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Copyright in a Nutshell for Found Footage Filmmakers

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Copyright in a Nutshell for Found Footage Filmmakers

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COPYRIGHT IN A NUTSHELL

FOR FOUND FOOTAGE
FILMMAKERS*

by *BRIAN L. FRYE*

Our Nixon
Penny Lane (2013)



Introduction

Found footage is an existing motion picture that is used as an element of a new motion picture. Found footage filmmaking dates back to the origins of cinema. Filmmakers are practical and frugal, and happy to reuse materials when they can. But found footage filmmaking gradually developed into a rough genre of films that included documentaries, parodies, and collages. And found footage became a familiar element of many other genres, which used found footage to illustrate a historical point or evoke an aesthetic response.

It can be difficult to determine whether found footage is protected by copyright, who owns the copyright, and whether particular uses of found footage infringe copyright, especially in the case of unpublished motion pictures. This article argues that copyright doctrine is unacceptably indeterminate and effectively restrictive in relation to the use of found footage.

The Purpose of Copyright

Intellectual property is a general term for laws that create exclusive rights to use certain intangible goods, like ideas and expressions. Copyright is a particular kind of intellectual property that gives authors certain exclusive rights in the works of authorship they create. Notably, copyright does not apply to the tangible copies of a work, but rather to the intangible work of authorship they embody.¹

The Intellectual Property Clause of the United States Constitution empowers Congress, “To promote the progress of science (...) by securing for limited times to authors (...) the exclusive right to their (...) writings.” Congress first used that power to enact the Copyright Act of 1790, which it has revised several times, most recently in the Copyright Act of 1979.

The purpose of copyright is to encourage people to create works of authorship. As Samuel Johnson observed, “No man but a blockhead ever wrote except for money” (quoted in Boswell, 1976:302). Without copyright, people could use works of authorship without paying for them. Copyright encourages the creation of works of authorship by enabling authors to charge for certain uses of the works they create. At least in theory, copyright is justified because the social cost of limiting the use of works of authorship is exceeded by the social benefit of the additional works of authorship produced.²

The Subject Matter of Copyright

Under the 1976 Act, copyright protects *original works of authorship fixed in any tangible medium of expression*. In other words, copyright requires both originality and fixation.³ Found footage is typically protected by copyright, unless it has fallen into the public domain, because it is both original and fixed in a tangible medium.

Originality

The originality requirement provides that copyright can only protect *original* works of authorship, or works that are *independently created* by an author and display *some minimal level of creativity*.⁴ As a consequence, copyright cannot protect facts, which are *discovered*, not created by an author, and can protect compilations of facts only if they reflect some degree of *creativity*, or authorial judgment.⁵ In addition, the idea/expression *dichotomy* provides that copyright cannot protect ideas, but can protect particular expressions of an idea.⁶ The *merger doctrine* further provides that copyright cannot protect the expression of a fact or idea that can only be expressed in a limited number of ways (Clayton, 2005).

And the *scènes à faire* doctrine provides that copyright cannot protect generic plots and characters.⁷

The purpose of the originality requirement is to ensure that copyright does not conflict with the First Amendment, by unduly limiting speech, or infringe on the public domain, by protecting works that already exist.⁸ But the originality bar is very low.⁹ While copyright cannot protect a telephone directory, it can protect almost anything else.¹⁰ Motion pictures typically satisfy the originality requirement because they are created by a cinematographer, who exercises authorial judgment about the subject of the motion picture.

Fixation

The fixation requirement provides that copyright can only protect works that are *fixed in a tangible medium*, or recorded in some way. The purpose of the fixation requirement is to limit the scope of copyright protection to recorded works and provide evidence of protected works (Lichtman, 2002:683 / Donat, 1997:1363, 1400). Motion pictures typically satisfy the fixation requirement because they are recorded on film or video.¹¹

Categories of Works of Authorship

The 1976 Act protects eight categories of works of authorship, including *motion pictures*. But a particular work of authorship may incorporate multiple categories of works of authorship. For example, motion pictures often incorporate a screenplay, set direction, a score, a soundtrack, and a series of related images. The screenplay may be protected as a *literary* or *dramatic* work, the set direction may be protected as a *choreographic* work, the score may be protected as a *musical* work, the soundtrack may be protected as a *sound recording*, and each image may be protected as a *pictorial* work. In other words, a particular found footage element may consist of many distinct copyrighted works.

