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# Fair Use in Independent Documentary Filmmaking

Margaret Hennefeld  
*University of Pennsylvania*, [hennefem@sas.upenn.edu](mailto:hennefem@sas.upenn.edu)

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# Fair Use in Independent Documentary Filmmaking

## **Abstract**

Copyright law's "fair use" doctrine aims to protect artists' First Amendment-informed rights by establishing the legality of their non-licensed citation or incorporation of copyrighted material of another author's copyrighted work into their own. However, ambiguities surrounding the function and extent of fair use, and the sheer legal expenses of clarifying these uncertainties on a case-by-case basis, frequently deny authors their First Amendment-based fair use rights. In the context of independent documentary filmmaking, a rigidly structured and highly expensive rights clearance culture generates many ethical ambiguities and thereby functions as a significant form of censorship.

## **Keywords**

copyright, documentary, fair use, Cinema Studies, Timothy Corrigan, Timothy, Corrigan

## **Disciplines**

Intellectual Property

## **“Fair Use” in Independent Documentary Filmmaking**

Copyright law’s “fair use” doctrine aims to protect artists’ First Amendment-informed rights by establishing the legality of their non-licensed citation or incorporation of copyrighted material of another author’s copyrighted work into their own. Under the 1976 Copyright Act’s Section 107 Fair-Use Statute, which codified fair use rights, a four-factor balancing test establishes the legal applicability of fair uses to different types of non-licensed appropriations of derivative work. “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—”<sup>1</sup>

- (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.

For the purpose of my paper, which focuses on how fair use law impacts independent documentary filmmaking, I will primarily discuss the first of these four factors: how the fair use doctrine’s evolution has engendered legal ambiguities which function as a

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<sup>1</sup>“US Code Collection – LII, Legal Information Institute.” 25 Apr. 2006  
<[http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000107----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000107----000-.html)>.

significant and ethically dubious form of censorship when they inhibit and codify filmmakers' attempts to exercise their fair use rights.

Legal ambiguities surrounding fair use, in fact, impinge upon filmmakers' First-Amendment-informed fair use rights in multiple ways. In many cases, rights owners pursue Strategic Lawsuits Against Public Participation (SLAPP): the threat of being sued by a large corporation over a legal gray area often intimidates filmmakers to the extent that they relinquish their fair use rights. This can result in the preclusion, significant editing or, in some cases, the blatant falsification of a documentary project. In some cases, an archive-heavy documentary—the licensing for which can often expend twice the time and budget of the film's production—may be abandoned during pre-production as a result of projected licensing costs. In other cases, post-production licensing difficulties severely limit a documentary's commercial distribution.

Fair use gray areas haunt the documentary genre even when filmmakers choose subjects that do not require extensive archival still and clip licensing. Documentary filmmakers often seek to record reality spontaneously. For example, during the late 1950s and early 1960s in America a style of artistic and politically-charged documentary filmmaking, direct cinema, experimented with “unmediated” film aesthetics by attempting to capture non-interventionist views of their subjects. Artists like the Maysles brothers positioned themselves as “fly-on-the-wall” filmmakers. Such projects would simply be more difficult under the current rights clearance culture: the prevalence of copyrighted content would seep into the experimental documentary's diegesis and thereby produce a host of legal difficulties for its filmmaker. Legal ambiguities produced by the spontaneous recording of licensed material leave a filmmaker with three options:

edit it out at the expense of the film's production values and artistic critical commentary; pay very expensive fees to license the content; or attempt to exercise her/his fair use rights.

In their extensive study on the impact of "fair use" on independent documentary filmmaking,<sup>2</sup> Patricia Aufderheide and Peter Jaszi assert that the basic question for determining the legal applicability of fair use "is always the same: [do] the public cultural benefits outweigh the private economic costs it may impose?"<sup>3</sup> Thus, a fair use is essentially one that transforms, criticizes or engages in a dynamic way the non-licensed material it appropriates.

