letters publicly as a resource for their clients and the future authors they inspire. Just as copyright incentivizes publication, so should the need for a strong creative community incentivize lawyers and clients to agree to publish and share the resources helpful in producing creative works.

Each specific instance remains somewhat unique in fair use opinions. Nonetheless, these guides should help lawyers better understand their due diligence obligations and their ability to fulfill those obligations and provide meaningful opinions. As a result, the ability of the creative economy to create more works and to avoid excessive transaction costs should further the underlying goals of copyright *to promote science and the useful arts* through creativity and innovation.

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92. CASTELLS, *supra* note 1, at xxviii.

93. See generally PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 187-216 (rev. ed., Stanford Univ. Press, 2003).

94. CASTELLS, *supra* note 1, at xxviii.