Original Elements

Copyright can only protect the original elements of a work of authorship.¹² As a consequence, every work of authorship is effectively a compilation of discrete elements, some of which may be original and protected by copyright, and some of which may not. For example, a motion picture may consist of images, dialogue, and music that are original and protected by copyright, as well as facts and ideas that are not. A motion picture may also incorporate pre-existing public domain elements, which cannot be protected by copyright.

Exclusive Rights

The Copyright Act gives authors certain exclusive rights in their works of authorship, which may include the exclusive right to reproduce, adapt, distribute, perform, or display the work depending on the nature of the work and the context in which it is used. In other words, the Copyright Act enables copyright owners to prohibit the use of original elements of a work of authorship without permission.

a motion picture may also incorporate pre-existing public domain elements, which cannot be protected by copyright

Ownership

Under the 1976 Act, obtaining a copyright in an original work of authorship is easy, because copyright exists as soon as the work is fixed in a tangible medium of expression. While registering a work with the Copyright Office provides valuable benefits, it is not necessary.

But determining copyright ownership can be more difficult. While copyright *vests initially in the author or authors of the work*, the statutory *author* of a *work made for hire* is the employer. Whether a work is a *work made for hire* is often difficult to determine, because it typically depends on a multi-factor balancing test.¹³ And in any case, the owner of the copyright in a work can license or transfer ownership of any element of the work. As a consequence, copyright ownership is often fragmented and unclear. Copyrighted works may be owned in whole or in part by many different people, especially if more than one person participated in the creation of the work, or elements of the work were licensed or transferred.

Duration

The Intellectual Property Clause authorizes Congress to grant copyrights for *limited times*. Initially, under the Copyright Act of 1790, the copyright term was 14 years, renewable by the author for an additional 14 years. But Congress gradually extended the term, and today it is typically the life of the author plus 70 years. The Supreme Court has explicitly held that the current copyright term lasts for a *limited time*, and has implied that anything short of *forever* is consistent with the *limited times* provision of the Intellectual Property Clause.¹⁴

Duration Under the 1976 Act

Unfortunately, the copyright term of a work of authorship can be remarkably difficult to determine. The copyright term in works created in 1978 or later is governed by the 1976 Act, as amended, and lasts for the life of the author or authors plus 70 years, or in the case of anonymous works and works made for hire, 95 years from publication or 120 years from creation, whichever expires first. So, in order to determine the copyright term, one must first determine whether it is a

work made for hire, and if not, one must identify all of the authors of the work and determine if and when they died. But in any case, works created in 1978 or later are protected by copyright, unless they are expressly dedicated to the public domain.¹⁵

Duration Under the 1909 Act

The copyright term in works created before 1978 is governed by the Copyright Act of 1909, as amended, and can be even more difficult to determine. Under the 1909 Act, the copyright term was 28 years from publication or registration, renewable for an additional 28 years, for a total potential term of 56 years. However, the 1976 Act increased the renewal term to 47 years, and the Copyright Term Extension Act of 1998 increased the renewal term to 67 years, for a total potential term of 95 years.

But the 1909 Act also required compliance with certain formalities. Specifically, obtaining a federal copyright required publication with notice, which consisted of the word “copyright” or symbol “©”, the year of first publication, and the name of the author. Unpublished works were protected by state common law copyright. And works published without notice fell irrevocably into the public domain.

As a consequence, the definition of *publication* is critically important to determining copyright protection under the 1909 Act. While the 1909 Act did not define *publication*, courts eventually held that a limited or *investive* publication created copyright protection if accompanied by notice, and a general or *divestive* publication destroyed copyright protection unless accompanied by notice. Of course, whether a particular publication is *investive* or *divestive* depends on the context, and courts tend to err in favor of the author.