For example, parody demonstrates a legally relatively straightforward type of fair use—even when done for profit, it transforms the visual and narrative signs of the content it appropriates. The Supreme Court established the applicability of fair use to parody in an important 1994 decision, *Campbell v. Acuff-Rose Music, Inc.*<sup>4</sup> Roy Orbison's publisher, Acuff-Rose Music Inc., sued *2 Live Crew* for their remixed rap version of Orbison's song "Oh, Pretty Woman" with different lyrics. The Supreme Court ruled in favor of *2 Live Crew's* fair use because, they argued, the parody was itself the product. *2 Live* did not simply make its profit by reproducing a minimally altered version of the song and pitching it to Orbison's target audiences—such uses of an author's exclusive rights would be justifiably interpreted as stealing. *2 Live* changed Orbison's music, referenced it in order to build upon it and to transform it.

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<sup>2</sup> Jaszi and Aufderheide conducted this study through the Center for Social Media at American University

<sup>3</sup> Aufderheide, Patricia and Peter Jaszi. "Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers." *Center for Social Media*. Nov. 2005  
<http://www.centerforsocialmedia.org/rock/finalreport.htm#legal>.

<sup>4</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.569, 579 (1994).

A similar parody case arose in 2001 with *Suntrust v. Houghton Mifflin* when a suit was brought unsuccessfully against the publication of *The Wind Done Gone* for appropriating many of the characters and narrative events from *Gone with the Wind*.<sup>5</sup> However, applying the 1991 *Campbell* decision, the Eleventh Circuit determined that the *Wind Done Gone*'s appropriation of *Gone with the Wind*'s narrative content was both critical and transformative, and ruled in favor of the *Wind Done Gone*'s protected fair use rights as a parody.

In effect, "fair use" attempts to create a space under the dictates of copyright law for authors to reference and to build upon one another's work without facing legal liability. However, ambiguities surrounding the function and extent of fair use, and the sheer legal expenses of clarifying these uncertainties on a case by case basis, frequently deny authors their First Amendment-based fair use rights. In the context of independent documentary filmmaking, a rigidly structured and highly expensive rights clearance culture generates many ethical ambiguities and thereby functions as a significant form of censorship.

Documentary films assume cultural and political truth-telling capacities within their entertaining narrative structures. However, recent trends in style and content—exemplified by filmmakers like Michael Moore—promote and standardize extensive uses of archival stills and footage in order to narrate non-fictional histories. The financial cost and tense legal climate associated with these archive-heavy documentary modes, to a very large degree, preclude genuinely independent commercial participation in the genre. Thus, by determining who gets to tell which stories and how, filmmaking fair use codes

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<sup>5</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1271 (11<sup>th</sup> Cir. 2001).

contradict their purported cultural function: to create greater spaces within the industry for dynamic dialogues across diverse traditions of authorship.

There are, however, important instances of successful fair use in documentary filmmaking. Robert Greenwald's three latest political documentaries, *Uncovered: The Whole Truth about the Iraq War*, *Outfoxed: Rupert Murdoch's War on Journalism* and *Walmart: The High Cost of Low Price* represent uniquely successful examples of fair-use-informed independent filmmaking. The first of the three, *Uncovered*, which Greenwald released through an alternative distribution strategy in 2003, marked his first encounter with significant rights clearance issues. Greenwald had cleared or licensed all of the clips in his documentary. However, at the last minute, he decided to add a clip of President Bush's February interview with Tim Russert on NBC's Sunday morning talk show, *Meet the Press*.<sup>6</sup> The clip depicts Bush defending his decision to wage war against Iraq and provides an important link in the documentary's critical analysis of the Iraq War.

When Greenwald tried to pay to license the clip from NBC, the network refused on the grounds that the clip is "not very flattering to the President."<sup>7</sup> Greenwald decided to use the clip without a license, deeming its transformative and critical nature adequate justification under the "fair use" doctrine. Further, the recirculation of this Bush clip clearly served the public interest. The Supreme Court established this factor of fair use in 1968 with *Time Inc. v. Bernard Geis Associates*<sup>8</sup> when Time Magazine's copyright on the Zapruder film of President Kennedy's assassination was not upheld—a history book which reproduced many of the Zapruder stills was deemed to serve the public interest and, thus, to constitute a fair use of the non-licensed content. Although NBC recognized

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<sup>6</sup> Lessig, Lawrence. "Copyrighting the President." *Wired Magazine* Aug. 2004: 12.08.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968).

Greenwald's fair use rights and opted not to sue him—Greenwald was backed by Stanford Law Professor Lawrence Lessig—for his eventual use of the clip, *Uncovered* is an exception to the rule.

