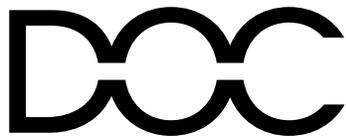


Copyright and Fair Dealing

GUIDELINES FOR DOCUMENTARY FILMMAKERS

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DOCUMENTARY ORGANIZATION OF CANADA
DOCUMENTARISTES DU CANADA

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Preamble

These Guidelines describe the application of fair dealing and copyright to the practices of documentary filmmakers in Canada.¹

A recent survey of Canadian documentary filmmakers revealed that copyright clearance costs now make up to 27 per cent of a film's budget.² High costs aside, the requirement that filmmakers secure licenses for *every* use of copyrighted content, no matter how fair or incidental, creates real problems for filmmakers. The irony is that many clearance costs are unnecessary. Much content used by documentary filmmakers qualifies as incidental uses or fair dealings that require no clearance under Canadian copyright law. Both the content and the quality of many Canadian documentary projects suffer needlessly under this "clearance culture".³

The Supreme Court of Canada understands fair dealing and other defences to liability for copyright infringement as "users' rights" that must be given a fair and balanced reading.⁴ The Supreme Court has also indicated that it will look to community practices for guidance on what is fair within a creative community, and for guidance as to the fairness of a system of practices.⁵ These Guidelines, based on law and guided by industry practice, answer the Supreme Court's invitation to act as an aide for future courts called upon to interpret fair dealing in the documentary context.⁶

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- 1 This document is comparable to the American University's Center for Social Media "Documentary Filmmakers' Statement of Best Practices in Fair Use", which clarifies what the American documentary film community regards as a reasonable application of the American "fair use" copyright doctrine ["Statement of Best Practices in Fair Use"]. Available at <http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf>.
 - 2 Kirwan Cox, *Censorship by Copyright: Report of the DOC Copyright Survey* (November, 2005), online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/internationalfilm>>.
 - 3 For an extended discussion of the consequences of a "clearance culture" on documentary filmmakers including the role that Errors and Omissions insurers and lawyers, broadcasters, and other gatekeepers play in interpreting copyright law and industry practices, see Laura J. Murray and Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007) at 126-133 [Murray and Trosow]; Howard Knopf, "The Copyright Clearance Culture and Canadian Documentaries: A White Paper on Behalf of the Documentary Organisation of Canada ("DOC")" *Documentary Organisation of Canada* (22 November 2006), online: Documentary Organisation of Canada <http://docorg.ca/sites/docorg.ca/files/White%20Paper_HPK_Copyright&Documentaries.pdf>. [Knopf, *DOC White Paper*]; Sheila Curran Bernard and Kenn Rabin, *Archival Storytelling: A Filmmaker's Guide to Finding, Using, and Licensing Third-Party Visuals and Music* (Oxford: Focal Press, 2009) at 220; Nancy Ramsey, "The Hidden Cost of Documentaries" *New York Times* (16 October 2005), online: New York Times <<http://www.nytimes.com/2005/10/16/movies/16rams.html>>; and Sean Flynn and Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearances Culture for Documentary Filmmakers* (December 2009), online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/internationalfilm>>.
 - 4 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339 at para. 48 [CCH]; *Théberge v. Galerie d'Art du Petit Champlain*, [2002] 2 S.C.R. 336, 2002 SCC 34 [Théberge].
 - 5 *CCH*, *ibid.* at para. 63.
 - 6 The application of these Guidelines is restricted to the documentary context. Other standards of fairness may apply in other creative communities. For example, the system of practices within the news production community may differ from that of the documentary filmmaker community, and both may differ significantly from that of the fictional film community.

This document discusses four classes of uses that documentary filmmakers agree do not require copyright clearance under Canadian law. Documentary filmmakers share a consensus that these uses are appropriate and legal as incidental uses or fair dealings with copyrighted material.

Background

The Canadian *Copyright Act*⁷ balances the public interest in the encouragement and dissemination of works with the private interests of creators in obtaining a just reward for their work.⁸ In the context of documentary films, two sets of defences to liability for copyright infringement assist documentary filmmakers: (1) the incidental use⁹ and public space¹⁰ exceptions, and (2) the fair dealing defence.¹¹

Incidental Use and Public Space

Documentary filmmakers may include all or part of another work in a documentary film where the inclusion is incidental and not deliberate.¹² The *Copyright Act* provides an explicit exception that relieves documentary filmmakers of the need to clear rights in, for example, logos and trade-marks, music (including mobile phone ring tones), and billboards that might appear in a street scene of a documentary film. This important exception bars in Canada some of the most outrageous clearance demands that have arisen in the United States,¹³ a country whose copyright law lacks a similar explicit exception (although the American

7 *Copyright Act*, R.S.C. 1985, c. C-42, as amended [*Copyright Act*].

8 *Théberge, supra* note 4 at paras. 30 and 123, per Binnie J. (referring to *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 at 200 (T.D.)).

9 *Copyright Act, supra* note 7, s. 30.7.

10 *Ibid.*, s. 32.2(1)(b)(ii).

11 *Ibid.*, s. 29.

12 *Ibid.*, s. 30.7. This exception provides that:

It is not an infringement of copyright to incidentally and not deliberately

(a) include a work or other subject-matter in another work or other subject-matter; or

(b) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter.

13 Recently Fox demanded that the online video site, Broadcaster.com, take down three animated clips – called “The OJ Simpsons” – parodying Fox’s animated show, *The Simpsons* (“Fox angry at Simpsons web parody” *BBC News* (14 May 2007), online: *BBC News* <<http://news.bbc.co.uk/2/hi/entertainment/6654087.stm>>). In *Anheuser-Busch Inc v. Balducci Publications* (*Anheuser-Busch Inc v Balducci Publications* 28 F. 3d 769 (1994)), the beer Michelob was represented as an oily product in an advertisement meant to comment on an oil spill. The court found that the First Amendment defence had to yield to Michelob’s rights. In *Starbucks v. Dwyer* (*Starbucks v Dwyer* (2000) *C00 1499*), Starbucks sued Kieron Dwyer for copyright infringement, trade mark infringement, trade mark dilution and unfair competition after the cartoonist created a parody of the Starbucks’ siren logo tagged “consumer whore.” Although the United States District Court for Northern California held that that the corporation was unlikely to succeed on its copyright and trade mark infringement claims because Dwyer’s drawing was likely to be deemed a legitimate parody, the court granted an injunction because it also found that the defendant’s parody tarnished Starbucks’ image, and constituted trade mark dilution. In *Mattel Inc v. Walking Mountain Productions*, 353 F. 3d 792 (2004), Mattel sought legal action against an artist who produced photographs that used Barbie dolls to represent scenes of human interaction.

