

Abraham Farlan: Be careful, Doctor Reeves. In the whole Universe, nothing is stronger than The Law.

Doctor Frank Reeves: Yes, Mr. Farlan, nothing is stronger than The Law in the Universe, but on Earth nothing is stronger than Love.

- A Matter of Life and Death (1946)

*“I would like to leave the topic of process by stating something that I hope is uncontroversial. The issues of authors are intertwined with the interests of the public. **As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation.** In the words of the Supreme Court, “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”*

- Maria A. Pallante, *The Next Great Copyright Act*

“Fair use is primarily intended to allow the use of copyright-protected works for commentary, parody, news reporting, research and education.”¹

Where do the emotions, love, devotion and the quotidian experiences of expressive culture fit into copyright law? J. Burnstein defines “expressive culture” as “processes, emotions, and ideas bound within the social production of aesthetic forms

¹ § 107 . *Limitations on exclusive rights: Fair use*⁴⁰

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

and performances in everyday life. It is a way to embody culture and express culture through sensory experiences such as dance, music, literature, visual media, and theater.”²

Considering the definition above, the area of copyright law I would like to reform or reimagine would be to extend the principles of § 107. *Limitations on exclusive rights: Fair Use*, to be more inclusive of emotive, fictional and expressive artistic creation and use.

I believe that Fair Use is a critical part of copyright law and that its limitations on exclusive rights fosters creativity in both makers and, conversely, in users or audiences of cultural works. As Pallante argues, “(t)he issues of authors are intertwined with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation...” I would like to suggest that “the public good” includes supporting affective audiences and users, like artists, students, community groups and fans, whose creations utilize copyrighted materials. But for the layman user/creator, the task of determining if a work containing unlicensed material is infringing via the application of the four factors, is unduly complex and then, paradoxically, inhibiting to free expression based on previous works.

The expressive, cultural groups that I feel are neglected--rather than harmed--by the current law include specific types of users like:

~**Appropriation artists** and designers, especially those creating fictional or personal works rather than documentary, educational, academic or scholarly/scientific texts, in mediums that include photographic and reproductive processes and media including

² www.socstrpr.org/wp-content/uploads/2014/09/MS06512Burstein.pdf

printmaking, collage, and audio/visual montage. I'm also thinking of soundtracks that are made from needle-drops on commercial recordings, remixes, supercuts and mixtapes.

~**Community groups** and

~**Fans, enthusiasts, amateurs and collectors:** including people making and sharing mix tapes, and montages and mash-ups/supercuts and remakes.

~**The Bereaved,** ie. Individuals creating audio/visual, photographic and moving images used in funeral and memorial services and shared on social media.

~**Design/Art students and apprentices,** or users remaking, remixing or copying to learn software and editing techniques, for instance or trainees learning a medium through copying (and where attributions are not incorporated into design).

The § 107 limitations and especially the § 108 Library and Archives exceptions give priority to research and works that are scholarly or academic, but, I think it is equally important to articulate the protection available for creative expression whose outcome is not based on facts or “science” but on the imagination. These would include hybrid, subjective genres like personal documentaries, essay films and “fake/false” documentaries.

My reforms would be modeled upon the principles developed in the *Documentary Filmmakers' Statement of Best Practices in Fair Use* extending the doctrines to fictional and personal art practices or to works that might be representative of expressive culture; i.e. arts and crafts incorporating and/or appropriating popular culture imagery by ethnic and racial and other communities.

The Best Practices Guidelines define what is valuable and unique about the documentary process and further outlines the exact needs of the discipline in relation to

copyright. Importantly, they respond precisely to the four factors of Fair Use, providing support to documentarians in applying the §107 limitations reflective of presumed commonalities in the field:

*“Another consideration underlies and influences the way in which these questions are analyzed: **Whether the user acted reasonably and in good faith, in light of general practice in his or her particular field.** In the future, filmmakers’ ability to rely on fair use will be further enhanced by the Statement of Best Practices in Fair Use that follows. This statement serves as evidence of commonly held understandings in documentary practice and helps to demonstrate the reasonableness of uses that fall within its principles.”³*

This same methodology could be used to consider practices that are somewhat outlying. While it would be very complicated to create a set of principles that are common to the needs of the disparate disciplines I’ve listed, I think that these groups of users and creators (or maybe it is more precisely a hybrid *user/creator*) like collagists, fans, community groups and mourners are unified by an explicit or implicit evocation of *The Commons* (as in Creative Commons).⁴

At the heart of my reform idea is the idea that “the user acted reasonably and in good faith, in light of general practice in his or her particular field.” I will try to give a few examples.