As archival researcher Kenn Rabin explains, “Fair use is a defense... If someone's suing you, you're already in the situation where you would have to have had the money to hire a lawyer, and do all that other stuff, which is already out of the range of most filmmakers.”<sup>9</sup> In other words, fair use often functions as a Catch-22: if you had the money to hire a legal team to defend your fair use rights, you wouldn't have needed to exercise them in the first place; you could have cleared them for much less money. Lessig confirms this predicament: “Defense of ‘fair use’ could run hundreds of thousands of dollars - several times the budget of a typical documentary. And losing this type of claim could expose the filmmaker to \$150,000 in damages for each copyright infringed.”<sup>10</sup>

This Catch-22 represents a widespread practice. SLAPP, a Strategic Lawsuit against Public Participation, is an acronym coined in the 1980s by University of Denver professors Penelope Canan and George W. Pring, which describes a form of litigation often employed by large corporations “to intimidate and to silence a less powerful critic”<sup>11</sup>—or fair-use-savvy cultural artist—by threatening them with the significant burden of legal defense to the point that they abandon their legally supported artistic and critical pursuits. The structures of copyright foster this type of strategy because, although plaintiffs must prove their infringement claims to be legitimate, once they do so, the burdens of proof rest with the defendants—the artists exercising their fair use rights.

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<sup>9</sup> Aufderheide, “Untold Stories.”

<sup>10</sup> Lessig, “Copyrighting the President.”

<sup>11</sup> “Creative Commons – Wikipedia, the free encyclopedia.” 29 Apr. 2006  
<[http://en.wikipedia.org/wiki/Creative\\_commons](http://en.wikipedia.org/wiki/Creative_commons)>.

These artists pursue their fair use rights because, often, they cannot even afford to license their derivative content, let alone finance a team of entertainment lawyers to defend their fair use claims.

Greenwald's success in exercising his fair use rights with *Uncovered* both reinforces and complicates this paradigm. NBC refused to license its *Meet the Press* clip of Bush for any amount of money. Their concern was political, not economic—or at least not directly economic. Thus, Greenwald's *Meet the Press* licensing controversy demonstrates a conflation of financial ownership and political censorship under the current rights clearance culture. Lessig argues that “What this incident demonstrates most is what many increasingly fear. Concentrated media and expansive copyright are the perfect storm not just for stifling debate but, increasingly, for weakening democracy as well.” The impracticability of defending one's fair use rights authorizes content owners and clearance gatekeepers, such as distributors and insurers, to manipulate copyright law for their own political ends, and thereby generates a host of ethical problems.

The implications of the *Uncovered* example are explicitly political: President Bush, who rarely gives press conferences, agreed to do an interview with Russert only if NBC promised to censor the interview's licensing. However, filmmaking and media's rigid clearance culture often functions as a form of political censorship in much subtler ways. If filmmakers need either Michael Moore's significant financial resources or Lawrence Lessig's personal legal backing, which Robert Greenwald enjoys, in order to ensure their fair use rights, then fair use problems also censor independent documentary filmmaking in terms of the projects they limit and preclude.

Jaszi and Aufderheide's fair use study suggests patterns of clearance problems among rising minority filmmakers, especially African-Americans. Rights clearance issues continue to haunt the distribution of films about Civil Rights, racism and African-American culture. In these cases, archival materials such as stills, film clips and music that play vital roles in evoking and demonstrating politically-charged histories become simply too expensive for independent filmmakers to license. For example, Joel Katz's 2002 documentary *Strange Fruit* motivates its contemplation of Southern lynching history with a narrative about the production and cultural significance of its Billie Holiday title song. Needless to say, it would be difficult to fathom making a documentary about the history and cultural importance of the song "Strange Fruit" without including the song itself. However, a predicament similar to Greenwald's confronted Katz. He found it impossible to license the home video rights for the song and was forced to limit severely *Strange Fruit's* commercial distribution.

A better known example centers on Henry Hampton's canonical miniseries, *Eyes on the Prize*. Historical documentaries prove particularly problematic genres because of their reliance on archival material to narrate their histories. Each episode in the *Eyes on the Prize* series is roughly 50% archival and most of the archival material derives from commercial sources. However, the film's low production budget limited most of its film clip and still licensing to five year terms. Thus, once the first five year license expired, it became illegal to distribute the film commercially. In his interview with Jaszi and Aufderheide, Jon Else, the series' producer and cinematographer, explained the situation:<sup>12</sup>

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<sup>12</sup> Aufderheide, "Untold Stories."