Documentary Filmmakers' Statement of Best Practices in Fair Use views that such inclusions qualify as fair use).¹⁴

Documentary filmmakers can also film buildings and sculptures permanently situated in public. The *Copyright Act* provides an explicit exception that permits documentary filmmakers to film Canadian buildings or publicly situated sculptures, no matter how well known they may be and no matter how prominently they might figure in the scene.¹⁵

These rights are in addition to, and not substitutions for or limitations of, filmmakers' fair dealing rights.¹⁶ In other words, use of a copyrighted image might be non-infringing as both a fair dealing with a work and an incidental use of that work.

These rights are useful to documentary filmmakers not only for relieving them of onerous and expensive clearance burdens, but also for relieving them of the obligation to "blur" or edit out uncleared trade-marks, music, statues, and buildings facades. Together, these rights ensure that documentary filmmakers are able to document reality: they reserve public space to the public.

¹⁴ "Statement of Best Practices in Fair Use", *supra* note 1.

¹⁵ *Copyright Act*, *supra* note 7, s. 32.2(1)(b)(ii). This exception provides that:
It is not an infringement of copyright [...] (b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work [...] (ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building.
See also De Beer, "Fair Dealing for Filmmakers: A Report on User Rights for Documentary Filmmakers in Canada" at 3, online: American University Washington College of Law <<http://www.wcl.american.edu/pijip/go/filmmakerpapers>>; and Murray and Trosow, *supra* note 3 at 128.

¹⁶ *CCH*, *supra* note 4 at para. 49, where the Court stated that it is an integral part of the scheme of copyright law that "the s. 29 fair dealing exception is always available." Just as the Great Library at Osgoode Hall would need to turn to the library exception (set out in *Copyright Act*, R.S.C. 1985, c. C-42, s. 30.2, as am.) only if the library was unable to make out the fair dealing exception (set out in *Copyright Act*, R.S.C. 1985, c. C-42, s. 29, as am.), so too do documentary filmmakers have the ability to look to both fair dealing and other user rights to show that they did not infringe copyright.

Fair Dealing

Fair dealing provides a framework that allows for the unlicensed use of copyrighted materials for specific purposes.¹⁷ The fair dealing test requires a documentary filmmaker to answer three questions positively:

1. Is the dealing for a permissible purpose?
2. Is the dealing fair?
3. Has the filmmaker mentioned the author and source (in the cases of criticism, comment, or news summary)?¹⁸

1. Is the dealing for a permissible purpose?

The *Copyright Act* permits a fair dealing defence in the case of only five types of dealings: (1) private study, (2) research, (3) criticism, (4) review, and (5) news summary.¹⁹ If a dealing is not for one of those five purposes, no matter how fair the dealing may otherwise be, then the fair dealing defence is not available.²⁰

Documentary films, by their nature, fall squarely within the ambit of many of these purposes. Each of the five categories of dealings is interpreted purposively. “Criticism”, for example, does not mean criticism in the academic or literary sense, but should be interpreted to include critical commentary, challenging viewpoints, and even parody when undertaken with a genuine intent to criticize the parodied

17 *Copyright Act*, *supra* note 7, ss. 29-29.2 (see note 19, below, and accompanying text).

18 *Ibid*, s. 29. The first two elements of this test were first set out in *Zamacois c. Douville*, (1943) Ex. C.R. 208 [*Zamacois*]. The third element was required by 1997 amendments to the Act that mandate the inclusion of a requirement to mention in the author and source in respect of criticism, review, and news reporting: S.C. 1997. c. 24, s. 18.

19 Section 29 of the *Copyright Act* provides in respect of research and private study that:
29. Fair dealing for the purpose of research or private study does not infringe copyright.
Section 29.1 of the *Copyright Act* provides in respect of criticism or review that:
29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

Section 29.2 of the *Copyright Act* provides in respect of news reporting that:
29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

20 Carys Craig, *Fair Dealing and the Purposes of Copyright Protection: An Analysis of Fair Dealing in the Copyright Law of the U.K. and Canada* (LL.M. Thesis, Faculty of Law, Queen's University, 2000) [Craig, unpublished] at 106; and Daniel Gervais, “Canadian Copyright Law Post-CCH” (2004) 18:2 I.P.J. 131 at 157.

work.²¹ Similarly, “review” should be interpreted to include not just commentary on artistic merit, but factual review and disclosure of facts and events.²² “News summary” should extend beyond the evening news and morning paper to benefit documentaries that pull together facts and events:²³ the Canadian provision is not limited to reporting on *current* events, as it is in such jurisdictions as the United

21 David Vaver, *Copyright Law* (Toronto: Irwin Law Inc., 2000) [Vaver] at 194 (citing *Hager v. ECW Press Ltd.* (1988), 85 C.P.R. (3d) 289 (Fed. T.D.) [*Hager*] and 195, where Vaver criticizes the decision in *Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada)* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin*], calling “disturbing” *Michelin’s* “assertion that the freedom of expression guarantee” can never override copyright “property”. Vaver argued that genuine parody or satire should not be held infringements in the first place. This view was subsequently vindicated in the Quebec Court of Appeal decision in *Les productions Avanti Ciné Vidéo inc. c. Favreau*, [1999] 177 D.L.R. (4th) 568 (Que. C.A.) [*Favreau*]. See also *Pro Sieben Media A.G. v. Carlton U.K. Television Lts.*, [1999] F.S.R. 610 (C.A.) [*Pro Sieben*]. For more on freedom of expression and *Charter* implications for copyright and a critique of *Michelin*, see Jane Bailey, “Deflating the Michelin Man: Protecting Users’ Rights in the Canadian Copyright Reform Process” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 125. Following the Supreme Court judgment in *CCH*, D’Agostino argued that it is reasonable to argue that “criticism” could now encompass parody and that “*Michelin’s* restrictive approach thus no longer seems to be good law”: Giuseppina D’Agostino, “Healing Fair Dealing?: A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use” (2008) 53 McGill L.J. 309 at 330 [D’Agostino]. More recently the Copyright Board of Canada noted that criticism and review can be private activities, and the preparatory steps to these activities characterized as “research”: see *Collective Administration in relation to rights under sections 3, 15, 18 and 21 (Re)*, [2009] C.B.D. No. 6; C.D.A. no 6. (26 June 2009) Copyright Board, at paras. 91 – 94, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>> [Copyright Board, *K-12* (2009)]. See also Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright Law” (2006) 56 *University of Toronto Law Journal* at 97 (where Craig also criticizes the decision in *Michelin*, arguing that by virtue of the private property category and the analogies that this category permits, the nature of copyright is distorted to fit assumptions regarding traditional private property entitlements) [Craig, “Dissolving the Conflict”]; Hugues G. Richard, *Fair Dealing: Criticism, Review and Newspaper summaries* at 4, online: Leger Robic Richard/Robic (1994) <<http://www.robic.ca/publications/Pdf/146-HGR.pdf>> (where, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) [*Hubbard*], Richard states that criticism is not limited to the style or manner of expression of a work, but can extend to the ideas or theories contained therein) [Richard]. Criticism is not confined to literary criticism and one is free to make use of excerpts of a work in order to criticize the views expressed by the author. Richard also states (citing Eaton S. Drone, *A Treaty on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston, Little, Brown & Co. 1879)) that criticism is to be determined by the character of its publication and the purpose which it serves); John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Thomson Canada Limited, 2009) (loose-leaf), at 23-12 (where, citing *Hubbard*), McKeown states that criticism extends to not only the literary style but also to the doctrine or philosophy of the writer as expounded in the literary work in question and that it should be interpreted liberally) [McKeown].

