Documentary

What Can You Use?
Best Practices

- Assn of Independent Video and Filmmakers,
- Independent Feature Project
- International Documentary Association
- National Alliance for Media Arts and Culture
- Women in Film and Video
Best Practices

• In Consultation With:
  – Center for Social Media in the School of Communication at American University
  – Program on Intellectual Property and the Public Interest in the Washington College of Law at American University,

Best Practices

• Endorsed by:
  – Arts Engine
  – Bay Area Video Coalition
  – CINE
  – Doculink
  – Electronic Arts Intermix
  – Grantmakers in Film and Electronic Media,
  – Full Frame Documentary Festival
  – Independent Television Service
  – National Video Resources
  – P.O.V./American Documentary
  – University Film and Video Association
  – Women Make Movies
Why Needed

• Increasing demands to clear rights
• Litigious society
  – Music lawsuits
  – Film downloading
• Other disciplines less demanding
  – News
  – Historical critics
  – Cultural critics
• Too rigid application of law
  – Public suffers
  – Restricts ability to communicate effectively
Fair Use

- copyright law permits quotations from copyrighted works to be made without permission, under certain conditions
- part of copyright law for more than 150 years.
- a right, not a mere privilege
- fair use helps reconcile copyright law with the First Amendment
Fair Use

- lawyers and judges decide whether an unlicensed use of copyrighted material is “fair” according to a “rule of reason.”
- if unlicensed use of copyright material generates social or cultural benefits greater than the costs it imposes on the copyright owner
- consider professional expectations and practice in assessing what is “fair” within the field
Open: 
Arabs, Jews, and the News
from

Arabs, Jews, and the News
Fair Use

• two key questions
  – Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?
  – Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?
  – both questions address whether the use will cause excessive economic harm to the copyright owner
Fair Use

- usually satisfy the “transformativeness” standard easily,
  - material is typically used in a context different from that in which it originally appeared
- Appropriateness
  - typically quote only short and isolated portions of copyrighted works
- Did User act in good faith?
- Follow typical practices?
- Most Lawsuits not successful
Fair Use

• Other Users
  – historians regularly quote both other historians’ writings and textual sources
  – artists reinterpret and critique existing images
  – scholars illustrate cultural commentary with textual, visual, and musical examples
  – news media:
    • Use of popular films, classic TV programs, archival images, and popular songs are constant and routinely unlicensed.
Best Practices Statement
4 classes of use

1. Used for Social, political, or cultural critique
   ▪ analyzes or comments on the work itself
   ▪ direct commentary and parody
   ▪ Whether the critique itself may do economic damage to the market for the quoted work irrelevant
   ▪ as extensive as is necessary to make the point
   ▪ 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
Best Practices Statement

4 classes of use

2. Quoting works of Popular Culture to illustrate an argument or point
   - Not critique, but makes a point
     - Use film to illustrate social concern (violence, sexuality)
   - Use is subordinate to intellectual or artistic point
   - A “new use”
   - Attribution required
   - Try to use multiple sources
   - Each part no longer than necessary
   - Not to avoid own need to shoot
Best Practices Statement
4 classes of use

3. Capturing material in the process of filming something else
   - Poster, music, television in background
   - Would require changing "the reality"
     - 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
   - Attribution
   - Not primarily to exploit the incidentally captured content in its own right
   - not constitute the scene’s primary focus of interest
   - music, not function as a substitute for a synch track (cutting on the beat, etc)
Best Practices Statement
4 classes of use

4. Using copyrighted material in historical sequence
   • selective use of words, music, photos, film
     • Project not designed around the material
     • Critical illustrative function, no substitute available
     • Licensing too expensive or impossible
     • Appropriate length
     • Not a single source
     • attribution
Misunderstandings

• Not have to be high minded/educational
  – Michael Moore

• Not have to be boring
  – Good docs are entertaining

• Failing to clear rights not prohibit claim of fair use
Free Use

- Buildings
- Federal govt works........no protection
- Public domain
- Right of publicity
- No photo release in public spaces
- Incidental uses of logos, products etc