Determining the Copyright Term

The upshot is that works published before 1923 are in the public domain, and works published in 1923 or later are protected by copyright, unless the author failed to provide notice or renew the copyright term. But the copyright status of unpublished works is different. Typically, unpublished works created by authors who died before 1946 are in the public domain, and unpublished works created by authors who died in 1946 or later are protected by copyright. However, unpublished works made for hire and unpublished anonymous works are in the public domain only if they were created before 1896.¹⁶

Infringement

If copyright owners believe that someone has infringed one of their exclusive rights in a work of authorship, they can file a copyright infringement action. In order to make out a *prima facie* copyright infringement claim, the plaintiff must prove: 1) ownership of a valid copyright; 2) actual copying of one or more original elements of the copyrighted work, and 3) substantial similarity caused by copying original elements.

To prove ownership, the plaintiff must show that the allegedly infringed work includes one or more original elements that

are protected by copyright, and must also show actual ownership of the copyright in those elements. In other words, plaintiffs can file an infringement action only if they actually own a work that is protected by copyright. Using a public domain element of a work cannot infringe copyright, because no copyright exists, and does not even require attribution.¹⁷

To prove actual copying, the plaintiff must provide either direct or circumstantial evidence of copying. Direct evidence is unusual, because infringers rarely admit to copying, so plaintiffs tend to provide circumstantial evidence by showing access and probative similarity. In other words, a plaintiff can prove copying by showing that the defendant had access to the plaintiff’s work, and that similarities between the two works support an inference of copying.¹⁸

And to prove substantial similarity, the plaintiff must show that the defendant’s work is substantially similar to the plaintiff’s work, and that the works are similar because the defendant copied protected elements of the plaintiff’s work. In other words, you can copy facts and ideas with impunity, because copyright can only protect the original elements of a work.

At least in theory. In practice, many courts have held that *substantial similarity* is a question of fact for the jury, and that substantial similarity only requires copying the *total concept and feel* of a work, which obviously may incorporate ideas and generic elements.¹⁹ In other words, while copyright technically does not protect facts and ideas, it can effectively enable copyright owners to prohibit the use of those unprotectable elements of their works, by enabling them to prove an infringement claim without showing that the defendant copied any specific original elements of their work.²⁰

Limitations on the Exclusive Rights of Copyright Owners

There are many statutory limitations on the exclusive rights of copyright owners, most of which apply to specific categories of works or kinds of uses. For example, the *first sale* doctrine allows the purchaser of a copy of a copyrighted work to resell their copy without infringing the copyright owner’s distribution right, and the *mechanical license* allows musicians to create sound recordings or *covers* of musical works for a fixed fee, without the permission of the copyright owner. But the most important limitation on the exclusive rights of copyright owners is arguably the *fair use* doctrine, which provides that certain *prima facie* infringing uses of a copyrighted work are non-infringing fair uses.

The Fair Use Doctrine

Fair use is a defense to copyright infringement. The purpose of the fair use doctrine is to ensure that the scope of copyright protection is consistent with the public interest and the First Amendment.²¹ Prior to the 1976 Act, fair use was a common law doctrine.²² While the 1976 Act codified the fair use doctrine for the first time, Congress’s intention was *to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.*²³

Under the fair use doctrine, certain uses of copyrighted works for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research are non-infringing fair uses. Courts must consider four factors in determining whether a particular use is a fair use:

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.
4. The effect of the use upon the potential market for or value of the copyrighted work.

In practice, the first fair use factor is the most important, and courts primarily ask whether or not a particular use is *transformative*.²⁴ The purpose of the *transformative test* is to ensure that copyright owners cannot prevent productive uses of works of authorship:

The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely *supersede the objects* of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society (Leval, 1990:1105, 1111).²⁵

Economists would say that the fair use doctrine reduces *transaction costs* on authorship by allowing authors to make productive uses of original elements of existing works of authorship without permission. For example, quoting a sentence from an existing literary work is typically a fair use, because requiring authors to obtain permission before quoting would be unnecessarily burdensome. Likewise, using an original element of an existing work in order to criticize it is typically a fair use, because many copyright owners would refuse permission to critical uses.