22 Vaver, *ibid.* at 191, where (citing *Allen v. Toronto Star Newspaper Ltd* (1997), 36 O.R. (3d)) [*Allen*]. Vaver states that it is possible to deal fairly with “even a whole work, sound recording, performance or broadcast.” See also 194, where Vaver explicitly states that review “may also include surveying past events or facts”. The court in *Pro Sieben*, *ibid.* at 614, acknowledged that review may also extend to the ideas found in a work and its social or moral implications. See also, McKeown, *ibid.*, at 23-12 where he states that the word “review” should be liberally interpreted.

23 Vaver, *supra* note 21 at 193, where Vaver states that news reporting, which is the current interpretation of the expression “newspaper summary”, can occur in “any medium”, cover various “range of formats” and may apply to “all forms of news” not just current events. Similarly, the UK Court’s analysis of “reporting current events” in *Pro Sieben*, *supra* note 21, did not hinge on any medium or format of delivery in particular, but solely on whether the content or subject matter was objectively factual in nature. See also, McKeown, *supra* note 21 at 23-13, where (citing *Allen*, *ibid.*) McKeown states that newspaper summary now extends to all media. See also, Richard, *supra* note 21 at 6 where Richard states the definition of a summary as a short statement of the essential points of a matter, which may support the view that news summary for fair dealing purposes should not be limited to current evening news and morning paper as long as it is a short account of a matter.

Kingdom²⁴ and New Zealand.²⁵ The emphasis should be on the expression's factual or historical nature, not the timeliness of the statement.

“Research” and “private study” are private activities that assist filmmakers in the *preparation* of their films, but do not excuse the need to clear rights in anticipation of distribution and public performance.²⁶

2. Is the dealing fair?

The heart of the defence of fair dealing is the fairness of the treatment of the work. The Supreme Court of Canada has set out a non-exhaustive list of six factors that are to be considered by the courts in determining the fairness of a given dealing.²⁷ These factors will be tailored to the facts of a case, and in some circumstances it will not be necessary to apply all six.

(1) **The Purpose of the Dealing:** Courts will make an objective assessment of the filmmaker's real purpose or motive in using a copyrighted work, not their subjective belief.²⁸

(2) **The Character of the Dealing:** Courts will examine how a copyrighted work is dealt with.²⁹ The custom or practice in a particular trade or industry

24 *Copyright, Designs and Patents Act 1988* (c. 48) s. 30. In *The Newspaper Licensing Agency Ltd. v. Marks & Spencer plc*, [1999] R.P.C. 536 (Ch D) [*Marks & Spencer*], Lightman J. expressed that “news” is broader than “current events” as it extends to the reporting of past events not previously known and of matters of a historical interest. For a summary of the jurisprudential history interpreting “current events” in the UK, see Craig, unpublished, *supra* note 20 at 50-54.

25 *Copyright Act 1994* No 143 (as at 1 December 2008), Public Act, s. 42.

26 A recent decision of the Copyright Board (Copyright Board, *K-12* (2009), *supra* note 21) at paragraph 89 states that: “Research occurs provided that effort is put into finding, regardless of its nature or intensity.” The same decision also pointed out that over a century ago the British Court set out that studying copyrighted material in a classroom environment does not fall under the ambit of private study. It is worth noting, nevertheless, that the Court in *CCH*, *supra* note 4 at 51 stated that “research” as a term “must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained,” and that it is not limited to private or non-commercial contexts in order to qualify as fair dealing. Factual, editorial, film and other third party material research by filmmakers for the purpose of building a story and selecting potential film clips to use in the final edit of a film is nonetheless research within the meaning of s.29 and may be relied on in *preparation* toward a final film edit.

27 *CCH*, *supra* note 4 at paras. 53-60. Other unnamed factors could also be used to assess the fairness of a dealing – D’Agostino, *supra* note 21.

28 The purpose of the dealing will tend to be fair if it is for one of the allowable purposes under the *Act*: research, private study, criticism, review or news reporting. “These allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.” *CCH*, *supra* note 4 at para. 54 (referring to *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.) as well as to McKeown, *supra* note 21 at 23-26). See also Copyright Board, *K-12* (2009), *supra* note 21 at para. 117, where the Board held that: “A single copy made for the use of the person making it, whether or not it was at his or her request, falls under the exception as long as it is made for a purpose that qualifies for the exception, even if it is made for other purposes as well. Such is also the case for single or multiple copies made for third parties at their request, as long they are made for an allowable purpose, even if they are made for other purposes as well.” See also, *CCH*, *supra* note 4 at para 54, where the Court states: “... these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights.”

29 See Copyright Board, *K-12* (2009), *supra* note 21 at para. 99, where the Board, discussing the analysis of the “character of the dealing”, provides that the following would be deemed as being less fair: making several copies instead of just one; keeping a copy rather than destroying it after use. In the United States, the character of the use is determined in part by a consideration of whether it is *transformative*. A work is considered transformative if it is not simply a gratuitous re-hashing of the original; if it “adds something

may assist in determining whether or not the character of the dealing is fair.³⁰ These Guidelines seek to set out accepted practices within the documentary community with a view to providing courts with guidance in just this inquiry.

(3) **The Amount of the Dealing:** Courts will examine both the amount of the dealing and the importance of the copied selection to the work allegedly infringed.³¹ Even an entire work may be fairly copied in some cases.³² This is particularly true for artistic works such as paintings and photographs, which are not usually dealt with other than as entire works.

(4) **Alternatives to the Dealing:** Courts will consider whether there is a non-copyrighted equivalent of a work that could have been used, and whether the dealing was reasonably necessary to achieve the (new) work's purpose.³³

new, with a further purpose of different character, altering the original work with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

30 *CCH*, *supra* note 4 at para. 55 (referring to *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.) [*Sillitoe*]). For a discussion of the utility of industry best practices or guidelines to determine fairness with regards to fair dealing, see D'Agostino, *supra* note 21 at 334, 354-359, 361-362.

