

DOKU.ARTS Recycled Cinema Symposium

Julie Ahrens
Director of Copyright & Fair Use
Stanford Law School

Good morning and thank you very much for joining us today. Thank you also to Andreas and Lisa for inviting me and organizing this symposium.

Today I will discuss the importance of fair use in the U.S. copyright system and explain how U.S. courts apply fair use and why the doctrine is essential for free speech as guaranteed by the First Amendment of the U.S. Constitution.

Fair Use & Documentary Film

The fair use doctrine under U.S. law gives creators the right to use copyrighted material in certain circumstances without permission or paying a license. It is a complete defense to a claim of copyright infringement.

Fair use is critical to documentary film because it is a medium that explores and discusses important social, cultural and historical issues. It is often impossible to discuss these issues effectively without

reference to historical material that illustrates, depicts and documents them. A tremendous amount of that historical material is under copyright. Accordingly, copyright can present a very significant barrier to the creation of many documentary films. A robust and effective fair use doctrine allows filmmakers to overcome these barriers and makes it possible for documentary filmmakers to take on subjects that would otherwise be difficult or impossible to discuss.

U.S. Copyright Law

Why do we even have copyright?

“promote the Progress of Science
and useful Arts, by securing for
limited Times to Authors and
Inventors the exclusive Right to
their respective Writings and
Discoveries.”

U.S. Const. art. I, § 8, cl. 8.

The Constitution, in the Copyright Clause, gives the U.S. Congress the power to enact copyright laws that give authors *limited* exclusive rights to their creations.

Congress has exercised that authority and enacted the Copyright Act, which grants a bundle of exclusive rights to a copyright owner, including the rights to publish, copy, distribute, display and publicly perform the work. Authors also have the exclusive right to create or authorize the creation of derivative works.

Purpose of Copyright

“Promote the Progress of Science and
useful Arts.”

Encourage creativity

Copyright law is Intended to motivate people to create new works by giving them a special reward in the form of a limited monopoly over their original works. The ultimate goal is to promote societal knowledge.

As the U.S. Supreme Court has stated, “[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” Sony Corp., 464 U.S. at 429 (internal quotation marks omitted).

Copyright is a limited monopoly: There are limits

on what is copyrightable – Only original creative expression is copyrightable. Not facts, not ideas.

There are also limits on how long the copyright will last; there are other limits and exceptions to copyright holders' exclusive rights.

And the one important limitation I will discuss in detail today is fair use.

First Amendment

“Congress shall make no law . . .
Abridging the freedom of speech.”

U.S. Const. amend I.

But before getting to the specifics about fair use, it's also important to keep in mind the First Amendment found in the Bill of Rights of the U.S. Constitution.

It provides, in pertinent part, that
“Congress shall make no law . . .
Abridging the freedom of speech.” U.S.
Const. amend I.

These two constitutional provisions— the Copyright Clause and the 1st Amendment -- govern Congress's ability to make copyright

laws.



Fair Use

As I said, fair use is one of the key limitations to copyright holders' exclusive rights. The fair use doctrine allows creators in certain circumstances to use copyrighted material without permission or paying a license.

The fair use of a copyrighted work is not an infringement of copyright.

Fair use is the lubricant that mediates the competing interests of copyright on one

hand, and free expression on the other.

It fosters new creation and innovation by limiting the ability of authors to control the use of their works.

Importance of Fair Use

- Balances the need to both protect copyrighted works and allow others to build on those works.
- Prevents copyright from stifling the very creativity it was designed to encourage.
- Serves as a crucial First Amendment safeguard.

Copyright's ultimate goal is to benefit society by stimulating creativity and assuring wide access to its products.

Without appropriate limitations, the exclusive rights and restrictions copyright creates have the potential to impede, not advance, creativity.

The capacity of people to express themselves fully and to talk about, interact with, and react to the world around us, resides squarely in their ability to reference, change, modify, dissect and criticize existing expression.

Copyright law has the potential to constrict speech, and fair use is a necessary “First Amendment safeguard[]” against this danger.

Why Fair Use? Why Not License?

Owner may refuse to license if she disagrees with the message or dislikes the creator of the new work.

Owner may not want to be associated with the new work.

Too expensive, only the most affluent can pay.

So it's not simply a matter of economics, or just about money, it's about protecting creators from censorship.