For self-identified appropriation artists, the application of the first factor, “Employing copyrighted material as the object of social, political, or cultural critique.” could be helpful in qualifying the re-use of unlicensed images.

However, the 1st limitation in the *Best Practices* warns that, “(t)he use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a

³ *Documentary Filmmakers’ Statement of Best Practices in Fair Use*

⁴ So maybe what I am saying in short is that my reform would actually include Creative Commons and Doc Best Practices as Copyright law!

way of satisfying the audience's taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work “

An appropriation work or remix or a trainees re-edit might be exactly about using a large amount of the copyrighted material⁵ in order enjoy or be in conversation with the original work.

In an apprenticeship, or for students and trainees, being able to use and recut copyrighted visual/audio material to practice and to make new films, free from concerns about infringement is critical, allowing the maker /learner to work spontaneously and to experiment. Also, the practice of copying goes back to the tradition in painting and sculpture whereby students learned arts and crafts processes by making copies of known works.

While In Portland at the AMIA Conference (Association for Moving Image Archivists), I saw an applicable panel and a research poster that connected with my thoughts about copyright reform. The poster session included the research paper by Ellen LeClere called *Copyright Be Damned*, about the ways users justify their reproduction and dissemination of copyrighted archival material in the course of their research.⁶

LeClere's investigation approaches both user misinterpretation of copyright law and their determination to use materials in ways that is in keeping with their wishes--

⁵ This also calls up factor 3: the amount and substantiality of the portion taken

⁶ **“Copyright is damned!” User Justifications for Reproducing Copyrighted Materials**
Ellen LeClere, School of Library and Information Studies, University of Wisconsin – Madison

How do archives users justify reusing copyrighted materials? There are many users who are unaware or are willing to risk of copyright infringement (or conversely, limit their usage when they could legally create reproductions). Exploring justifications for reproducing and disseminating copyrighted materials exposes gaps in copyright knowledge and highlights the disparity between what is needed and what is permitted, allowing film archivists to promote legislation that allows for broader and unfettered access to collections.

including conduct like making copies for personal reference but also more clearly infringing behaviors like sharing images on social media for reasons of study, “highlight(ing) the disparity between what is needed by users and what is permitted by law.”⁷

However, the study focuses on the use of material for traditional research rather than expressive or affective purpose--although the posting of the images on social media might indicate another kind of *feeling* about the materials. Still, because the usage is by researchers in a library setting, LeClere finds that many of the users’ activities are likely justified as fair use, via the application of the §108 library and archive exceptions.

An example of a more rogue user, was demonstrated in the panel presentation on fan remakes of George Lucas’ *Star Wars Trilogy* called *Fandom Despecialized: Fan Edits and the Search for Authenticity* by Jimi Jones.⁸

Examining the culture (or cult!) of re-cutting *Star Wars*, Jones advanced the idea that *Star Wars* fans, are re-editing the films (the footage garnered from various commercial sources like VHS copies) based on George Lucas's original intent justifying their use of the unlicensed material while challenging the sole authorship of the films by

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⁸ *Fandom Despecialized: Fan Edits and the Search for Authenticity*

Presenter: Jimi Jones, University of Illinois at Urbana-Champaign

This talk explores the world of fan edits. One fan edit in particular, Star Wars Despecialized, represents an attempt by a distributed network of online Star Wars fans to create and disseminate a high-quality version of the film that represents its original, unaltered 1977 release. In this talk I discuss the phenomenon of this particular fan edit in terms of a search for the authentic, unadulterated Star Wars. I look at how this community collaborates, how it disseminates its works and what the resurrection of the original, authentic Star Wars means.

the director. And since filmmaking is a highly collaborative endeavor, in these cases the fans and audience members are engaged in a kind of creative partnership.

The *Star Wars* panel concluded with the intriguing notion that the fans efforts to *remake back* to the original versions with which they were familiar, feel nostalgic for and love, functions as an assertion of ownership and, thus, rights over the *Star Wars* “texts”.

The fans’ claims that they are attempting to “fix” (repair) Lucas’ “fixed“ (or embodied, in copyright parlance) trilogy suggest that the films live beyond of the control of the author or the market, and now reside in the public commons. This creative activity by fans might be considered an appropriation or even an expropriation of the films, but there is no attempt by the fans to conceal the original authorship of *Star Wars* or to disguise the material as other than Lucas’—the fans become ersatz preservationists.