31 *CCH*, *ibid.* at 56 (referring to *Hubbard*, *supra* note 21); see also Vaver, *supra* note 21 at 191 and Copyright Board, *K-12* (2009), *supra* note 21 at para. 102, where the Board, citing *CCH*, states that: "...repeated requests within a short timeframe for multiple excerpts from the same work could be unfair." In other words, even if the dealing is justifiable in a single instance, it may be found to be unfair if the dealing is repetitive. The same decision goes on to affirm at para. 103 that: "...single copies made for the use of the person making the copies and single or multiple copies made for a third party (*i.e.*, a student) at his or her request tend to be fair." The amount of a dealing is not determined by a formula but is rather an exercise of judgment. While duration matters, context is determinative. In *Time Warner Entertainment Co. v. Channel Four Television Corp.* (1993), 28 I.P.R. 456 (C.A.) [*Channel Four*] a 30-minute documentary's use of twelve and a half minutes worth of clips (twelve extracts) from the film "A Clockwork Orange" was not deemed to be unreasonable or gratuitous. While acknowledging the concern that a substantial use of clips may in fact compete with the original film, the court ultimately concluded that "serious criticism of a film requires that you spend sufficient time showing the film itself" (at 9-10). Of note: the clips were accompanied by voice-overs and narration, and were interspersed with comments and critiques by those interviewed for the programme (at 10)." See also *Hubbard*, *supra* note 21 at 1027, where the Court stated that: "After all is said and done, it must be matter of impression."

32 *CCH*; *supra* note 4 at para. 56 ("It may be possible to deal fairly with a whole work."); Copyright Board, *K-12* (2009), *supra* note 21 at para. 102 ("The reproduction of an entire work may be fair."). However, the reproduction of an entire work is contingent on the purpose. As Theresa Scassa notes, "It might be fair dealing to copy an entire journal article for the purpose of research, but not to copy the entirety of another work in a different context." Theresa Scassa, "Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*" (2004) 3 C.J.L.T. 89 at 95 [Scassa]. See also Sunny Handa, *Copyright Law in Canada* (Toronto: Butterworths, 2001) at 299, where, criticizing *Zamacois*, *supra* note 18, for its proposition that the copying of an entire work can never be considered fair, Handa had also stated before *CCH* that it is reasonable to expect that a more balanced approach will be adopted in Canada. See also at 291, where (citing *Allen*, *supra* note 22) Handa states that the proper test for fair dealing is not simply a mechanical test, measuring the extent of copying involved; rather, it is to be a purposive enquiry. See also at 301 and 305 where Handa states that fair dealing may allow the copying of an entire work under certain circumstances and that fair dealing is an evolving concept and therefore rules that hold that no copying of an entire work can be fair must be revisited. See also *Tom Hopkins International Inc. v. Wall & Redekop Realty Ltd.*, 1 C.P.R. (3d) 348 at 352-53, (1984), where the Court stated that fair dealing may allow the copying of an entire work under certain circumstances.

33 *CCH*; *supra* note 4 at para. 57; see also Copyright Board, *K-12* (2009), *supra* note 21 at para. 105. The Supreme Court goes on to add (at para. 106) that it would: "...not be reasonable to require that students do all their research or private study on site. Similarly, it is not reasonable for students to use only those works that are in the public domain... What captivates younger generations is not always what entranced baby boomers." This analysis tends to justify as fair space- and time-shifting activities undertaken in furtherance of a recognized category of dealing. The Supreme Court does not expand, however, on what an "equivalent" to a work constitutes, "such that copying the work would cease to be fair dealing because of the existence of the unprotected 'equivalent'": Scassa, *ibid.* at 95. As D'Agostino notes, the Court did, however, focus "more on the ease of access to the works than on the actual availability of noncopyrighted works": D'Agostino, *supra* note 21 at 322.

For example, the court might consider whether a given criticism would be equally as effective if it did not reproduce a copyrighted work.³⁴

(5) **The Nature of the Work:** It is more difficult to deal fairly with confidential or unpublished content than with published material.³⁵ One can deal fairly with an unpublished work where doing so, for example, serves the goals of freedom of expression generally: the advancement of knowledge or the pursuit of truth.³⁶

(6) **Effect of the Dealing on the Work:** A reproduced work that substitutes for, or competes with, the market of the original work is less likely to be held to be fair.³⁷

This short discussion of the factors a court will consider in assessing the fairness of a dealing is far from complete. However, filmmakers should appreciate that neither demand for payment, nor the availability of a license, nor the failure to

34 See also Copyright Board, *K-12* (2009), *supra* note 21 at para. 91, which adds that a: "...copy is not made for the purpose of criticism unless it is incorporated into the criticism itself. It would be possible, however, to claim that the copy supplied to the person intending to engage in criticism is made for the purpose of research that may or may not lead to criticism."

35 *CCH*, *supra* note 4 at para. 58 (referring to *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at 264). The Court in *Channel Four*, *supra* note 31, concluded that once a work is published, or in the context of film, distributed widely and available in the public sphere for consumption, it must be considered "fair game" to criticism or review. See also, Handa, *supra* note 32 at 307, where (citing *Harper & Row Publishers v. Naion Enterprises*, (1985) 471 U.S. 539) Handa states that the court did not create an absolute privacy-based rule that would disallow publication in every case where unpublished works are concerned.

36 See, e.g., *Lion Laboratories Ltd. v. Evans* [1984] W.L.R. 539 (C.A.) [*Lion Laboratories*] where the reproduction of copyrighted information about malfunctioning breathalyzer machines was held to be justified despite the material's confidential nature and the fact that it was protected by copyright. The Court concluded its dissemination was in the public interest. Interestingly, the court did not rely upon the fair dealing defense to reach this conclusion, but instead borrowed from the law of confidences to apply a "public interest" defense. See also Copyright Board, *K-12* (2009), *supra* note 21 at para. 108, where the Board, when comparing the relative public interest concerns raised by access to classroom material and access to legal resources, distinguished between the two by noting that classroom material was created by using private resources, rather than the decisions of the Supreme Court that are compiled by private publishers but are created using public resources. As well, the Board noted that while there is "rarely an alternative to the most recent judgment of the Supreme Court; a textbook can always be replaced with other teaching support resources." See also Sheldon Burshtein, "Supreme Court of Canada Speaks on Copyright" *The Licensing Journal* (November/December 2004) 1 at 5: "If a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work, one of the goals of copyright law." [Burshtein]. See also Handa, *supra* note 32 at 307, where Handa states that the Court unequivocally stated that fair use must be applied in context of the stated goals of copyright law. The Court takes into consideration those aspects of liberty and freedom as well. See also, Craig, unpublished, *supra* note 20 at 75, where Craig also emphasizes that the right of free expression is essential for the working of a parliamentary democracy such as ours, for the search for truth, and for achieving personal fulfillment.