*Eyes on the Prize* is no longer available for purchase. It is virtually the only audio-visual purveyor of the history of the Civil Rights Movement in America...*Eyes on the Prize* cannot be broadcast on TV anywhere, nor can it be sold. Whatever threadbare copies are available in universities around the country are the only ones that will ever exist. It will cost up to \$500,000 to re-up all the rights for this film. This is a piece of landmark TV history that has vanished.

Eventually, *Eyes on Prize*'s plight received enough media attention to attract a wealthy private investor who has agreed to finance all of the archival re-licensing costs for the entire series. However, the series' extended exclusion from commercial distribution demonstrates a serious problem that is profoundly embedded in media and filmmaking industries' current uses of copyright law.

The good fortune of *Eyes on the Prize* does not help to create a friendlier rights clearance climate for other similar projects that make extensive use of archival footage to narrate their histories. Filmmaker Jeffrey Tuchman described to Jaszi and Aufderheide the ways in which prohibitive rights clearance terms are seriously compromising the historical authenticity in his latest project about the Civil Rights Movement. Since the project focuses on oral histories, Tuchman planned to use a Folkways Records/Smithsonian collection of songs, "Voices of Civil Rights." However, divided ownership between the songs' master rights and their publishing rights drove up licensing costs to exorbitant rates.

The Smithsonian demanded that Tuchman pay \$3,500 for the master rights for less than a minute of one of the songs—with no indication of the costs of the publishing rights. Tuchman recounts his dilemma: "So here I was with music that was utterly

indigenous to the story I was telling and I couldn't use any of it...I'm not done with trying to use music from that time, but do I have the resources to pursue it to the end of the Earth? No."<sup>13</sup> Further, most of the music Tuchman sought was already in the public domain. Controversy arose regarding ownership of the songs' arrangement rights.

In their study, Aufderheide and Jaszi cite numerous other examples of clearance difficulties precluding or seriously inhibiting the production of politically relevant historical documentaries—especially ones that focus on minority histories and on other marginalized stories. Tuchman asserts: “I don't think it's accidental that what you now see are reality and makeover shows, where there are no encumbrances. There are other reasons why those shows are appealing, but I think that's one of them.” Although radical improvements in filmmaking and editing technology have reduced production costs significantly, prices of locating and obtaining archival footage tend to stabilize the high costs of documentary filmmaking and thereby edge genuinely independent productions out of commercial distribution markets.

Further, rights clearance issues play an important role in defining the types of projects that get produced. In the context of documentary filmmaking—a primary means of making historical narratives visible to large audiences—the rigid clearance culture puts a great deal more at stake than individual filmmakers' artistic ambitions. Jaszi and Aufderheide cite Robert Stone's analysis of dominant televised histories. Stone argues: “Why do you think the History Channel is what it is? Why do you think it's all WWII documentaries? It's because it's public domain footage. So the history we're seeing is being skewed towards what's fallen into the public domain.”<sup>14</sup> Thus, the economic

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<sup>13</sup> Aufderheide, “Untold Stories.”

<sup>14</sup> Ibid.

feasibility of archival use and licensing to a very large degree determines the types of content that audiences are able to access. Whereas recognizable material in the public domain tends to get used and reused, obscure songs and images, each one owned by multiple companies who are often only willing to license them for impossibly expensive fees, remain obscure and vanish from dominant histories, as *Eyes on the Prize* almost did.

Rights clearance issues restructure public cultural views of reality in many ways. In terms of larger patterns, the availability of archival footage determines which histories dominant documentary sources make visible. However, similar problems plague less historically-focused documentary films. In an October 2005 *New York Times* article, “The Hidden Cost of Documentary Filmmaking,” Nancy Ramsey questions rights clearance’s impact on recent documentaries’ commitment to “truth-telling.”<sup>15</sup> She describes *Eyes on the Prize* producer and cinematographer Jon Else’s recent project, *Sing Faster: The Stagehands’ Ring Cycle*, a Sundance award-winning film which depicts the lives of the backstage workers at an opera company.