But the application of the fair use doctrine can be unpredictable.²⁶ For example, it can depend on the nature of the work copied. Courts have typically held that quoting a sentence from a literary work is a fair use, but that quoting a musical phrase from a sound recording is not.²⁷ And it can also depend on the nature of the use. While the fair use analysis is theoretically objective, juries and courts both tend to consider whether the alleged infringer acted in *good faith*.²⁸

Finally, while the statutory fair use doctrine explicitly provides that the *fact that a work is unpublished shall not itself bar a finding of fair use*, the Supreme Court has recognized a *distinct statutory right of first publication*, which affects the *balance of equities in evaluating such a claim of fair use*. As a result, the unauthorized use of an unpublished work is typically not

a fair use, or at least, is less likely to be a fair use than the unauthorized use of a published work.²⁹

Copyright & Found Footage

Found footage is an element of an existing motion picture that is used as an element of a new motion picture.³⁰ Filmmakers use found footage in many different ways, but it is especially common in documentaries and collage films, which may consist entirely of found footage.³¹

Unsurprisingly, the use of found footage may present an assortment of copyright issues. Of course, if found footage is in the public domain, anyone can use it with impunity. For example, Bruce Conner's film *Crossroads* (1976) consists entirely of found footage of the July 25, 1946 Operation Crossroads Baker underwater nuclear test at Bikini Atoll (Wees, 2010). The found footage was created by the United States government, so it is in the public domain, and Conner could use it without permission.³²

But if found footage is not in the public domain, using it without permission is typically a *prima facie* infringing use, so the user must either obtain permission to use the material, or make a fair use claim.³³ However, it can be difficult

Room 237
Rodney Ascher (2012)





Let the Fire Burn
Jason Osder (2013)

to determine whether an element of a motion picture is protected by copyright. And if an element of a motion picture is protected by copyright, it may be difficult to determine the owner.

Ironically, using an element of a commercial motion picture tends to present the fewest copyright issues, because the ownership of a commercial motion picture can usually be determined. Commercial films are typically published by distribution to the public.³⁴ And the copyright in a commercial film usually belongs to the publisher. So the copyright term of a commercial motion picture is often relatively easy to determine. As a result, an author who wants to use an element of a copyrighted commercial film can either request permission, or make a fair use claim.

Of course, filmmakers may or may not receive permission to use particular found footage, the terms of use may or may not be reasonable, and fair use claims are inherently unpredictable, at least on the margins. But at the very least, found footage filmmakers can usually determine the copyright status and ownership of a commercial motion picture.

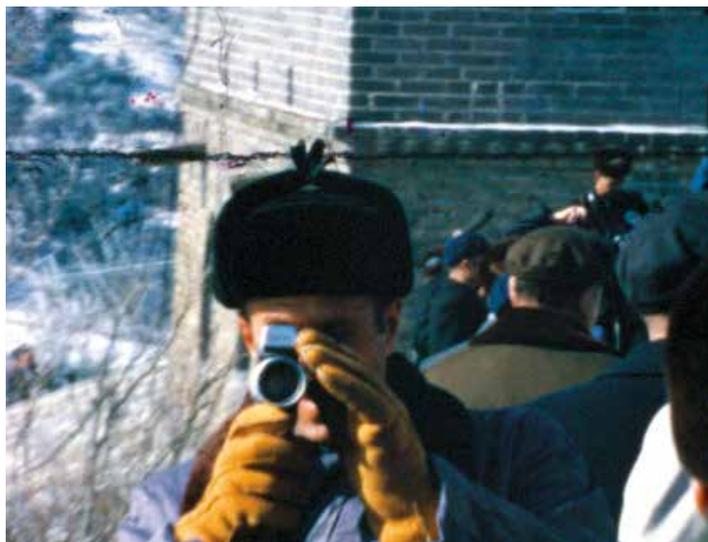
For example, Rodney Ascher's film *Room 237* (2012) consists in substantial part of found footage copied from Stanley Kubrick's film *The Shining* (1980). The owner of the copyright in the found footage is relatively easy to determine, because Warner Brothers, Inc. registered copyrights in the screenplay, images, and soundtrack of *The Shining*, and acknowledged Stephen King's novel *The Shining* (1977) as a previously existing copyrighted work. And the found footage was published, because copies of *The Shining* were both sold and rented to

the public. As a consequence, Ascher could either negotiate a license with Warner or make a fair use claim to use the found footage in order to comment on *The Shining*.

