



website: acsil.org | email: info@acsil.org | Tel: 646-688-4428

FAIR USE POSITION PAPER

The Association of Commercial Stock Image Licensors (ACSIL) is a non-profit trade organization that includes all the major stock footage libraries. Every day, ACSIL members are collaborating with documentary and factual producers. Film archives often support the research process, and footage from the archives has always played an important role in helping filmmakers achieve their artistic visions. Film archives always have been, and will continue to be, staunch allies of the documentary production community.

ACSIL understands that Fair Use is an important right we have as Americans and we wholeheartedly support that right. We applaud recent efforts to clarify Fair Use for an audience that needs to know when and how to apply Fair Use correctly. In an effort to strengthen our long-established, close working relationships with filmmakers and documentarians, we present ACSIL's position on Fair Use.

What is Fair Use?

In the United States, subject to some exceptions, unauthorized use of copyrighted works is a violation of law. Fair Use is one of those exceptions. If applicable, Fair Use is a defense to a claim of copyright infringement. US copyright law instructs the judge to consider four factors when determining if a Fair Use defense is applicable. These factors are:

- The purpose and character of the use, including whether such use is “transformative” and whether it is of commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for, or value of, the copyrighted work.

Everyone agrees it is the content creator's responsibility to be educated about, and mindful of, the pitfalls of copyright infringement. The Center for Social Media's Documentary Filmmakers' *Statement of Best Practices in Fair Use* and the Duke Center for the Study of the Public Domain's illustrated publication *Bound By Law?* have created particularly comprehensive and engaging examples of copyright law and fair use primers that are well worth reading.

Fair Use does NOT equal free rein. It is not:

- An excuse to ignore the licensing and clearances process.
- A substitute for a licensing budget.
- A license to steal.



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If you are thinking about Fair Use, and want to avoid a Copyright Infringement claim, here are some suggestions:

Educate yourself.

- As a producer or filmmaker, it's your responsibility to know how and when to employ Fair Use. Be familiar with its definition, and understand the risks and legal precedents associated with its use.
- Know the limits of Fair Use and operate within the boundaries.
- Use good judgment when considering a Fair Use position.

Understand that Fair Use is unique to US law. Fair Dealings practices apply outside the United States.

- A lawyer's opinion and position does not protect you from a lawsuit.
- Evaluate all costs associated with a Fair Use position, including legal fees and insurance costs.
- Fair Use and Fair Dealing do not have the same boundaries and guidelines.

Know the risks associated with Fair Use.

- Even if you have an errors and omissions policy, a rights holder can still claim copyright infringement and challenge your use of their materials and/or intellectual property.
- Buying insurance does not permit you to violate Fair Use standards.
- Does your insurance policy require you to clear all rights?
- If you aggressively rely on Fair Use, will you be able to sell your finished film?
- What are the delivery requirements of distributors and/or broadcasters who are interested in your film?
- Will you be able to distribute your film internationally?
- Are you as prepared to have other aspiring documentarians Fair Use your work as you are to Fair Use the work of others?

If for some reason you are still considering Fair Use as a "budget solution", you should know that most film archives have economic models that will work for all types of budgets. Do not assume you can't afford something without actually investigating the costs.

Resources:

- The Copyright Law of the United States (<http://copyright.gov/fls/fl102.html>)
- Documentary Filmmakers' Statement of Best Practices in Fair Use (www.centerforsocialmedia.org/fairuse)
- Bound By Law? Tales from the Public Domain (www.law.duke.edu/cspd/comics)
- The Association of Commercial Stock Image Licensors' Website (www.acsil.org)