In one scene, Else juxtaposes blaring sounds of Wagner from a performance with a behind-the-scenes view of a group of stagehands who are ignoring the orchestra while watching an episode of *The Simpsons*. Else describes the importance of this clip: “I felt it was a wonderful cultural moment to see two stagehands playing checkers while the gods are singing about destiny and free will and Marge and Homer are arguing on the television set.” Else attempted to license the rights for this brief clip: he received permission from Matt Groening’s company, which produces *the Simpsons*, and then approached Fox. “The first response was \$10,000 for four seconds,” Else says. “When I

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<sup>15</sup> “The Hidden Cost of Documentaries - New York Times.” 8 Apr. 2006  
<<http://www.nytimes.com/2005/10/16/movies/16rams.html>>.

explained this was for public television, they replied that was their public television minimum.” After a lengthy process of negotiation, things became more complicated when Fox learned that Else also intended *Sing Faster* for home video distribution. However, Else concludes: “It wasn’t the case of Fox being intractable jerks; it’s just this odd gray area. At the last second, I replaced it with a shot of a film that I own...I’ll burn in journalistic hell for that.”<sup>16</sup> Thus, rights clearance questions put documentary ethics immediately at stake: filmmakers counteract clip licensing problems by further manipulating their portrayals of reality to make them conform to their films’ copyright-censored documentary structures.

The example of *Sing Faster* demonstrates copyright’s profound imbrication in larger questions regarding the documentary genre’s truth-telling claims and responsibilities. Of course, documentary, which appeals to its viewers through many of the same narrative codes that make a Hollywood film easy and interesting to watch—e.g. aesthetic framing which promotes formal arguments particularly in expository documentaries—would be difficult to conceive of as a purely objective and truthful form. By presenting a specific view of its subject through decisions about camera angle, duration and visual scope of individual shots, lighting, editing, and other formal elements which discreetly or conspicuously present manipulated and manipulative portrayals of its content, documentary thwarts its own purported ambitions of being pure non-fiction.

The example of Else’s decision to fudge reality as a technique for circumventing copyright law literalizes abstract questions regarding documentary ethics. If the logic of rights clearance codes fosters a blatant disregard for ethical concerns—Else was not unwilling to pay a reasonable fee to license the *Simpsons* clip—then how does one

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<sup>16</sup> Ibid.

distinguish between conventional documentary practices of manipulating reality and recent copyright censorship-induced methods of blatantly falsifying it? In order to grapple with the nuanced complexities of this question, it is helpful to examine documentary films that justify their dubious ethics by forfeiting their fair use rights alongside their diametric opposites: successful fair use informed filmmaking.

Robert Greenwald's 2004 documentary *Outfoxed*, which ironically exposes the Fox News Channel's political biases and dubious journalism, tests the limits of its fair use rights. Greenwald fills his documentary with an abundance of clips from programs like the *Fox News* show, the *O'Reilly Factor* and *Hannity and Colmes*: anything that airs on the Fox News Channel and reveals its conservative political biases counts as fair game. *Outfoxed*, released during an election year, proves its immediate political value. Its arguments are concise and coherent, and it makes an important point about how Fox's unethical yet apparently entertaining manipulation of news stories has also forced other major networks to restructure their journalistic narrative codes in order to compete with Fox's ratings. However, Greenwald's concern with the dictates of fair use impacts his own filmmaking formal strategies.

Fair use attempts to create a space for the non-licensed appropriation of content when its use is critical or transformative in nature. That is how fair use defends its status as informed by the First Amendment. A fair use contains important critical arguments and original ideas. Thus, regulation of a fair use of non-licensed content suggests an unconstitutional degree of censorship. *Outfoxed* asserts its adherence to the dictates of fair use as unambiguously as possible. Its non-licensed clips tend to be short, to support

specific larger arguments that the film makes, and are always presented in a critical context.

For example, during a sequence titled “Fox News Techniques: Some People Say,” FAIR (Fairness and Accuracy in Reporting) media analyst Peter Hart narrates a montage series of short Fox News clips in which reporters assert subjective opinions by introducing them under the vague heading, “some people say.” Hart explains this technique: “Some people say is Fox’s cue that I’m pretending to be an anchor so I can’t say this is my opinion or this is Roger Ailes’s opinion, but ‘some people say...’” Greenwald intercuts interview footage with Hart between twenty-four media clips from various Fox News programs, most of which range from one to four seconds in length, of reporters reverting to a dubious “some people say” narrative strategy.

Many of these clips demonstrate the quotation and then allow the reporters to continue for several seconds, revealing a glimpse of the partisan politics they propagandize:

“Some people say it might undermine what the U.S. troops are doing there.”

“Some people say he was supported by Iran.”

“Some people say John Kerry has some similarities to an earlier Massachusetts politician.”

Ten of the final clips cut off after the word “say,” except for the last one: “Some people say it’s exploitive. What do you say to that?” Greenwald responds to Fox’s provocation with an abrupt and forceful sound effect which suggests that Fox has been trumped and exposed both in and by its own artifice. Thus, Greenwald asserts his fair use of these clips

by presenting them out of context—especially toward the end—frequently interrupting them, and narrating them into the film’s larger critical arguments.

Producer Tia Lessin defends her similar fair use standards.<sup>17</sup> She describes a sequence in *Bowling for Columbine* she intentionally neglected to license—which satirically depicts a local news anchor warning about African-American male criminal suspects—because it exposes racism in the media. Lessin argues:<sup>18</sup>

This is exactly why fair use exists, for critical uses like this... On the other hand you can’t just include music or footage because it’s pretty or because it’s going to add production value to a piece if there isn’t an underlying satirical or critical reason to do so.

However, Jon Else’s testimony, which excuses Fox’s intractability in refusing to license to him the short *Simpsons* clip for *Sing Faster*—that ambiguities are to be expected because, again, rights clearance is such a gray area—significantly complicates Lessin’s analysis. Further, even an unambiguously authorized use of archival material leaves a filmmaker vulnerable to legal difficulties. Big corporations frequently exploit fair use gray areas to frighten independent filmmakers out of borrowing their non-licensed footage. Unlike Robert Greenwald, not every fair-use-savvy documentary filmmaker enjoys the personal backing of Professor Lessig’s legal team.

Further, these legal gray areas foster distinct visual and narrative strategies in films that attempt to exercise their fair use rights. Although Greenwald makes an important point that Fox’s propagandistic techniques undermine their journalistic ethical standards, his fair use structured formal arguments raise a relevant question: is Greenwald’s

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<sup>17</sup> Aufderheide, “Untold Stories.”

<sup>18</sup> Ibid.

narrative strategy any less deceptive than Fox's? Hart criticizes Fox's "some people say" strategy: "Journalistically speaking, it's a very peculiar technique because the idea behind journalism is that you're sourcing who it is you're referring to. This is just a clever way of inserting political opinion when you know it probably shouldn't be there." However, Hart inadvertently also describes many aspects of Greenwald's fair-use-friendly formal techniques.

In order to avoid the legal wrath of Rupert Murdoch's News Corporation, Greenwald avoids using each clip for more than a few seconds, presents them out of their original contexts and narrates them into clearly defined larger critical arguments. Most of the "some people say" clips, for example, do not demonstrate the subjective political opinions they purportedly introduce. The majority cut off immediately after the buzz phrase has been delivered and reveal absolutely no evidence that they propagandize conservative party politics. In effect, Greenwald's rapid editing, several fleshed out examples and intercut interview footage with a professional media analyst lead his viewer automatically to identify the phrase "some people say" as an unambiguous sign of Fox's propaganda. Although—as anyone who has ever watched Fox News can, one hopes, ascertain—Greenwald's basic argument is relatively accurate, his film's formal logic generates its own set of ethical concerns.

*Outfoxed* constructs its arguments by inundating and confusing its viewer with speedily delivered and skillfully positioned series of montage clips and images. Greenwald leaves no space within the film's tight structure for critical distance or reflection upon its narrative arguments. Fifteen seconds of interview footage with purported experts explain a general idea; then, Greenwald cuts to a minute of

meticulously remixed visual evidence from various Fox News programs which he leads his viewer to assume—though it is impossible to determine during the film—explain this idea. Thus, regardless of the veracity of *Outfoxed's* individual arguments, its narrative strategies do not stray too far from Fox's own dubious methods. Critical arguments informed by fair use in documentary filmmaking often ironically preclude dialogical exchanges between a viewer and a text. Rather, they foster manipulative, propagandistic and interpretively narrow modes of discourse: precisely the structural logic that Greenwald attempts to expose and to condemn in Fox News' programming.

Greenwald's film is pregnant with these quick paced montage sequences which emphasize one or two specific relationships between disparate media clips presented alongside one another. During an earlier Fox technique analysis sequence, Greenwald introduces a series of clips from *The O'Reilly Factor* of Bill O'Reilly telling his guests to "shut up" with footage of O'Reilly responding to a piece of "viewer mail" on his show that criticizes him for rudely interrupting his guests: "Well, the shut up line has happened only once in six years." Greenwald cuts: O'Reilly tells a homosexual student guest to shut up; he tells Jeremy Glick—now a famous former *O'Reilly* hostile interviewee whose father died in 9/11—to shut up repeatedly; he tells an atheist boy scout who had refused to recite an oath to shut up; he apostrophizes Jimmy Carter and then requests that he shut up; he tells all Americans critical of the Iraq War to shut up; finally, he yells at his longstanding rival Al Franken—who has literally made a career out of bashing Bill O'Reilly and Ann Coulter—to shut up. Thus, Greenwald conflates these amusing contradictions that he locates in the *O'Reilly Factor* with sweeping critical structural analyses of Rupert Murdoch's News Corporation. Again, although Greenwald's

arguments might be legitimate, his narrative techniques are at best dubious and highly manipulative.

However, even with Greenwald's extensive legal team, had he allowed more space for his viewer's critical contemplation of Fox News' technique—which would most likely have involved longer clips with less thorough narrative explanations—the status of his fair use rights could have easily fallen under attack. What, then, are alternatives to legally appropriating archival material without the dictates of fair use structuring a film's narrative at the expense of its ethical standards?

Jon Else opted to falsify reality rather than risk legal liability. Although the *Simpsons* clip in *Sing Faster* would have facilitated Else's ironic cultural commentary, it would not have commented critically directly upon the *Simpsons* the way *Outfoxed* does on Fox News programs. Filmmaker Gerardine Wurzburg discusses the problems created by increasingly more rigid delineations of fair use:<sup>19</sup>

Fair use has become much more carefully defined. It used to be interpreted much more loosely...I don't think you can invoke fair use anymore, unless you're using a piece that's going on the news that night. And as you become more visible you have to be more careful. It's been more than five years, I would say, since I've invoked it.

Wurzburg's testimony demonstrates how the narrow dictates of fair use put enormous pressure on Greenwald to structure his documentary in rigid adherence to copyright's legal codes. Filmmaker David Van Taylor confirms Wurzburg's anxieties regarding fair use: "Basically, we do that [invoke fair use] if you are using it for an educational purpose

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<sup>19</sup> Ibid.

or are using it to comment on or criticize the copyrighted material itself...[but] not clearing something is always a risk...Fair use is a crap shoot.”<sup>20</sup>

What, then, when one encounters difficulties licensing content from a large corporation—which seems to be a pattern with Fox—are alternative solutions to Greenwald’s rigidly fair-use-structured style of filmmaking or to Jon Else’s blatant falsification of reality to avoid grappling with the hazy limits and legal tumult associated with fair use? The problem is that, under copyright law, there are none. The fair use doctrine’s impact on independent documentary filmmaking demonstrates just one example of copyright law’s problematic structures.

However, substitutes for copyright do exist. Creative Commons<sup>21</sup> provides an alternative space for copyright licensing and artistic authorship. Robert Greenwald describes his decision to start licensing his films through Creative Commons:<sup>22</sup>

In making *Outfoxed* and *Uncovered*, I learned how cumbersome and expensive it can be to license footage from news organizations. Creative Commons licenses allow me as a filmmaker to know immediately how I can use a piece of content in my films. I could think of no better way to walk the talk myself than by releasing the interviews from *Outfoxed* and *Uncovered* under a license that allows other filmmakers to use my material in new and creative ways. I look forward to seeing what others do with these interviews.

Whereas rigid and dichotomized copyright structures—“yes, I reserve all rights, or, no, I do not own this”—generate many ambiguities for fair use and artistic licensing, Creative

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<sup>20</sup> Ibid.

<sup>21</sup> Creative Commons (<http://creativecommons.org>) was started in 2001 by Professor Lawrence Lessig.

<sup>22</sup> Brown, Glenn Otis. “Political Expression and Copyright.” *Creative Commons Blog* 15 Sept. 2004 <<http://creativecommons.org/weblog/entry/4400>>.

Common's variety of different licenses allows for greater degrees of flexibility with archival licensing in independent documentary filmmaking. Although Creative Commons is a long way away from soliciting Murdoch's News Corp. as a licensee, artists are beginning to opt for CC licenses more and more frequently. Thus, Creative Commons provides an increasingly more formidable alternative to the severe rights clearance problems produced by the rigid structural logic of copyright law.

Stanford Law Professor Lawrence Lessig officially launched Creative Commons in 2001<sup>23</sup> in conjunction with the Supreme Court case *Eldred v. Ashcroft*. This case challenged the legal status of the Sonny Bono Copyright Term Extension Act (CTEA), which essentially enables copyright owners to renew their existing copyright terms for twenty year extensions—in addition to the terms established by the Copyright Act of 1976—an unlimited number of times. In other words, the CTEA theoretically provides for the existences of interminably extended copyright licenses. Further, the legislation of this act affected both new and existing works and thereby impacted both prospective and preexisting copyright licenses. Works licensed before January 1, 1978 and still in copyright on October 27, 1998, received ninety-five year extensions under this act; works authored on or after January 1, 1978, received extensions for the tenure of the author's life with a seventy year term extension after the author's death.

Lessig originally conceived of Creative Commons as a more nuanced structural alternative to copyright's CTEA-ridden licensing logic: Creative Commons licenses allow copyright owners to share their authorship rights with the public while retaining predetermined degrees of control over their own content. For example, authors can opt to reserve none, varying degrees of some, or all rights for their work. Whereas the rigid

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<sup>23</sup> The initial set of Creative Commons licenses was published on December 16, 2002.

binary structures of copyright tempt authors and license owners to abuse the status of copyright—copyright engenders too many legal uncertainties—CC-licenses are designed to provide for functional clarity: they structure more flexible systems of rights licensing and thereby foster a more participatory culture of authors and artists building upon and transforming one another’s derivative works.

Many nascent filmmakers, less well-known than Greenwald, find wider audiences on the Internet by publishing their work under Creative Commons licenses. For example, Andy Samberg, Jorma Taccone and Akiva Schaffer, members of *Lonely Island*, an LA-based comedy collective, have released much of their music and video shorts online under CC Attribution-NonCommercial-ShareAlike licenses. Ironically, *Lonely Island* had pitched their comedy shorts ideas to Fox earlier that year and were rejected. Creative Commons’ participatory web culture helped popularize *Lonely Islands’* work, earning all three group members jobs with Saturday Night Live—Samberg as an actor and Taccone and Schaffer as writers.

Even though, clearly, not every author who publishes her/his work under a CC license will experience immediate professional success, Creative Commons’ website is structured to promote the work of its authors. CC’s homepage emphasizes two bold options—*Find* and *Publish*—which strike its user immediately upon logging on to the website [figures 1 and 2]. Under the logic of Creative Commons’ licensing, users are encouraged to become authors—to participate in the engagement and transformation of images as opposed to their passive consumption, which the structures of copyright tend to foster.

Figure 1



Figure 2



Of course, in the context of contemporary independent documentary filmmaking, Creative Commons by no means represents an absolute or immediate solution to the plethora of rights clearance issues which currently haunt the film industry. However, the emergence of Creative Commons—which is embedded in copyright’s problematic structures—expresses the urgency and growing interest in copyright’s structural reform. Since copyright blatantly favors the interests and legal authority of corporately-financed and -authored content, Creative Commons creates a space for cultural dialogues between independent filmmakers. If enough viable content exists under a CC-license, filmmakers will no longer consider it necessary to grapple with the torrents of legal gray areas that ensnare copyrighted content. Further, if Creative Commons attracts substantial enough

networks of licensors within filmmaking communities, then, perhaps big media will eventually find it in their interests to absorb a greater degree of CC-licensed content. In doing so, they would provide for more legally flexible networks for the critically transformative dialogical engagement of licensed content across diverse traditions of authorship.

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