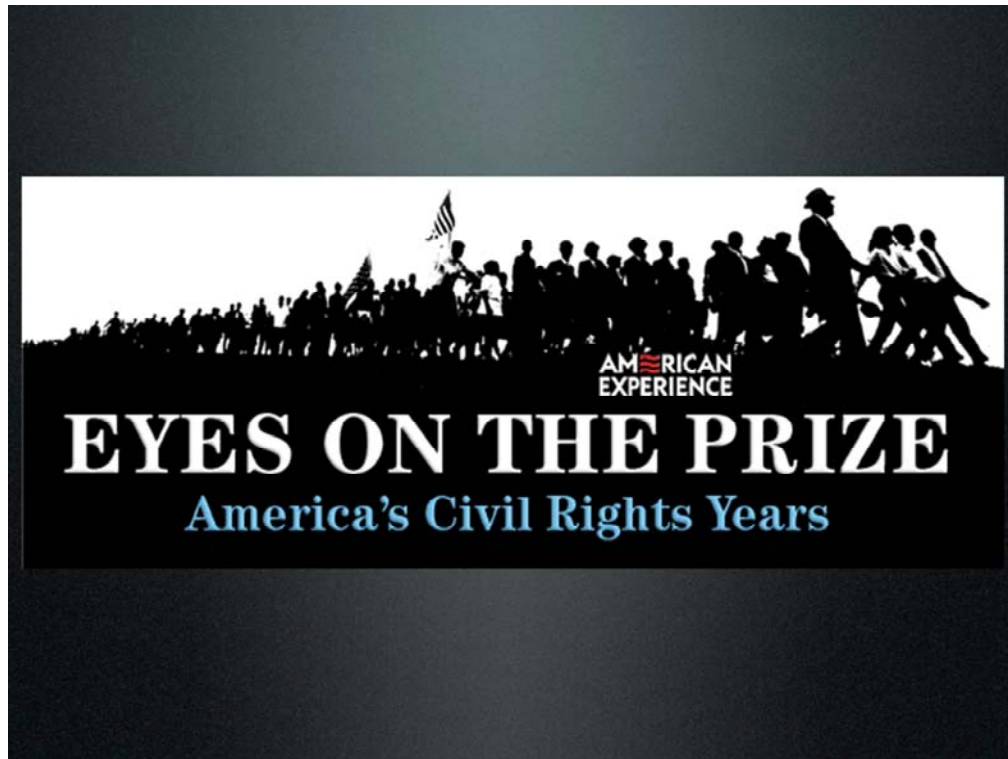
Fair Use Particularly Important for Archival Material

The licensing system creates particular risks when you're talking about using historical works:

To document and tell a historically accurate story you often must use the original material of the time – including photographs, video, audio and music.

With old material it can be very difficult to identify the rights holder, especially given the increasing length of copyright terms.

Filmmakers also face the risk that even if they did secure licenses for archival material, those licenses are limited in time and if you want to distribute or use the film in the future, you may not be able to afford to renegotiate the rights.



Take for example, *Eyes on the Prize*, a 14-part television series, chronicling the history of the civil rights movement in America. It is considered one of the most important film accounts of the American civil rights movement. The film was shown on PBS in early 1987 and the 1990s. It became an important teaching tool and was shown in classrooms around the country.

But in the mid-1990s, both rebroadcasts

and home video production were stopped for several years due to limits on the licenses of the copyrights of the archive footage used, including hundreds of photos, music tracks and video clips. Copyright holders originally granted the filmmaker licenses but those licenses were for uses for varying lengths of time. As those licenses expired and the filmmaker tried to re-license the use of materials, the copyright holders began to demand higher rates.

It took a \$600,000 charitable grant from the Ford Foundation and a philanthropist's donation of \$250,000 for the production company to renew the rights, and save the series and allow it to see the light of day once more.

Four Factors

17 U.S.C. § 107

- Purpose and character of the use
- Nature of the original work
- Amount and substantiality of the portion used
- Effect of the use on the potential market for or value of the original

So how does fair use work?

Congress codified the fair use doctrine in the Copyright Act.

To decide whether a use is a fair use or not, courts look at each of the four factors set out in the statute and weigh them together.

Ultimate Question:

Are the goals of copyright better
served by allowing the use than
preventing it?

The ultimate question in any fair use
analysis ...

Flexible

Fact specific

Notoriously difficult

Does not mean it's undefined
and unreliable

Because courts make fair use determinations by applying a four-factor test, it is flexible.
Flexibility is a good thing.

The flexibility of the fair use test provides room to protect and allow new uses that we haven't even imagined yet. Thanks to fair use, we've seen the development of innovative devices and tools we now use everyday – from the VCR to the Google search engine. New technologies continue to test the boundaries of fair use, as many recent cases demonstrate.