Similarly, Jason Osder's film *Let the Fire Burn* (2013) consists entirely of found footage, primarily television news broadcasts. The owner of the copyright in the found footage is relatively easy to determine, because the copyright in a television news recording typically belongs to the station that produced the recording. And the found footage was probably published, because copies of television news recordings are typically sold or rented to the public, often via stock footage companies. As a consequence, Osder could either purchase a license from a stock footage company or make a fair use claim to use the found footage in order to comment on the events depicted in the television news recordings.

However, the use of non-commercial found footage can present some of the most vexing problems in copyright law. The Copyright Act assumes that works are created for commercial gain. And courts largely follow suit. But the Copyright Act effectively provides that all original works are protected by copyright, unless they are affirmatively placed in the public domain. Every letter, fax, and email is protected by copyright, as well as every home movie, home video, and vine.

Using an element of a non-commercial motion picture often presents difficult copyright issues, because it can be difficult to determine the copyright status and ownership of a non-commercial film. In addition, it is often unclear whether a non-commercial film was ever *published*, so it can be difficult to determine the copyright term.



Our Nixon
Penny Lane (2013)

For example, Rich Bott and Jim Fetterley of Animal Charm create video collages using found footage from discarded videotapes.³⁵ The owner of the copyright in the motion pictures they use is often unclear or effectively impossible to determine. But the motion pictures are typically published, because they were sold to the public, often by their copyright owner. As a consequence, Animal Charm effectively cannot license the motion pictures they use, but can make fair use claims.

But amateur motion pictures and home movies present the most difficult copyright issues. For one thing, their authorship is often difficult or impossible to determine. Amateur motion pictures and home movies are often acquired from third parties like film laboratories, collectors, antique stores, or flea markets. They may or may not be accompanied by information indicating their provenance, like names or addresses. The people named may be dead or impossible to find. And in any case, third parties may have created or participated in the creation of the films. As a consequence, it is often difficult or impossible to determine who owns the copyright in an amateur motion picture or home movie. And if you cannot identify the owner of the copyright in a film, it is impossible to ask for permission to use it.

Copyright scholars refer to works that lack an identifiable owner as *orphan works*. They present a problem because copyright law assumes that people who want to use a work can negotiate with the owner of the copyright in that work. But under the 1909 Act, copyright protects many works that no longer have substantial commercial value, and under the 1979 Act, copyright protects everything, whether or not it ever had any commercial value. So many works with no commercial value are effectively in limbo.

In addition, the overwhelming majority of amateur motion pictures and home movies are unpublished, because they



The Family Album
Alan Berliner (1986)

were never distributed to the public. Amateur motion pictures are typically shown privately, and rarely distributed to the public.³⁶ Home movies are typically private, and exist as unique copies.³⁷ As a consequence, the copyright term of an amateur film or home movie is either the life of the artist plus 70 years or 125 years, depending on the author of the film.

For example, *Our Nixon* (Penny Lane, 2013) consists in large part of home movies filmed by Nixon aides H.R. Haldeman, John Ehrlichman, and Dwight Chapin between 1969 and 1973.³⁸ But it is largely impossible to determine who created which home movies. Anyone could have been holding the camera. However, the Nixon White House home movies were nationalized by the Presidential Recordings and Materials Preservation Act (PRMPA) of 1974. As a consequence, they can be used by anyone, for any purpose, without permission.

But the Nixon White House home movies are the exception that prove the rule. Most amateur films and home movies are anonymous and unpublished. As a consequence, they are typically protected by copyright, at least in theory. For example, Alan Berliner's film *The Family Album* (1986) consists entirely of found home movies, acquired from many different sources. In other words, the found footage used in the film is anonymous and unpublished, and at least potentially infringing.

