By the end of this chapter, you should be able to answer:

1) What are Best Practice Documents?
2) Does a Code of Best Practice take the place of Fair Use?
3) If my field of work has a Code of Best Practice, am I obligated to follow it?

By the early 2000’s, it became clear that the strict enforcement of copyright was making it almost impossible for documentary filmmakers to do their jobs. Every bit of music, art, writing, reading out loud, dramatic performance, etc, required a “copyright clearance fee,” or money paid to the owners of the material. Clearance fees were required even if the material was in the background, or used unintentionally. Fees could be from a few hundred to several thousand dollars. Multiplied over the length of a film, the costs for copyright clearance exceeded all other costs for making the film. A famous example depicts the situation very well. A filmmaker was interviewing a woman, and that woman’s cell phone rang. Her ring tone was the theme song from “Rocky”. The filmmaker found that the clearance fee for this ringtone was $10,000. She chose to edit it out.

In response, many film makers began charging their own copyright clearance fees and performance fees. Many did not want to, but felt they had no choice. Inevitably, the cost of all clearance fees rose in response to demand. No one – except a few lawyers – was happy. Many films in this period did not get made. (Boyles et al, 2006)

The Response:

Noting their common problem, several documentary filmmakers started a project. Working with two sympathetic lawyers, they began to document common situations in filmmaking (such as background music or art) and then began to designate the most common and logical of them as “Fair Use”. The document was very specific and provided explanations for every situation.
The working group vetted the document via other lawyers who were not familiar with the project. All approved it.

The final document, “Documentary Filmmakers Statement of Best Practices in Fair Use” was issued in 2005. As intended, it was used by filmmakers, film publishers, and film insurance providers. A filmmakers agreed to work within the parameters of the Best Practices document, and the publishers agreed NOT to demand clearance fees for material covered by the document. Insurance companies then could not sell “copyright infringement insurance” for materials and practices covered by the document. The cost of making a film dropped; the cost of insurance dropped; and many more documentary films were made.

A comic book/graphic novel, Bound By Law, depicts this story (and the basics of copyright) in more detail. It is available for no charge at https://web.law.duke.edu/cspd/comics/

The Result:

So is the “Documentary Filmmakers Statement of Best Practices in Fair Use” an unqualified success? Yes, in many ways. It led to a revolution in the making a documentary films, and sparked a series of other “Best Practices” documents in other fields. But some people point out that it only specifies the four most common situations in which the portrayal of non-owned copyrighted material may occur. While the document acknowledges that other situations may occur and need copyright analysis, it does not offer any specific analysis. Consequently, no situation outside of the four specified can be covered by infringement insurance, and few publishers are willing to approve them. Likewise, a filmmaker may film a segment that begins easily within the guidelines, but then goes further than the guidelines allow. So, while the Best Practices document has been wonderful for the documentary film industry, it has also been a “fence” or restriction on what they can do. (CITE!)

Documents of Best Practice are not law. Practitioners in their fields are not obligated to follow them. They may even re-write portions of them, or write their own versions to work with. A document of Best Practice is widely endorsed by the members of a profession, and a few legal
professionals, and can become a recognized and accepted code of conduct. If so, a practitioner not following the Code of Best Practices may find themselves ostracized or not able to find funding. It is that choices of the people around him or her.

At the time of this writing, no set of best practices had been tested in court.

MORE “BEST PRACTICE” DOCUMENTS

Best Practice in Fair Use documents have been created by the following fields:

Visual Arts
Poetry
Open Courseware
Media Literacy Education
Orphan Works
Academic Libraries
Online Video
Dance Related Materials
Creative Communities
Cinema and Media Studies
Images for Teaching, Research, and Study
Scholarly Research in Communication
Music Scholarship

In the decade since the first “Best Practices in Fair Use” document, many more have been created. The first 7 on the list above were created by the “Center for Media & Social Impact,” which supported the creation of the documentary filmmakers Best Practices. The other Best Practices were created by independent organizations in their fields.
The Center for Social Media & Social Impact is at

http://www.cmsimpact.org/fair-use/related-materials/codes

Several other useful documents can be found at

http://www.cmsimpact.org/fair-use/related-materials/fair-use-related-materials

It is almost inevitable that some documents will be challenged. At the time of writing, the Document of Best Practices in Fair Use in the Visual Arts is experiencing some strong challenges, and the Document of Best Practices in Academic Libraries has had its challenges as well.

Scenarios:

I. Does a documentary filmmaker have to avoid “surrounding culture” when he or she makes films?

Q: In my documentary film class, our instructor told us that we had to film scenes without any advertising or brand names showing: billboards, flyers, magazines, soda cans (even as trash), etc. I thought that a documentary film should show life “as it is” with all of its details. While I understand what our instructor told us about copyright and trademark, and the need to pay clearance fees, some part of this just doesn’t make sense. Why can’t we document life as it is?

A: Actually, you can document life with incidental bits of copyrighted content included. Your instructor was right, but some recent events have changed the world of documentary filmmakers. In 2005, several filmmakers and interested friends met and developed a document titled “Documentary Filmmakers Best Practices in Fair Use.” The list helped immensely to describe what sorts of uses of copyrighted materials could be considered Fair.

The Best Practices group was supported by the American University Center for Social Media. They worked together to find several prominent lawyers and film societies to endorse the “best practices” document. From that point, a filmmaker would need to assert that he or she was using the best practices, and work only with publishers and insurers who accepted the best practices. Very soon, the Documentary Filmmakers Best Practices in Fair Use became the standard procedure for handling “surrounding culture” while making documentary films.

(Center For Social Media 2005, 12)
Scenarios:

Q: The Best practices statement for Poetry includes satiric uses as well of parody. We know that parody is included under Fair Use but satire is not. How can the Poetry Foundation “expand” the law?

Q: Should a teacher of the visual arts display copies of such artworks to his class? Why, why not, or under what conditions? Consider some potential responses before checking the Code of Best Practices in Fair Use for the Visual Arts.

Q: What are some possible creative fields that need Codes of Best Practices? What practices in particular stand out to you?

Sources