37 *CCH*, *supra* note 4. at para. 72 and 59 (referring to *Pro Sieben*, *supra* note 21, *per* Robert Walker L.J.). See also Copyright Board, *K-12* (2009), *supra* note 21 at para. 113, where the Board, in its assessment of the "[e]ffect of the dealing on the work," noted that: "... a systematic practice that competes with the market of the original must not be permitted, regardless of whether downstream dealings fall under the fair dealing exception." However, see Burshtein, *ibid.* at 5: "While the effect of the dealing on the work is another factor warranting consideration, it is neither the only factor nor the most important factor"; and D'Agostino, *supra* note 21 at 323: "In underscoring that the market factor 'is neither the only factor nor the most important factor,' the Court seemed to suggest that this factor is less important than the others." See also Handa, *supra* note 32 at 299, where (citing *Zamacois*, *supra* note 18) Handa had also stated before *CCH* that the likelihood of competition between the two works would have to be considered to determine whether a dealing with a particular work is fair; see also at 291.

acquire a license, has any bearing on the fairness of the dealing or the applicability of the defence.³⁸ Each case depends on its own particular facts.

3. Where required, has the author and source been mentioned?

When engaging in fair dealing for purposes of criticism, review or news reporting (but not for private study or research), the *Copyright Act* imposes the additional requirement to “mention” the source and (if given in the source) the author of the work.³⁹ Again, no matter how fair the dealing, if the filmmaker neglects to mention the source and author, then the defence is unavailable to those engaged in criticism, review or news summary.⁴⁰

The use of credits at the end of documentary films, or onscreen captions, should satisfy this obligation. Oral attribution through voiceovers also likely fulfils this requirement. However, it is not clear what other kinds of attribution satisfy the requirement to “mention” source and author.⁴¹ On the one hand, the Act’s use of a casual term (“mention”) signals that it requires something less than academic standards of attribution.⁴² On the other hand, at least one court has held that a parody does not intrinsically “mention” its target despite having successfully conjured up that target.⁴³ Further, it is not clear how a simple photograph or musical work can “mention” an author or source. Elsewhere, documentary filmmakers have called for the repeal of this requirement.⁴⁴ Until such time as it is repealed, however, documentary filmmakers should be vigilant with their credits and captions.

38 *CCH*, *supra* note 4 at para. 70:

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner’s monopoly over the use of his or her work in a manner that would not be consistent with the Copyright Act’s balance between owner’s rights and user’s interests.

39 *Copyright Act*, *supra* note 7, ss. 29.1 – 29.2.

40 *Michelin*, *supra* note 21; *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, 2001 BCSC 156, [2001] B.C.W.L.D. 404, 85 B.C.L.R. (3d) 302, [2001] 4 W.W.R. 95, 10 C.P.R. (4th) 423, [2001] B.C.J. No. 151 [BCAA].

41 *Vaver*, *supra* note 21 at 197; *Michelin*, *ibid.* at 383. In *Pro Sieben*, *supra* note 21 at 618, the Court found that an on-screen title mentioning the name of the programme an interview excerpt was taken from along with the on-screen logo of the television company that owned the programme – in this case the revolving number “7” logo included on all Pro Sieben programming – was sufficient to credit both the source and author of the work.

42 *Vaver*, *ibid.* See also Richard, *supra* note 21 at 8, where he suggests that a fair interpretation of the word “source” should include the name of the author and title, or any other useful description of the work.

43 *Michelin*, *supra* note 21 at 383; Normand Tamaro, *The 2009 Annotated Copyright Act* (Toronto: Thomson Canada Limited 2008) at 537 [Tamaro].

44 Knopf, *DOC White Paper*, *supra* note 3.

Guidelines

These Guidelines are organized around four classes of dealings that documentary filmmakers regularly engage and regard as legal, fair, and not requiring clearance. These Guidelines offer, for each class of dealing, (1) a description of the dealing followed by (2) an outline of the principles that support the legality of the dealing and (3) a discussion of the Guideline's applicable limitations. These Guidelines will also comment on the differences between American "fair use" and Canadian "fair dealing" where doing so will help clarify the nature of the dealing, legal principle, or limitation at issue.

Documentary filmmakers may encounter situations other than those addressed in these Guidelines which might also qualify as fair dealings with copyrighted materials. In every case, a documentary filmmaker must carefully consider the facts of the dealing to determine whether the dealing ultimately falls within the ambit of an exception to copyright infringement.

One: The non-deliberate filming of copyrighted material (captured during the process of filming something else)

Description: It is typical for documentary filmmakers to unintentionally capture copyrighted content in the background of what is being filmed (e.g., posters on the wall, cell phone ring tones, the playing of a song on a stereo/radio, the playing of a movie/television program, etc.). In many cases it is difficult, if not impossible, to avoid capturing copyright-protected materials when filming. Eliminating these materials from a film (e.g., asking a subject to turn off a radio, remove a poster from his wall, etc.) forces the filmmakers to alter the reality being documented.

Principle: The filming of these materials should be recognized as an "incidental inclusion" of copyrighted material, and thus an exception to copyright infringement under the *Copyright Act*.⁴⁵ This exception will apply to these practices where two conditions are met: the inclusion of the copyrighted work must be (1) *incidental*, and (2) not *deliberate*. Courts have interpreted "incidental" to mean an activity that is "casual, inessential, subordinate to a principal activity, or merely background".⁴⁶ This definition encompasses materials that appear in the background of a documentary, are of limited importance, and not the main focus of a film or subject of a scene. The Supreme Court of Canada has defined the term "deliberate" in the criminal law context to mean "considered, not impulsive", and that is a reasonable interpretation of the *Copyright Act's* use of the term.⁴⁷ The "deliberateness" requirement applies to the inclusion of content, not the setting.⁴⁸ One might deliberately select a specific setting for a scene – say,

⁴⁵ *Copyright Act*, *supra* note 7 at s. 30.7.

⁴⁶ *IPC Magazines Ltd v. MGN Ltd.*, [1998] F.S.R. 431 at 441 (Ch.); Vaver, *supra* note 21 at 180. See also, Handa, *supra* note 32 at 284, where he observes that a person may include a work in another work, provided that it is done incidentally and not deliberately.

⁴⁷ *More v. R.*, 1 C.R. 98, [1963] S.C.R. 522, [1963] 3 C.C.C. 289, 41 D.L.R. (2d) 380 at 35.

⁴⁸ Section 30.7 of the *Copyright Act*, *supra* note 7, stipulates that the work itself must not be deliberately included in another work or subject matter. Similarly, deliberateness or a deliberate inclusion is defined by the UK broadcaster, Channel 4, as content specifically added to or included in the final edit

Yonge Street at midday – without also having deliberately selected the logos and billboards that will inevitably be included in the scene. Considered purposively, the intent of the exception is to prevent copyright from having oppressive effects: where incidentally included work merely occupies the background and is not the subject of the film or scene, the exception will apply; where the included work functions as an essential and important feature of the film or scene, stepping out of the background to serve as subject, the exception has no application.⁴⁹

Limitations:

- The inclusion of copyrighted material (other than buildings and sculptures) must be both incidental, and not deliberate.⁵⁰
- Canadian documentary filmmakers should also be aware that the United States does not have comparable “incidental use” or “public space” provisions in its *Copyright Act*. Instead, filmmakers should rely on the fair use defence under US law. See the *Documentary Filmmakers’ Statement of Best Practices in Fair Use* for its discussion of this practice.⁵¹

Two: Using copyrighted material when documenting a newsworthy occurrence (whether current or historical)

Description: Documentaries frequently detail newsworthy events. Factually accurate documentaries often need to include copyrighted materials such as segments from an infamous speech, or scenes that appeared on news broadcasts during an historic or newsworthy event. Many documentaries tell important parts of Canadian history, and serve an important role in educating the public about current affairs and historical events. In order to accurately detail these newsworthy events, it is necessary that documentary filmmakers be able to make use of copyrighted materials that are essential to recounting them.

Principle: The use of copyrighted materials in this fashion should generally be considered fair dealing for purposes of news reporting where the filmmaker meets the additional requirement of mentioning the source and (if available) the author of the material.⁵² “News reporting” is a general category of fair dealing. What qualifies as “news” extends beyond what might appear on the 6:00 o’clock evening news: depiction of current affairs, public interest stories, and investigative

(i.e. is traced to decisions made in the edit suite). “Independent Producer Handbook: Channel 4 and Five” *Channel 4 Television* (2008), online: Independent Producer Handbook Homepage <<http://www.independentproducerhandbook.co.uk>> at 87.

49 Elizabeth F. Judge and Daniel Gervais, *Intellectual Property: The Law in Canada* (Toronto: Carswell, 2005) at 98; Knopf, *DOC White Paper*, *supra* note 3 at 20-21; and Vaver, *supra* note 21 at 180.

50 See discussion above.

51 “Statement of Best Practices in Fair Use”, *supra* note 1 at 5.

52 *Copyright Act*, *supra* note 7 at s. 29.2.

journalism also qualify as “news reporting” for the purposes of fair dealing.⁵³ Determination of the reach of this branch of the fair dealing exception is a question of judgment, which must take into account the public interest.⁵⁴ Fair dealings for the purposes of “news reporting” obviously include those cases in which the reproduced content is the subject of the reporting, but also include historical and other content relevant to the subject of the reporting. The content itself need not be the subject of the reporting, so long as the purpose of its reproduction is to aid in the presentation of the reporting.⁵⁵

Limitations: In addition to heeding the six factors of “fairness”, documentary filmmakers are best positioned to assert a claim of fair dealing for purposes of news reporting where:⁵⁶

- The dealing reports news in a manner that has relevance for contemporary Canadians; dealings with content for the purpose of purely recounting history are better defended as fair dealings for the purposes of review or criticism (see Guideline Three, below).⁵⁷
- The copyrighted materials are (objectively) reproduced for purposes of news reporting, as opposed to gaining a competitive advantage over the copyright holder.
- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned. Source citation is not a condition of fair use in the United States.
- The use of the material in the documentary is not such as to substitute for the market of the original copyrighted work.

53 *Fraser v. Evans*, [1969] 1 Q.B. 349 (C.A.) (reproduction of information obtained in preparation for a governmental report); *Allen*, *supra* note 22 (photographic reproduction of a magazine cover featuring Sheila Copps was held to qualify as newspaper summary under s. 27(2)(a) (now s.29.2) of the *Copyright Act*). For exploration of the scope of “news” reporting, see *Marks & Spencer*, *supra* note 24.

54 Vaver, *supra* note 21 at 188-190. See also *Lion Laboratories*, *supra* note 36. For an extended discussion on the public interest in copyright law, see Handa, *supra* note 32 at 318, where Handa states that the common law defense of public interest may be applied to balance the public interest aspect of copyright law with the economic rights claim of the author although this is a peculiar result in the context of copyright proceedings. See also at 308 where Handa states that a public interest concern is not a licence to infringe a work and that the public interest concept in copyright law is a complex concept. It is not to be used liberally as a copyright override wherever there is a public interest concern. See also, Craig, “Dissolving the Conflict”, *supra* note 21 at 111, where Craig states that the copyright owner’s rights exist only through that public interest and cannot be justified in spite of it. See also at 112, where Craig states that copyright must not be private property because characterizing it as private property pits the copyright system against freedom of expression and copyright ought not to be so characterized. Conceptualizing copyright as inherently in conflict with free expression undermines copyright’s own rationales and threatens its internal coherence. To conclude that copyright trumps free expression is to deprive copyright of its justification and to render incoherent a public interest based theory of copyright.

55 *Allen*, *supra* note 22.

56 Vaver, *supra* note 21 at 191-194.

57 *Ibid.* at 194.

Three: Using a copyrighted material for the purpose of critiquing or reviewing either the composition of the material, or the views expressed in the material

Description: Documentary filmmakers often make use of clips from a film, quotations from a literary work, *etc.*, in order to engage in a critical analysis of either the composition of a given work (*e.g.*, film clips that illustrate the shoddy editing of a movie) or the views expressed within that work (*e.g.*, making use of segments of a copyrighted work in order to criticize its homophobic/misogynist overtones).⁵⁸ Film makers may also reproduce content for the simple purposes of reviewing what was said or done in that content (*e.g.*, reproducing an interview clip to establish that an individual stated a certain position).⁵⁹

Principle: The use of copyrighted content in this fashion qualifies as fair dealing for the purposes of criticism or review so long as the dealing is fair and the film maker mentions the source and author of the copyrighted work. The courts have interpreted “criticism” to involve critical assessment, analyzing and judging merit or quality.⁶⁰ Criticism in this sense is equally available to one who criticizes the merit, form or structure of a work – in the sense of literary or film criticism – and to one who criticizes the ideas expressed in a work.⁶¹ “Review” similarly includes dealings that survey or portray past events or facts.⁶²

Recent case law suggests that parody, when it comments bitingly on its target, may amount to criticism that qualifies as fair dealing.⁶³ A critique does not have to be serious or learned; critique may also be humorous or funny by virtue of amplification, deformation or exaggeration of a subject work.⁶⁴ Nor do criticisms need be communicated to the public in order to qualify for the defence.⁶⁵ However, copying a work with the intent of profiting from its popularity does not amount

58 *Hubbard, supra* note 21; and *Hager, supra* note 21.

59 In addition, Copyright Board, *K-12* (2009), *supra* note 21 at para. 92, clarifies that section 29.1 of the *Copyright Act* “applies solely to the dealing carried out in the context of criticism itself.” This point is illustrated by considering a music columnist who copies an entire album, or a number of individual works, and then criticizes a single song. The copies of the other songs that were not criticized, while not justifiable via s. 29.1, could be said to have been made: “for the purpose of research – research in contemplation of criticism.”