Flexibility can be tricky too. Fair use is very fact

specific, so each case has to be examined on its own. So it's not always easy to predict what will or will not be considered a fair use.

But fair use is not so ill-defined that it's useless. There are some genuinely well-settled principles which will help guide you when you're determining whether what you want to do is fair use or not. There are tough cases; but there are also more settled cases.

Transformation Is Key

- Add something new with further purpose or character?
- New expression, meaning or message?
- Or does it supersede or supplant the objects of the original creation?

First, the true heart of the matter is transformation. Are you doing something new with new meaning, expression and value? Or are you simply superseding the purpose of the original work?



So quickly to mention a few well-settled uses that are fair use. Using a copyrighted work to criticize or comment on the work is clearly a fair use (i.e. movie review; book review). Also parody can be fair use, as was found in this case involving Annie Leibovitz and Paramount Pictures.

Leibovitz v. Paramount

Annie Leibovitz' s photo of Demi Moore, evocative of Botticelli' s Birth of Venus. Paramount' s ad agency re-shot the photo to be just like the one of Demi.

Parody: ridiculing the pretentiousness of the original; disagreeing with the original's praise for the beauty of a pregnant body.

Smirk on his face; ring is obviously cheap and garish

Parody of a photograph in a movie poster was transformative: "the ad [was] not merely different; it differ[ed] in a way that may reasonably be perceived as commenting" on the original.



Andrea Blanch, *Silk Sandals*



Jeff Koons, *Niagra*

Also, fair use protects a creators ability to use copyrighted material to comment on society. This is demonstrated by the decision in *Blanch v. Koons*.

Copied the original ad from Allure magazine.

Used a fragment of the Allure photograph to comment upon the culture and attitudes promoted and embodied in Allure Magazine. Koons was not criticizing or commenting upon Blanch's photo, rather he was using a piece of popular culture to illustrate his point about society.

Used the original as fodder for his commentary on society.



Patrick Cariou, *Yes, Rasta* (2000)

Another case involving appropriation art, which went even further than the Koons case, was *Cariou v. Prince*, involved this and other photographs by Patrick Cariou.

Patrick Cariou is a professional photographer who took documentary, portraits of Rastafarians in Jamaica for his book, *Yes, Rasta*. His photographs of Rastafarians appear to celebrate the Rastafarians by depicting them respectfully, in their actual environment.



Richard Prince, *The Other Side of the Island* (2008)

Richard Prince is a famous appropriation artist who created Canal Zone, a series of 30 paintings.

In his Canal Zone paintings, Prince collaged, enlarged, cropped, tinted, and painted over 35 photographs from Yes, Rasta. Some of Prince's paintings use a substantial amount of imagery from Cariou's photographs; in others, Cariou's work is almost undetectable.

Prince uses elements of Cariou's utopian images to depict a post-apocalyptic world that exists only in Prince's imagination. Prince turns

the Rastafarians themselves into something unnatural using double imagery and garish overpainting and surrounds them with an array of nude women in highly sexualized and conventionalized poses.

On appeal the appellate court held you can use material, like photographs, as the raw materials in a new work of art. Parody/comment/criticism is not necessary. Prince didn't need to comment on Cariou's photos or society, nor did he need to articulate what his intentions were. Transformative nature is assessed by examining how the artworks may 'reasonably be perceived'.

Transformation can be found where the artist's expression and "composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs." *Id.* at 706.

Finding that Prince's works had a different purpose was key to the Court's fair use finding: "[L]ooking at the artworks and the photographs side-by-side, we conclude that Prince's images ... have a different character, give Cariou's photographs a

new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's." *Id.* at 707-08.

25 paintings fair use, but 5 paintings remanded for further consideration of transformative purpose. The Court found that 5 paintings do not sufficiently differ from Cariou's photographs to say they're transformative as a matter of law. The Court noted Prince made minimal changes in those 5 paintings that took them in a different direction, but it wasn't enough to say with certainty at this stage whether those artworks present a "new expression, meaning, or message."

The line between fair and infringing in the visual art context remains unclear. The Court's remand of the five works leaves artists and practitioners continuing to wonder, "Just how much does the second work need to change the original in order to be transformative?"

Using Copyrighted Material in a Historical Sequence

One of the most settled areas in fair use is the use of copyrighted content as historical artifacts.

Sometimes the best or effective way to tell a historical story is to use copyrighted material -- words, music, photos, films -- from that time. Such materials are often very important to tell an accurate story.



One of the leading cases applying fair use to the use of copyrighted material in a historical sequence is **Bill Graham Archives v. Dorling Kindersley**.

