

Counseling Your Clients on Fair Use of Others' Works . . . While Standing on One Foot¹

BY STEVE ZANSBERG

It's 4:30 in the afternoon, and your office phone rings. The call is from your client, the news director at the local TV station: "This afternoon, the cops busted two seniors at Ridgeway High who were planning an attack on the school. The only photos we can find of the two alleged perps are their portraits in last year's high school yearbook. The school says a private company, Alumni Photo, is the copyright owner. We've tried reaching that shop but have received no response. We're OK to run the photos on our 5:00, 5:30, and 6:00 casts . . . It's a fair use, right?"

Ugh.

This is no time to deliver a scintillating tutorial on copyright infringement, statutory damages, and the muddled state of the law applying the defense of fair use. Your client wants a simple answer: "Yes" or "No."

We've all been in this position. So, what do *you* say?

My stock answer goes something like this: "Unless you have obtained permission from the copyright owner, you will be committing copyright infringement, and *if* the photos are registered with the U.S. Copyright office, your station may be subject to paying statutory damages starting at \$750 and rising to either \$30,000 or \$150,000 (for willful infringement). The likelihood of your successfully claiming your use of these students' portraits, merely to illustrate your story, was a 'fair use' is pretty slim. After all, professional photographers make a living, in part, by licensing their photos for such uses.² However, your actual financial exposure is probably quite low: The photos (from

last year's high school yearbook) are probably not registered in the Copyright Office, so you can probably negotiate a low settlement with this local photographer, say two or three times his or her ordinary licensing fee." Of course, the two high school yearbook photos will appear, somewhere, on the evening news.³

Can Broader Lessons Be Learned?

The point of the above thought exercise/hypothetical is that counseling clients about whether a particular use of a copyrighted work in reporting the news (or in longer-form documentary works) constitutes "fair use" is no simple matter. While our clients may wish there were a plain and easy "litmus test," I know of no "cookie cutter, once-size-fits-all" standard that can be applied, easily, to all (or even most) factual scenarios. As our friend Mark Sableman has aptly declared, "Fair use isn't arithmetic."⁴

So, how can we media attorneys best serve our clients to navigate these shoals, not only when called upon to make individual "judgment calls," like the example above, but to provide them helpful guidance to make these determinations on their own? As anyone who has examined the body of case law applying the four factors set forth in 17 U.S.C. § 107 knows, the interplay between those factors and various factual circumstances frequently requires nuanced and subjective analyses. This article is not the appropriate place for a lengthy exegesis of the fair use doctrine and its application in published judicial decisions.⁵ Instead, I offer here two simple rules of thumb that I, and my clients, have found understandable and practicable. But first, I will briefly outline *what fair use is*, according to the Copyright Act.

The Basics

What Is Copyright?

Copyright is the intellectual property right of ownership in original expression (text, photos, painting, music, sculpture, etc.) created by a human (not a monkey or machine) that attaches (springs into life) the moment the creative expression is "fixed in a tangible medium." The right of ownership exists, under the law, the moment one creates *expression* (not merely an idea) and records it, in some way, in a "tangible medium." Among the so-called bundle of rights the owner of a copyrighted work possesses is the right to prohibit others from making copies of that protected expression without the owner's prior permission. An additional right of the copyright owner is the right to prohibit others from creating, without prior permission, a "derivative work" that is generated by express or implicit reference to the original copyrighted work. Additional rights (including the recovery of statutory damages) come to a copyright owner upon formally registering the copyrighted work with the US Copyright Office, but such registration is not necessary for the right of ownership in the intellectual property to exist.

What Is Fair Use?

Recognizing that a 100 percent prohibition on the copying of original expressive works by others would stifle creativity and the generation of additional expressive works that incorporate prior works, Congress enacted an exception to the copyright owner's right to grant permission to others to reproduce his/her copyrighted work. Section 107 of the Copyright Act states:

[T]he fair use of a copyrighted work, including . . . by reproduction in copies . . . , for purposes such as criticism, comment, news reporting,

Steve Zansberg is a partner in the Denver office of Ballard Spahr, LLP, and is a former chair of the Forum on Communications Law.

teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. . . .

Courts Struggle When Applying the Factors—No Wonder Journalists Do Too

The difficulty in predicting, in advance of a judicial determination, whether a particular use of another's copyrighted work in a news report, magazine article, or documentary film is fair use is evidenced by the wildly disparate outcomes reported in published judicial decisions to date. I will not catalog them here. Two examples sufficiently illustrate the point.

In 1993, the “not guilty” verdict, in Simi Valley, California, following the trial of the white police officers who beat African American Rodney King, set off widespread rioting in the streets of Los Angeles. Perhaps the most famous incident of those riots was the beating of a truck driver, Reginald Denny, at the now infamous intersection of Florence and Normandie. The entire incident of African American rioters pulling Denny out of his truck and almost beating him to death was captured on videotape by a local helicopter news crew. The copyright owner of that footage, Los Angeles News Service, sued several different companies that had incorporated that footage into their reports. In one case, the usage was found to be a fair use and therefore not copyright infringement.⁶ In

the other case, decided earlier by the same appeals court, the inclusion of the same footage (though a longer clip) in a different broadcast report was deemed not necessarily a fair use, and therefore left to a jury to decide whether it constituted copyright infringement.⁷

The difference between the two cases' outcomes turned largely on the factors of “nature and purpose of the use” and the amount of the footage that the two defendants had used. In the earlier case against Los Angeles television station KCAL-TV, the defendant used only 45 seconds of the four-minute footage, but it was “the heart of the matter,” showing the brutal assault on the helpless truck driver as he lay in the street. And that defendant's use—on a nightly news broadcast that competed directly with the news reporting of LANS—was found to present an open question (for the jury to decide) whether the use was “fair” or infringing.

In contrast, in the second case, the defendant, cable channel Court TV Network, used only a few seconds of the Denny beating footage, in a promotional spot advertising the networks' coverage of the trial of one of Denny's assailant's (for that assault), and also in a stylized promo for the network's nightly program of courtroom coverage from across the nation. These two uses were found to be “transformative” and incorporated a much shorter length clip than KCAL's usage, and, perhaps most importantly, Court TV was not in direct competition with LANS in delivering nightly breaking news. Thus, Court TV's use was held to be “fair” as a matter of law.

The lack of predictability of fair use safety is compounded by two additional facts: (1) Judges have made clear that no one of the four statutory factors is itself dispositive, and all four factors must be considered, in tandem.⁸ Thus, judges or juries must independently determine how much weight to give to each of the four statutory factors. (2) The courts have crafted a legal doctrine—the “transformative use test”—to guide the factfinder's decision making. First proposed by federal District Judge Pierre Leval of the Southern District of New York in 1990, this theory

posits that use of copyrighted work is deemed “fair use” if, considering the totality of circumstances, the use in the new work is “transformative” of the original work's original purpose, intent, or effect.⁹ This doctrine has garnered a significant amount of judicial recognition and adoption,¹⁰ notwithstanding the unquestionable subjectivity of its application. The added difficulty of predicting whether a judge or jury will find a particular use sufficiently “transformative” to be deemed a “fair use” hardly moves the ball forward.¹¹

The Two Rules of Thumb

The bottom line, then, is that there is no “simple, easy test” that a news producer or documentarian can apply to a proposed usage, without permission, of a particular copyrighted work in a particular documentary. In the training sessions I put on, I half-jokingly say that if two lawyers are presented with a particular use of a copyrighted work in a particular film or broadcast report, they are likely to offer at least three different opinions whether the fair use exemption applies.

Notwithstanding this considerable uncertainty, there are some reasonably reliable guideposts that are helpful to both news producers and documentary filmmakers. For example, it is notable that the first of the four factors in the statutory exemption is whether the preexisting copyrighted work is put to a commercial or noncommercial use. Thus, the usage of materials for a journalistic or educational project is *more likely* to be deemed a fair use under this factor than a profit-making commercialization (e.g., selling tee shirts, posters, or coffee mugs bearing a copyrighted image). However, merely because copyrighted work is incorporated into a news report, or a documentary film, does not thereby *automatically* exempt it from copyright infringement.¹²

And the unauthorized use of professional photographs in straight-ahead news reporting can give rise to serious financial exposure. The news agency Agence France-Presse and Getty Images learned this lesson the hard way back in 2010, when they distributed to news outlets across the

globe the harrowing images taken by a local photographer in the immediate aftermath of the January 12, 2010, earthquake in Haiti (though fair use was not the basis for the defense); a jury awarded the professional photographer, David Morel, the maximum statutory damages of \$150,000 for each of the eight photos, for a total award of \$1.2 million.¹³

In light of this significant financial exposure for using others' copyrighted works without permission, what "rules of thumb" can guide reporters, editors, and others engaged in nonfiction production (news and/or documentaries) as they ponder whether to use copyrighted works in their productions?

Rule of Thumb No. 1: Determine what you are reporting or commenting upon. This rule is perhaps the easiest way to determine, with a fairly high degree of certainty, whether any usage you make of another's copyrighted work will be deemed a fair use, under Factor 1 and the "transformative use" test. Fair use of a copyrighted work "for purposes such as criticism, comment, [or] news reporting" means, essentially, that you are permitted to report on, or provide criticism or commentary of, *the copyrighted work itself*. Perhaps this point is best demonstrated by example.

Voiceover: "The student protests against continued American involvement in Vietnam garnered an extensive amount of media coverage, both in daily newspapers across the nation, and on the evening news." Clearly, a documentary film focusing on historical events of the 1960s and 70s, or the anti-war movement more specifically, could make a fair use of existing newspaper articles, headlines, and brief snippets of news reports that were broadcast by major news outlets to illustrate this narration. The voiceover makes clear that the documentarian is reporting/commenting on the *existence of those copyrighted works*. The fact that such copyrighted works were made and widely distributed is the focus of the report, not the underlying events depicted in them.

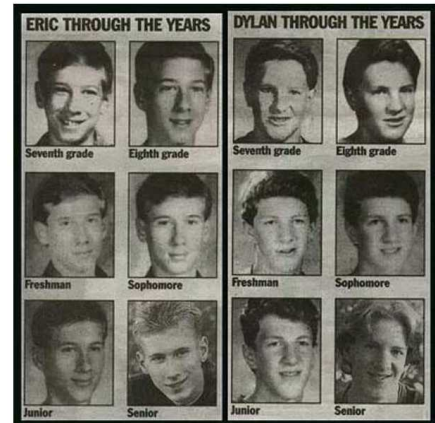
In contrast, use of the exact same set of copyrighted images and news footage to illustrate the following narration is less likely to be deemed a fair use: "The 1960s were a turbulent time

in which society wrestled with profound issues of war and peace, civil rights, and generational change." Certainly, an argument could be made that the use of such footage to accompany this narration is *also* a fair use. However, in this latter scenario, the press coverage of Vietnam War protests would be considered more in the nature of "wallpaper," or "B-roll"—visual imagery used to depict *the underlying events* captured in those news clips, not *the fact that such footage was broadcast*. Although this distinction may be subtle, in some cases, it is of crucial importance to distinguishing between whether the footage is being utilized to illustrate a narrative *distinct from the existence of the copyrighted work*, i.e., the underlying subject matter of that copyrighted work (i.e., the turbulent events of the 1960s), as opposed to the amount and nature of *press reports covering those events* at the time.¹⁴

Another useful example of the distinction is the historical file footage of legendary prize fighter Muhammad Ali, a/k/a "The Greatest," engaging in verbal jousting with legendary ABC sportscaster Howard Cosell, epitomized by Ali's trademark "float like a butterfly, sting like a bee" eloquence.¹⁵ Using such a clip in a documentary that addresses the evolution of boxing as a sport or a biography of Ali might be deemed a fair use, depending on what the footage is used to "demonstrate." Put another way, it is unclear whether incorporating such footage (and depending on the amount of it used) will be deemed sufficiently "transformative" to warrant a fair use finding. One thing is fairly clear though: If the documentary focused, in whole or in part, on Ali's transformation of the sport *as a result of his deft handling of the press* and his being a master showman/self-promoter, the use of such a clip (or clips) is far more likely to be deemed a fair use because it is commentary on *the existence of the copyrighted work(s)*.

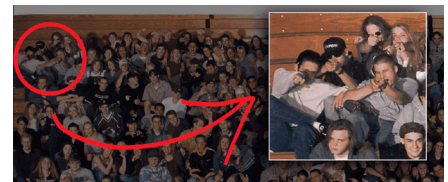
For the final example, let's return to the use of high school yearbook photos in connection with a breaking news event, as discussed at the start of this article. On April 20, 1999, Eric Harris and Dylan Klebold, two seniors at Columbine High School in Littleton, Colorado, committed a

homicidal (and suicidal) assault killing twelve students and one teacher and wounding twenty-four others. At the time, it was the worst mass shooting in US history. One newspaper published a collage of the two shooters' school yearbook photos. (See photo below.)



While publishing these copyrighted works, presumably without the photographer(s)' permission, could arguably be deemed "fair use" in connection with reporting on the Columbine massacre, it is far from clear that those photos were used to illustrate anything other than *their content*¹⁶—what the two killers looked like over the course of six years.

In contrast, a different photograph from that time period would likely have a much stronger claim to fair use by the news media. Shortly before the shooting occurred, a photographer at the Chrystal Light Photography agency took the class photo of the 1999 Senior Class, below.



In the upper-left-hand corner of the photo, two seniors, Eric Harris and Dylan Klebold, sitting essentially beside one another, posed with a group of their peers pretending to point firearms at the camera.

Posting or broadcasting this photo, in connection with reporting on the Columbine High School tragedy, to draw attention to the photograph's existence, not merely its contents, is far more likely to be deemed a fair

use than the montage of class photos above. The fact that this photo was taken only a couple of weeks prior to the deadly massacre at Columbine High School is itself “newsworthy,” or at least a subject of legitimate commentary.¹⁷ In other words, the report is *about the photo itself*, not merely that it contains Harris and Klebold (as well as some of their victims).

A couple of cautionary points with respect to this rule of thumb. First, it is *not* a “necessary” condition for coming within the fair use safe harbor that the report focus on the existence of the copyrighted work. Instead, it is, more likely than not, a *sufficient* condition for being a fair use. Second, the distinctions discussed above can be quite subtle. And merely changing the voiceover narration in a documentary on history of professional boxing, for example, to reference the fact that Ali was a frequent guest on ABC’s *Wide World of Sports* program, in order to “set up” that clip, could be deemed a contrived, artificial, or pretextual “foundation” for using the clip, and, therefore, an unsuccessful claim of fair use.

The bottom line is that if there is a legitimate “need,” within a news report or documentary, to address the existence and/or significance of a prior copyrighted work itself, then showing a small portion of that work (see Rule 2 below) is far more likely to be deemed a fair use than the claim that “the public is entitled to see” the *content of the underlying work* merely as illustrating a point made in the report.

Rule of Thumb No. 2: Use only what you need and no more. This rule relates primarily to the third statutory factor, which examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Taking merely a few frames or seconds out of a two-hour feature film or a six-minute song is far less likely to be deemed copyright infringement than copying the entirety of a photograph, a 20-line poem, or a 30-second television advertisement.

Thus, republishing a photograph (100 percent of the copyrighted work) is a riskier proposition for fair use than reproducing only a small fraction of a longer song, film, book, or

painting. This does not mean that photographs or entire paintings can never be used under the fair use doctrine without the owner’s permission, but it is always a harder case to make. Again, presidential-campaign-ending photo of Donna Rice sitting on Gary Hart’s lap on the *Monkey Business* yacht proves that the existence of a photograph, in its entirety, may well constitute a fair use.

Perhaps the easiest way to convey the rule “Use only what you need to illustrate your point, and no more,” is the famous quotation from Atticus Finch in *To Kill a Mockingbird*: “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.” Thus, when filmmakers and news producers ask me whether their incorporating ten or twelve seconds of another company’s video clip constitutes a fair use, my rejoinder is, “How would *you* react if that was *your* footage that some other filmmaker incorporated into his or her production?” Photographers, videographers, reporters, and producers understand, intrinsically, what it means to have their work reproduced without permission, and they appreciate that *their copyrighted works* should not be used by others without permission (and, perhaps, appropriate licensing fees) unless the usage is, in fact, a “fair use.” Thus, even if the inclusion of the copyrighted work in a news report or documentary is for the legitimate purpose of “comment, criticism, or news reporting” on the existence of the copyrighted work, the report must use no more of the copyrighted work than is necessary to make that point. If a full sound-up of Muhammad Ali’s “I’m so fast, that last night I turned off the light switch in my hotel room and was in bed before the room was dark” is sufficient to demonstrate his verbal prowess in the media, then stringing together two or three additional such clips thereafter, especially from the same source, runs the risk of “taking too much,” under the third and fourth statutory factors. And, thus, the fair use defense may be abandoned.

Conclusion

These two rules of thumb are, once again, by no means the end-all

and be-all of fair use. Others have presented robust and persuasive positions, with which I agree, that fair use in news reporting and documentaries is not narrowly limited to merely commenting on and demonstrating the existence of prior published copyrighted works. So, *please* do not mistake these two rules of thumb as exhausting the universe for fair usage of copyrighted works in documentaries. Put another way, the diagram below shows that Rule of Thumb No. 1 describes merely a subset of the universe of uses that constitute a fair use.



Nevertheless, Rule No. 2 applies to *all* uses outside the smaller inside circle of fair uses encompassed by Rule No. 1 above. In other words, one should *always* use the *smallest* amount of the copyrighted work being reproduced without permission that is necessary to illustrate the point for which the fair use is being made.

Like the great sage Hillel’s one sentence synopsis of the Torah, I hope you find these two rules of thumb of some use in counseling your clients on the intricacies of fair use. “Now go and study.” ■

Endnotes

1. According to the Talmud (Shabbat 31a), the great Jewish sage Rabbi Hillel was challenged to teach a potential convert the entire Torah while the student stood on one foot. Rabbi Hillel responded, “What is hateful to you, do not do to your neighbor. That is the whole Torah; the rest is the explanation of this—go and study it!” Shoshannah Brombacher, *On One Foot*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/689306/jewish/On-One-Foot.htm.

2. See, e.g., *Dlugolecki v. Poppel*, Case



No. 2:18-cv-03905 GW (GJSx) (W.D. Cal. 2018) (high school yearbook photographer's copyright infringement claim premised on news organizations' use of Meghan Markle's yearbook portraits).

3. Although the attempted school shooting hypothetical is not taken, literally, from any particular real-world incident, it is representative of an all-too-familiar factual scenario. *See, e.g.*, Nicky Woolf, *Two Teenage Girls Face Trial in Colorado for "Planning Mass School Shooting,"* DEMOCRATIC UNDERGROUND (Jan. 14, 2016), <https://www.democraticunderground.com/10141315325> (publishing photos of two accused school assailants, with cut line "credit: Mountain Vista High School yearbook photo"); *2nd Teen Accused in High School Murder Plot Appears in Court,* CBS4 DENVER (Feb. 27, 2017), <https://denver.cbslocal.com/2017/02/27/2nd-teen-accused-in-high-school-murder-plot-appears-in-court/>.

4. *See* Mark Sableman, *Fair Use Isn't Arithmetic,* THOMPSON COBURN LLP (Oct. 25, 2018), <https://www.thompsoncoburn.com/insights/blogs/in-focus/post/2018-10-25/fair-use-isn-t-arithmetic> ("Any arithmetical method for determining fair use will almost always be erroneous.").

5. For more extended and scholarly discussions, see WILLIAM F. PATRY, PATRY ON FAIR USE (2018); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1305 (2018). More practical guides (for news and documentary producers) include CTR. FOR SOC. MEDIA, AM. UNIV., SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM (2013), available at <http://cmsimpact.org/code/set-principles-fair-use-journalism/>; CTR. FOR SOC. MEDIA, AM. UNIV., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at <http://cmsimpact.org/>

[wp-content/uploads/2016/01/Documentary-Filmmakers.pdf](http://www.cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf). Also, the University of Texas offers a helpful guide to applying the four statutory factors in practice: *Four Factor Test*, UNIV. OF TEX. LIBRARIES (Mar. 5, 2018), <https://guides.lib.utexas.edu/copyright/fourfactors>

6. *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002).

7. *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

8. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from the other. All are to be explored, and results weighed together, in light of the purposes of copyright.").

9. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); *see also* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d Cir. 2014) ("A use is transformative if it does something more than repackage or republish the original copyrighted work.").

10. Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (surveying case law and presenting data "showing that since 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine").

11. As one university's guide states, "the outcome of a court's fair use analysis can be hard to predict since the test is subjective and open to interpretation." *Basic Information on Copyright and Fair Use for Using Works of Others* at 3, UNIV. S. CAL. BULL. (2006).

12. *See* *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939 n.13 (9th Cir. 2002) ("even straight [news] reporting may, in some cases, be 'commercial' for purposes of the [first statutory] factor.") (citations omitted); *L.A. News Serv.*, 108 F.3d at 1121 ("[N]ewcasts are commercially supported by advertisers, who

pass the cost of sponsorship on to those who purchase their products.") (citations omitted).

13. *See* James Estrin, *Haitian Photographer Wins Major U.S. Copyright Victory*, N.Y. TIMES, Nov. 23, 2013.

14. *See, e.g.*, *Otto v. Hearst Communs., Inc.*, No. 1:17-cv-4712-GHW, 2018 U.S. Dist. LEXIS 208698, at *24 (S.D.N.Y. Dec. 10, 2018) ("Though 'news reporting is a widely-recognized ground for finding fair use under the Copyright Act,' *the use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use in this District.*") (emphasis added); *Psihoynos v. National Examiner*, No. 97-cv-7624 (JSM), 1998 U.S. Dist. LEXIS 9192, 1998 WL 336655, at *3 (S.D.N.Y. June 22, 1998) ("The Examiner's use is not transformative, because its piece uses the photo to show what it depicts.").

15. *See, e.g.*, *Muhammad Ali Moments Alongside Sportscaster Howard Cosell*, YOUTUBE (2016), https://www.youtube.com/watch?v=BR_5XrRYbpU.

16. *See* *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017) ("CMG's articles did not comment on, criticize, or report news about the Images themselves; instead, *they used the Images as illustrative aids because they depicted the subjects described in its articles.* CMG's argument, if accepted, would eliminate copyright protection any time a copyrighted photograph was used in conjunction with a news story about the subject of that photograph. That is plainly not the law.") (emphasis added).

17. *See, e.g.*, Keryn Donnelly, *The Tragedy Behind This High School Class Photo Will Give You the Chills*, MAMAMIA (Mar. 11, 2017), <https://www.mamamia.com.au/columbine-photo/>.