60 *Ibid.* at 194. With respect to its “ordinary meaning”, *The Oxford English Dictionary*, online edition, defines “criticism” as “the action of criticizing, or passing judgment upon the qualities or merits of anything; *esp.* the passing of unfavourable judgment; fault-finding, censure” online: Oxford English Dictionary <<http://www.oed.com/>> [OED].

61 *BCAA, supra* note 40. In the UK context the court in *Channel Four, supra* note 21 at 12, affirmed that “criticism” is to be construed expansively. The criticism need not be directed at a specific work or to the style of the work; it can also be directed at the thought and philosophy behind the work. See also *Hubbard, supra* note 21.

62 *Vaver, supra* note 21 at 194. With respect to the “ordinary meaning” of “review”, *The Oxford English Dictionary*, online ed. defines “review” as “to survey; to take a survey of” and “to look back upon; to regard or survey in retrospection”; *OED supra* note 60.

63 *Favreau, supra* note 21.

64 *Ibid* at para. 69; *Tamaro, supra* note 43 at 545.

65 Copyright Board, *K-12* (2009), *supra* note 21 at para. 93.

to criticism supporting a parody defence.⁶⁶ Filmmakers should be aware that the “parody defence” has never been successfully applied in Canada. American law, in contrast, recognizes parody and satire as forms of criticism that may qualify as “fair use” of copyrighted material.⁶⁷

Limitations: To support the claim that a use of this kind is fair, a documentary filmmaker should adhere to the six “fairness factors,” and be able to show that:

- The criticism or review of a copyrighted work is (objectively) more than simply a condensed version of the copyrighted work.⁶⁸
- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned. Note that this requirement is absent from US law.⁶⁹
- The criticism or review does not take the original work’s place in the market. The more that a work encroaches upon the market of a copyrighted work, the less likely it is to be deemed to be fair.⁷⁰ This does not mean that a work can never fairly undermine the original work’s market; for example, a critical review of a movie might keep consumers from viewing that movie (the original work) but this does not make the dealing unfair.⁷¹
- If a parody, the parody offers genuine commentary on or critique through humorous amplification, deformation or exaggeration of its target. The parody must be genuinely critical and not a parasite on the popularity of the target.⁷²

66 *Ibid* at para. 6.

67 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994). See also Vaver, *supra* note 21. For contrast to this American approach, see Handa, *supra* note 32 at 289, where (citing *Michelin*, *supra* note 21) he observes that Canadian courts have consistently interpreted the scope of the five listed fair dealing purposes narrowly.

68 *R. v. James Lorimer & Co. Ltd.*, [1984] 1 F.C. 1065 at 1077 [*Lorimer*]. See also Handa, *supra* note 32 at 300, where (citing *Breen v. Hancock House Publishers Ltd.*, [1985] 6 C.I.P.R. (3d) 433 (F.C.T.D.)) Handa asserts that merely summarizing a work without the addition of some further comment does not constitute a fair dealing. See also Richard, *supra* note 21 at 4, where he states that fair dealing for purpose of review requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author’s name. See also at 5, where Richard states that to reproduce in totality an article from a literary journal for the purpose of reviewing it has been held not to be fair dealing.

69 Vaver, *supra* note 21 at 191.

70 *CCH*, *supra* note 4 at para. 59. See also Handa, *supra* note 32 at 291, where Handa states that the Court also considers the nature of the dealing and what impact it would have on the market for the plaintiff’s work, and at 299, where (citing *Allen*, *supra* note 22) Handa states that “in considering whether a dealing with a particular work is fair, it would have to be considered whether any competition is likely to exist between the two works.” See also at 314, where Handa states that because untouched markets are always potentially within the contemplation of the rights holder, a court will be more interested in the effect of the copying on existing markets.

71 Vaver, *supra* note 21 at 199. See also see Burshtein, *supra* note 37 at 5: “While the effect of the dealing on the work is another factor warranting consideration, it is neither the only factor nor the most important factor.” See also Handa, *supra* note 32 at 299, where Handa states because the fundamental goal of copyright is to promote further creation and to disseminate information, under the fair dealing doctrine, a party, other than the original work’s copyright holder, who is willing to disseminate a work must not be absolutely prevented from doing so if the copyright holder has not done so. Handa also states that it is reasonable to expect that a more balanced approach will be adopted in Canada.

72 *Favreau*, *supra* note 21.

Four: Using a copyrighted work for the purpose of criticizing or reviewing different material

Description: A documentary filmmaker's purpose in making a given film may be to criticize or review its subject matter. This subject matter may be another film or other copyright protected work, or it may be the actions or ideas of another individual or group. The filmmaker may pursue that purpose through the reproduction of content that is not the subject of the criticism or review. Typically, filmmakers do so for the purposes of contrast, clarification, illustration or explication. For example, in criticizing a particular special effect, a documentary filmmaker might make use of clips from several copyrighted works that contain superior effects. Similarly, a filmmaker may use clips from a film to criticizing a film distributor's decision to stop exhibiting a film. In all of these cases, the filmmaker criticizes or reviews the film's subject matter through contrast, clarification, illustration or explication of the actions, style, philosophy, or viewpoint of another subject.

Principle: Fair dealing for the purpose of criticism or review does not require that the dealing relate specifically to the copied work.⁷³ A documentary filmmaker may therefore criticize a given work by quoting both from that work and from additional works, without infringing copyright in any of them. As a result, provided the filmmaker mentions the author and source, a filmmaker may rely on fair dealing to quote from other works for illustrative or comparative purposes in furtherance of criticism and review. Documentary filmmakers can similarly make use of a copyrighted work in furtherance of criticism or review of an individual's or group's philosophy, style, views or actions.⁷⁴

⁷³ *Hubbard, supra* note 21.

⁷⁴ *Ibid.* Megaw L.J. writes at 98:

Counsel for the plaintiffs did not suggest that "criticism" in this subsection was confined to what I would call literary criticism; that is to say, criticism of the style – the literary style – of the work in question. But if it is not confined to that, it must surely then cover criticism of the ideas, the thoughts, expressed by the work in question – the subject-matter of the work.

See also McKeown, *supra* note 21 at 23-13, where McKeown states that the fair dealing for the purpose of criticism is not so limited.

Limitations: In addition to adhering to the six “fairness” factors, a documentary filmmaker must ensure that:

- The criticism or review of a copyrighted work is (objectively) more than simply a condensed version of the copyrighted work.⁷⁵
- The source of the work (and author, performer, maker or broadcaster if given in the source) is mentioned.⁷⁶ Note that this requirement is absent from US law.⁷⁷
- The criticism or review does not take the original work’s place in the market. The more that a work encroaches upon the market of a copyrighted work, the less likely it is to be deemed to be fair.⁷⁸

Conclusion & Additional Considerations

The four dealings outlined in these Guidelines do not exhaust the scope of situations that do not require copyright clearance. In addition to uses that qualify as fair dealings and incidental inclusions, other dealings with content do not require copyright clearance. These include the use of an insubstantial part of a copyrighted material, and the use of materials in the public domain.

Use of Copyrighted Material that Does Not Constitute a Substantial Part of the Material

Under the Canadian *Copyright Act*, a copyright owner has the exclusive right to reproduce any substantial part of his work. Therefore, if a documentary filmmaker’s use of a copyrighted material does not amount to a substantial part of the work from which it was taken, it will not infringe copyright, and there is no need to rely on the fair dealing or incidental use provisions in the *Copyright Act*.⁷⁹ The term “substantial part” refers to both a quantitative and a qualitative element. That is, there is no strict percentage that needs to be shown to demonstrate the use of a “substantial part” of a work; even a quantitatively small portion of the

75 *Sillitoe*, *supra* note 30; *Lorimer*, *supra* note 68. See also, Richard, *supra* note 21 at 4, where Richard states that review requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author’s name.

76 *Copyright Act*, *supra* note 7 at s. 29.1.

77 “Statement of Best Practices in Fair Use”, *supra* note 1; Tamaro, *supra* note 43 at 539.

78 Tamaro, *supra* note 43 at 540; *Zamacois*, *supra* note 18; *Hager*, *supra* note 21.

79 *Copyright Act*, *supra* note 7 at s. 3 (1); *Application by John E. Marriott, Canmore, Alberta, for the reproduction of the quotation from the book entitled “The Banff-Jasper Highway”, written by Mabel Bertha Williams* (11 June 2007), Copyright Board of Canada Decision 2007-UO/TI-22, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/unlocatable-introuvables/other-autre/7-b.pdf>>. Also see *CCH*, *supra* note 4 at para 56.

work that represents an essential part of a work, or its core, may be considered to be a substantial part.⁸⁰

Materials in the Public Domain

A documentary filmmaker can also make use of materials for which the term of copyright has expired. The *Copyright Act* provides that the term for which copyright subsists, except as otherwise expressly provided for in the Act, is the life of the author, the remainder of the calendar year in which the author dies, and a period of 50 years following the end of that calendar year.⁸¹ For example, the term of copyright for an author who died on 1 January, 1989, will expire immediately after midnight on 31 December, 2039. Some works have terms other than the general. In Canada, photographs are subject to the general term unless the author was deemed at law to be a corporation, in which case the term of protection extends from the date of the making of the negative or initial photograph to end of that year, plus an additional 50 years.⁸² Films that lack a dramatic character (e.g., journalism, home movies, etc.) are protected for a straight fifty-year period running from when the film was made. If, however, the film was first published during this period, the copyright is prolonged to fifty years from the end of the calendar year of the first publication.⁸³

Filmmakers should be aware that copyright terms are not uniform worldwide. Europe and the United States both recently increased their standard terms of protection to 70 years past the author's death. In each case, a filmmaker must abide by the laws in force in the country.⁸⁴

80 Vaver, *supra* note 21 at 145, (courts often determine whether a taking is substantial by looking at what the ordinary buyer or user would think and whether a distinctive part of the original work has been used); *Jarvis v. A & M Records Inc.*, 827 F. Supp. 282 (D.N.J. 1993); *G. Ricordi & Co. (London) Ltd. v. Clayton & Waller Ltd.* (1930), [1928-1935] MacG. Cop. Cas. 154 (Ch.); and "Is Fair Use Fair Dealing?" *Copyright and New Media Law Newsletter* Vol. 4 (2000), Issue 4 at 3 (substantiality "depends on the nature of reproduction and is also a matter of degree, in terms of both the quality and quantity of the work used.") See also, Handa, *supra* note 32 at 304, where (citing *University of London Press Ltd. v. University Tutorial Press Ltd.* (1916), 2 Ch. 601) Handa states that when the defendants do not add sufficiently to the copied work and the original product was not simply collateral to the infringing product, but it was its very essence the court found an infringement. See also at 314, where (citing *Sega Enterprises Ltd. v. Accolade Inc.* (1992), 24 U.S.P.Q.2d 1561) Handa states that, notwithstanding that entire works were copied, the purpose of copying the entire work was incidental to its desired use, and, since the desired use was not directed at copying the work; the fact that the entire work was copied was "of very little weight".

81 *Copyright Act*, *supra* note 7 at s. 6. For an extended discussion of the value of the public domain and its role in achieving the public interest purpose of copyright law in fostering innovation and creativity, and in the dissemination, access to and use of copyrighted (and expressive) works, see: Bailey, *supra* note 21; Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437; Carys Craig, "The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest" (2005) 2 *University of Ottawa Law & Technology Journal* 425; and David Fewer, "Constitutionalizing Copyright" (1997) 55(2) *U.T. Fac. L. Rev.* 175.

82 *Copyright Act*, *supra* note 7 at s.10.

83 *Ibid.* at s. 11.1.

84 For the applicable American law, see: *Copyright Act* s. 101, 17 U.S.C s302(a) (1976). A European Union directive mandates all member countries to extend the copyrights of an author to 70 years past her death, see EC, *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*, [1993] O.J.L 290/9, art.1(1).

Appendix

Copyright and Fair Dealing: A Summary of the Guidelines for Documentary Filmmakers

Clearance of a clip will not be required where:

- The dealing involves the incidental and non-deliberate inclusion of a work (whether audio or visual) in the background of a film.
- The dealing involves a reproduction of a building or sculpture permanently situated in public in a film.
- The dealing involves a work that is in the public domain.
- The dealing involves a non-substantial part of a work.

Clearance will not be required where the fair dealing defense applies:

- The dealing is for a purpose falling within one of the five eligible categories of dealings; and
- The dealing is fair; and
- In the case of dealings for purposes of news reporting, criticism and review, one mentions the source and the author (if given in the source).

Categories of dealings that qualify for the fair dealing defense include:

- Research
- Private study
- Criticism, either of the work itself or of another subject. Criticism can include parody where the parody involves *bona fide* criticism (although this point remains controversial under Canadian law).
- Review
- News reporting

The “fairness” of a dealing depends upon the circumstances.

Courts will have regard to the following criteria:

- The purpose of the dealing.
- The character of the dealing: the custom or practice in a particular trade or industry may assist in determining whether or not the character of the dealing is fair.
- The amount of the dealing: fairer dealings tend to copy less, although it is possible to fairly copy an entire (*e.g.*, artistic works and photographs).
- Alternatives to the dealing: Was it necessary to copy the work to achieve the filmmaker’s purpose?
- The nature of the work: Courts frown on dealings with unpublished content, but even confidential documents may be fairly dealt with where doing so serves the goals of freedom of expression.
- The Effect of the Dealing on the Work: A film that substitutes for the market of the original work is less likely to be fair. The availability of a license is irrelevant to the question of the fairness of the dealing.

The Requirement to Mention Author and Source

The requirement to “mention” the source and the author (if given in the source) may be met by an appropriate credit.



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