The Grateful Dead, The Illustrated Trip
published by Dorling Kindersley Ltd.

The Illustrated Trip is a 480 page coffee table book that includes Grateful Dead information and

images. A timeline runs continuously throughout the book, chronologically combining over 2000 images with explanatory text. The publisher sought permission from Bill Graham Archives to include 7 images of concert posters, but negotiations fell through and they used the images in the book without permission. Posters were displayed at relevant point on the timeline with related concert event information as captions.

Reproduced whole poster; reduced size

Original Posters: Promotional for Grateful Dead shows

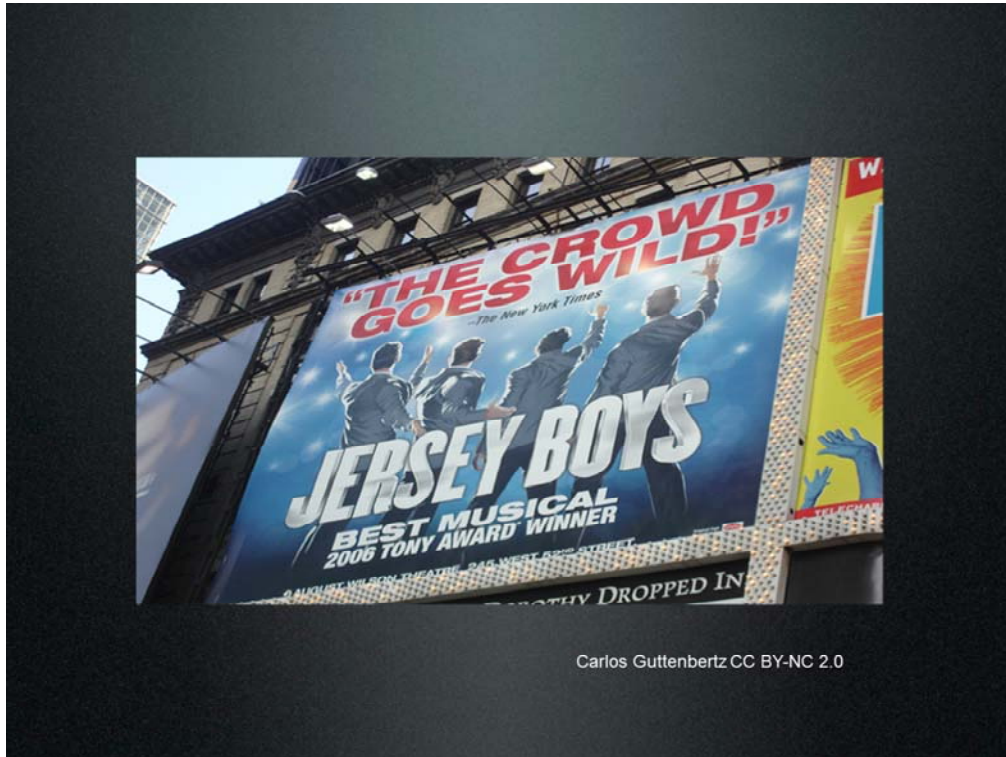
Book: Posters used to commemorate historic events – used as historic artifacts represent actual occurrence of concert events – DK minimized

expressive value of reproduced images by combining them with the timeline, textual material, and other graphical artwork to create a collage of text and images on each page of the book

Different purpose- historical artifact to tell the history of the Grateful Dead. Original posters were used to advertise the Dead shows.

The Court stated that biographical works are “forms of historic scholarship, criticism and comment that require incorporation of

original source material for optimum treatment of their subjects.”



Here's another example ... involving the Tony Award winning musical, Jersey Boys. The plaintiff sued the producer for using a seven-second video clip from The Ed Sullivan Show to mark a historical juncture in the Four Seasons' career. The clip was Ed Sullivan introducing the Four Seasons onto his show.