Nevertheless, foes of my reform could argue that this use also goes beyond the limitation of the 1st factor; becoming a “way of satisfying the audience’s taste for the thing...the critical use should not become a market substitute for the work...” and that the fans are attempting to recreate for, and to satisfy a particular audiences’ “taste” for the singular work (the “original” 1977 *Star Wars*) that they recall from their experience when the movies circulated in the commercial realm. Additionally, foes could claim that re-makers are trying explicitly to create a “market substitute” that replaces the Lucas sanctioned contemporary versions. The fans, I think, would counter that their work is an act of love and of restoration.

Finally, I’ll share a brief personal story of the creation of a memorial video created for my brother’s funeral, that used family and some well know photos of stars like Denzel Washington, and images from classic/commercial movies in a slide-show

edited to Sam Cooke's song "Wonderful World" which I paid for and downloaded from the internet.

The song was very expressive of the deceased tastes and character and further expressed our feeling about him. The images and song were clearly of someone who had passed away – including the message "rest in peace" and dates of birth and death. After sharing the video on Facebook and receiving acknowledgments of the work from friends, family and acquaintances, I then also received a notice blocking the video due to copyright infringement of the song. Furious (and grieving) I fired a back at Facebook with my disgust about the crackdown considering the material and moment (but I'll admit I've had a similar experience sharing a student's project that used a snippet of an unlicensed song).

Facebook restored the video and did not further threaten my account, but I have wondered ever since how to intervene. Making these memorial videos is a common practice—but funeral homes (and mourners) are not necessarily informed about nor concerned with the rights (and technology) around the audio/visual materials used in funeral services and shared with others online as part of the memorial process. I believe this is a place where the bereaved should be protected from copyright law. Any foe callous enough to argue against the use in this way might say that by distributing the video online, people outside of those with an emotional or familial connection to the subject of the video could access and copy the song without paying. But, with my reform sharing music like this or in the ways user do when creating mix-tape or mix CD for communicating affection, and other emotions would be justified under fair use.

I believe my reform allies would be mixed-media artists, appropriation artists, fan and other communities, art teachers, social media users (i.e. everybody!), mourners and those engaged with notions of Cultural Commons. My reforms would allow these different user/creators the opportunity to experiment, train, remake and be expressive with unlicensed materials without the fear or time and resource burdens of running a project through the application of the four factors of Fair Use, emphasizing instead creative learning, practice, remixing and memorializing.

The foes to my reform ideas would be Philistines? (no, not really—well maybe). The opponents would be the same entities who might be resistant to aspects of fair use, such as large-scale organizations like the record industry, studios-- or individuals who are not the artist but who have financial interest in the marketability of the copyrighted material.

I would imagine that George Lucas would be opposed to the reform because it submits that the fans' emotive and artistic opinions about his movies supersede his own choices as the author. But as Jones pointed out, George Lucas considers his *Star Wars* trilogy films as open texts, asserting that the films are layered and “palimpsest”⁹ and that they can be reworked by him as the artist/author over time and as technology allows. (Us too! say the fans) But now that Lucasfilm has been sold to Disney, the game may change. I'm sure that a company like Disney, that is notoriously controlling of their brand, and attentive to preventing their holdings from falling into the public domain, would be opposed to any reform that extended fair use.

I think that libraries and particularly archives might be against the idea of having

⁹ Jimi Jones quoting George Lucas *Fandom Despecialized: Fan Edits and the Search for Authenticity*

more open access to the copyrighted material in their collections because this might compromise the ownership of the holdings or violate deeds of gift and despite the library exceptions, the institution could be held liable for distribution of the copyrighted material.

And, ironically, I think that documentarians might have a difficult time with my reforms because they have been so careful in crafting a *Best Practices* document that is conversant and highly negotiable with the principles of copyright law.

My foes' arguments might state that fair use is meant protect authors while allowing for the public good and that loosening limitations would erode the boundaries of the copyright laws, making the four factors even more challenging to apply. They also might argue that my user groups are ill defined and that it would be too difficult to identify common practices and methods across such disparate types of users. Lastly, opponents could assert that emotions, expressiveness and affect are simply too subjective, requiring judges to adjudicate inappropriately on matters like authenticity and artistic merit (is this the *real* version of *Star Wars*?) as well as distinguishing whether or not a user is operating in "good faith" no matter how much they feel about the material they are appropriating.

Still, in my ideal world of reform, as in *A Matter of Life and Death*, judgment would be earthly and based on love rather than based on universal law!