

# The Society for Cinema and Media Studies' Statement of Best Practices for Fair Use in Teaching for Film and Media Educators

## INTRODUCTION

The field of film and media studies in the United States was shaped by the legal principle of fair use - the ability of educators, critics, and others to teach, study, and write about media without having to ask copyright holders for permission every time their works are used. Educational and critical uses of media, such as those employed by film and media educators, are woven into the fabric of a free, democratic society, and lead directly to the continued health and creative vibrancy of both commercial and non-commercial film and media. There are two main barriers to the full exercise of lawful uses of media by film and media educators. First, many film and media educators lack a basic understanding of copyright law, particularly of the framework through which they may make legal, non-infringing uses of another's work. Second, vagueness in the law has resulted in a lack of consensus among educators regarding permissible practices and a confusing patchwork of policies, guidelines, and actual uses. In light of these two barriers, it is unsurprising that academic gatekeepers (libraries, university general counsels, IT staffs, etc.) frequently choose to adopt overly cautious and conservative copyright policies that sometimes result in a diminished educational experience for film and media students.

The Society for Cinema and Media Studies ("SCMS") has created this Statement of Best Practices for its membership to clarify some of the issues concerning the permissible use of media for teaching. Note that this statement explains and clarifies United States copyright laws and policies, as over 85% of SCMS survey respondents teach within the U.S. SCMS members teaching in other countries should consult with local experts as to how these guidelines might apply in other parts of the world. This statement is informed by statutory provisions and their legislative histories, analogous case law, and current professional practices based on a survey conducted by the SCMS Public Policy Subcommittee and input from members of the subcommittee. The online survey was administered using SurveyMonkey.com. It generated 659 responses over 10 days in Spring 2007, representing approximately 30% of SCMS membership, polled the current practices of SCMS members and asked for comments and feedback concerning the issue of copyrighted material and film and media pedagogy. The survey focused on the sources used to obtain course material, the screening of that material, and the creation of compilations for instructional purposes and student uses. SCMS has attempted to use the information it gained through the survey to compile, analyze, and evaluate common practices of film and media educators. The final report was reviewed and approved by the SCMS Board of Directors.

SCMS' Statement sets out to accomplish four specific goals:

1. To provide practical assistance to film and media educators in determining whether a particular use of a work is permissible;
2. To provide a guide for publishers, universities, and other gatekeepers or insurers to support the work of film and media educators;
3. To deter copyright owners from taking unfair or intimidating action; and
4. To formalize customary practices that over time can help guide courts in determining what types of uses are generally accepted as non-infringing by film and media educators.

**FINAL SUBMISSION**  
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## THE CONCEPTS OF COPYRIGHT AND FAIR USE

The freedom of film and media educators to use audiovisual works in their courses – and the limits on such use – are rooted in existing copyright laws. Copyright law provides owners of copyrighted works a number of limited rights, including the right to exclude others from reproducing, performing, displaying, and distributing their works. The law also gives copyright owners the right to exclude others from preparing derivative works from their original works, including translations, adaptations, and compilations. In many cases, if someone engages in any of these activities without the permission of the copyright owner, that person may be infringing on the owner's rights and may thus be held liable for damages.

In the interest of balancing copyright owners' rights against potentially beneficial uses of the works by others, copyright law has imposed a number of restrictions on these rights. These restrictions serve as "safe harbors" for educators by allowing certain uses of protected works that do not infringe copyright holders' rights. There are three important safe harbors of particular interest to film and media educators: the doctrine of fair use, the exception for face-to-face teaching activities, and the exception for online distance education. The fair use doctrine affords the broadest protection for use of copyrighted materials because it is a general and flexible standard. In general, fair use allows people to use copyrighted materials without authorization for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," so long as their use qualifies as a "fair use" in light of the four factors set out in 17 U.S.C. § 107:

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 Copyright Act specifically recognizes that uses of copyright works for the purposes of teaching and criticism are the kinds of uses that the fair use doctrine is intended to protect. Under the first factor, if the "purpose and character of the use" is non-profit educational activity, it would tend to weigh heavily in favor of the use being fair and non-infringing. However, not every educational and noncommercial use is non-infringing; fair use analysis requires examining all of the factors relative to the others and in view of the overall aims of U.S. copyright law. Further, different courts have emphasized different factors at different times. The second factor asks users to consider "the nature of the copyrighted work." Generally, creative works are afforded greater protection than purely factual works. The third factor depends on the "amount and substantiality of the portion" borrowed from the overall copyrighted work, taking into account whether more of the work was used than necessary to accomplish the specific purpose of the use. The fourth factor examines "the effect of the use upon the potential market for or value of the work." In the educational context, this factor protects the copyright owners' financial interests in being able to create and sell works to educational institutions, educators, and students. If the audiovisual work being used by an educator was specifically marketed for classroom use and the use would substitute for purchases or licenses that otherwise would be likely to occur, it would tend to weigh against it being fair use and the educator may have to obtain formal permission for such use.