Finding the use “undoubtedly ‘fair’ and the plaintiff’s case objectively unreasonable, the Ninth Circuit affirmed the award of attorneys’ fees to discourage “lawsuits of this nature . . . [which] have a chilling effect on creativity insofar as they discourage the fair use of existing works

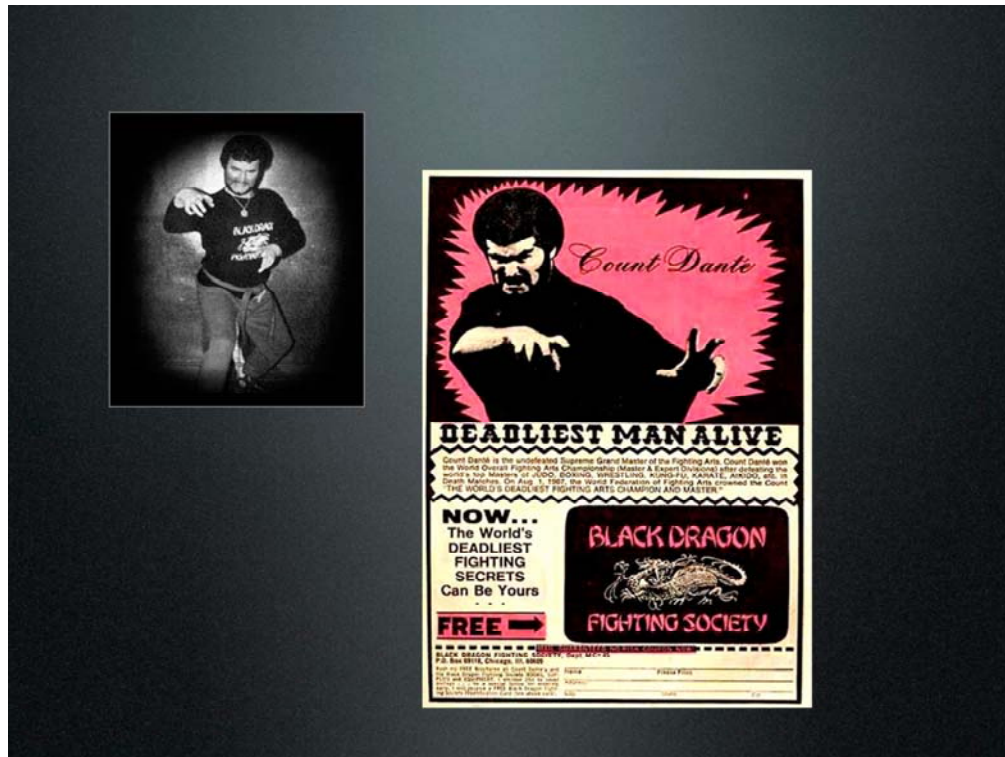
in the creation of new ones.” Id. at *12–13.



Here's another example, that my colleagues and I litigated, involving a documentary called "The Search for Count Dante," The film chronicles the real-life odyssey of martial arts master John Keehan, a.k.a. Count Juan Raphael Dante — "The Crown Prince of Death."



[video plays]



As you saw in the trailer, to tell the story about Count Dante, Webb's film necessarily relied on pieces of copyrighted content that documented Count Dante's life, including press photographs and reproductions of an ad Keehan had placed in comic books in the 1960s.

Plaintiff William V. Aguiar III, sued the filmmaker Floyd Webb, alleging that Webb's promotional website and film

trailer infringed on copyrights and trademarks that Aguiar claimed to own. Aguiar asserted that he was the heir to John Keehan's estate and therefore owned the copyrights in the historical artifacts about Keehan's life.

Aguiar sought an injunction to stop Webb from displaying his promotional website and movie trailer, but with our help Webb was able to defeat Aguiar's claims. The court agreed that Webb was likely to prevail on his fair use defense because he used these materials as historical artifacts in the context of a new work, a biography of Count Dante. The materials were used to tell a different story than the original.

Baltimore Ravens Logo 1996-1998



Another important case involving historical images was Bouchat v. NFL.

Baltimore Ravens Logo Today



Baltimore Ravens Logo 1996-1998



At issue in this case were three videos the NFL produced depicting the history of various NFL teams and players. Top Ten: Draft Classes, Top Ten: Draft Busts, and Sound FX: Ray Lewis

The NFL videos share the qualities of other historical documentaries. They feature three key components: archival footage, commentary, and interviews. These ingredients are crucial to the creation of any historically accurate film.

Court held:

“Were we to require those wishing to produce films and documentaries to receive permission from copyright holders for fleeting factual uses of their works, we would allow those copyright holders to exert enormous influence over new depictions of historical subjects and events. Such a rule would encourage bargaining over the depiction of history by granting copyright holders substantial leverage over select historical facts.

It would force those wishing to create videos and documentaries to receive approval and endorsement from their subjects, who could simply choose to prohibit unflattering or disfavored depictions.

... This would align incentives in exactly the wrong manner, diminishing accuracy and increasing transaction costs, all the while discouraging the creation of new expressive

works.”

Julie Ahrens
Director of Copyright & Fair Use
Stanford Law School

This work licensed:

