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## Assignment #2: Fair Use in the News

### Part One:

In 2013, director Rodney Ascher released *Room 237*, a documentary exploring fan theories about Stanley Kubrick's *The Shining*. Voiceover interpretations of the film are presented with visuals from the film. In a risky move for a documentarian, Ascher made the choice to exclusively rely on fair use for the content from *The Shining*. He did not attempt to negotiate with Warner Brothers, the rights holder of the film, nor pay them a licensing fee. While there was speculation that Warner Brothers might sue for copyright infringement, they never pursued the issue. *Room 237* was released widely and is currently available for streaming on Netflix. Given the success of Ascher's approach, it is likely that other documentarians will be inspired to rely on fair use for the materials used in their movies. However, without a precedent established through litigation, the legality of the approach is unclear.

Prior to the movie's release, Ascher sought out legal assistance for advice in rights clearing. Asked in an interview about the difficulty of releasing a film with so many clips from copyrighted works, Ascher responded,

“...At the rough cut point, when it seemed to be coming together, we both started looking around for precedents where other people had done sort of similar things. And there are a couple out there. And then our executive

producers came on board: P. David Eversoll and Todd Hughes. They had just finished their movie [\*Hit So Hard\*](#), about Patty Schemel, the drummer from Hole, and they had really gone through clearance boot camp for that thing. There's a lot of pop music in it, and TV clips and things, so they were a giant help in holding our hands through the clearance process" (Ascher, qtd. in Tully).

He continues to say that, while some of the footage used in the film is licensed or in the public domain, much of it is fair use. While he does not go into the specifics of why he believes his use qualifies as fair, one can imagine that he would cite criticism's inclusion in Section 107 as a fair use of copyrighted work.

Warner Brothers did not make a public statement about whether or not they believe the use of *The Shining* was legal. However, one might imagine that they, as the copyright holder, could have asserted their exclusive right to authorize derivative works. *Room 237* could not exist without *The Shining*. Warner Brothers could also argue that there was an adverse market impact. A documentary on critical interpretations of *The Shining* might be a natural feature for them to create as a DVD special feature.

Four factors are considered with determining fair use: purpose, nature, amount, and market impact. I would argue that *Room 237*'s use is transformative. The film's intention was to examine how fans interact with a piece of art, which necessitates referencing a work but does not recreate the unmediated experience of viewing that work. *Room 237* also made important transformations by editing the clips used. As one reviewer notes, "...A great many clips from the Warner Bros.

release are run, slowed, halted, backed up, blown up, and overwritten as support for the interviewees' claims" (Bordwell). These edits allow a viewer to explore the footage in a different way, transforming it.

The second factor is the nature of the copyrighted work. This would potentially weight against *Room 237* because *The Shining* is a creative work. The original movie is available to the public through rental or purchase.

The amount of material used would also potentially support an infringement claim by Warner Brothers. The movie relies heavily on visual footage from *The Shining*, never showing the interviewees discussing the film. Warner Brothers could argue that the amount of material shown is in excess of what was needed for the critical purpose of the film. However, Ascher and the distribution company, IFC Midnight, could argue that deemphasizing the interviewees and showing instead footage from *The Shining* makes the critical interpretations easier to understand. This makes the quantity of footage necessary for their purpose.

The last consideration is market impact. I would argue that *Room 237* has a positive impact on *The Shining's* market value, if any. To fully appreciate *Room 237*, one would have to first watch *The Shining*. Those who watch *Room 237* would therefore have already contributed to the market value of *The Shining* by having seen it in a theater or as a rental. As homage to *The Shining* and its fans, *Room 237* might also inspire more people to seek out the film on which it is based.

Considering the factors as a whole, I think the courts would interpret *Room 237's* use of clips to be fair use. The critical purpose of the film, coupled with a lack

of demonstrable market value harm would outweigh the quantity of footage used and the creative nature of the copyrighted material.

#### Part Two:

A potential issue for archives is owning materials that contain unlicensed copyrighted elements. Archives are increasingly collecting “orphan” content like home movies that might not have been intended for commercial distribution. Amateur content creators are unlikely to have the money or knowledge to seek rights clearances for copyrighted materials like music or graphics on a t-shirt. Such amateur content might be donated to an archive along with its copyright. However, at an archive, the movies can find a wider audience. For example, the archive may want to lend the item for a screening. Increased access might bring the work to the attention of the underlying rights holder, who could sue for copyright infringement. In this case, an archive might be able to use the affirmative fair use defense.

In this situation, *Lenz vs. Universal Music* could serve as precedence for fair use. In that case, a mother posted a video of her baby dancing to a Prince song. Although the song is protected by copyright, it was sufficiently transformed by being in the background of the video, incomplete and with terrible audio quality. When deciding whether or not to screen a work with missing underlying rights clearances, an archive can consider the four factors. First, purpose: the archive could argue that screening the material serves an educational or scholarly purpose. Archival footage is often useful to gain a historical sense of a time period. This purpose would likely be different from the original, commercial purpose of the underlying work. This

factor would support a fair use conclusion. The second factor is nature. An underlying work, like a song, might be very creative; this factor would potentially lean away from fair use. The third factor, amount, would vary by item. To take less risk, an archive might want to screen materials in which copyrighted works are not featured in their entirety. The final factor is market impact. A screening is an ephemeral event. For this reason, it would not replace the need to buy the copyrighted work for sustained access. There would be little market impact. Works would have to be evaluated on a case-by-case basis, but fair use could be a valid affirmative defense for archives looking to screen movies with incomplete rights clearances.

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