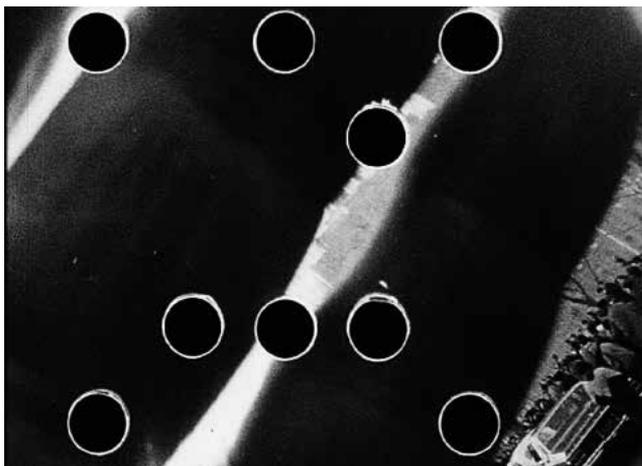
As a consequence, using found footage is almost always a potentially infringing or *transgressive* use of a copyrighted work. Using an original element of a published commercial motion picture is typically a *prima facie* infringing use, but is often protected by fair use, if the new work is transformative. But using an original element of an unpublished, non-commercial work is typically not a fair use, at least under the prevailing interpretation of the fair use doctrine, because it infringes the right of first publication.³⁹ Effectively, even transformative uses of unpublished works may be infringing uses.

Objections to the Fair Use Doctrine

Moreover, as Amy Adler has observed, the concept of *transformativeness* essential to the fair use doctrine is inconsistent with many of the ways in which authors, especially artists, actually use elements of existing works (Adler). For example, artists like Andy Warhol, Sherrie Levine, Richard Prince, and Jeff Koons routinely use original elements of existing works of authorship without *transforming* them in any of the ways contemplated by the fair use doctrine. While their uses create new meanings, they do so by changing the context in which those works are presented, rather than changing the works themselves.

Likewise, while many filmmakers use original elements of existing motion pictures in transformative ways that are protected by fair use, others do not. For example, many filmmakers have created so-called *perfect films*, or unedited found footage presented as a work of authorship.⁴⁰ Such *perfect films* are non-transformative uses of unpublished works that would almost certainly be infringing.

In addition, as Andrew Gilden has observed, the open-ended nature of the *transformativeness* inquiry tends to disadvantage marginalized authors (Gilden, forthcoming publication in 2016). The *transformativeness* analysis increasingly relies on a *raw material* metaphor that favors artists seen by courts as *cooking* or *recontextualizing* the material they incorporate into their work, rather than using it in its *raw* form. But this raw/cooked dichotomy subtly encourages courts to privilege certain kinds of uses over others. While courts are increasingly willing to find that *rich and fabulous* appropriation artists have *transformed* the works that they copy by *cooking* the *raw materials* of culture, they are less willing to pardon lesser-known artists. In other words, courts unconsciously respond to social cues. While blue-chip artists like Prince and Koons have mounted successful fair use defenses based on recontextualization, socially marginalized authors are typically less successful (Gilden, forthcoming publication in 2016).



Perfect Film
Ken Jacobs (1985)



Back to the Garden
Richard Prince (2008)

Of course, this could cut either way for found footage filmmakers, depending on their circumstances. It could benefit well-established filmmakers, who can produce evidence of the cultural significance of their works, at the expense of marginalized filmmakers, who cannot. But to the extent that found footage filmmaking is historically a marginal art form, the *transformativeness* inquiry and its *raw/cooked* metaphor are likely to disadvantage many found footage filmmakers, especially those who create *perfect films* and other found footage forms that rely on minimal modification of the found footage.

Conclusion

The purpose of copyright is to encourage the creation of works of authorship. The fair use doctrine is intended to complement copyright by facilitating productive uses of the original elements of works of authorship. But copyright and fair use are both inconsistent with many artistic practices relating to found footage. Copyright and fair use assume that authors typically copy elements of commercial works, and are intended to distinguish between competing and non-competing uses of the original elements of a work. But found footage filmmakers often use elements of unpublished motion pictures, and often use elements of motion pictures in ways that are inconsistent with the current interpretation of the *transformativeness* requirement of the fair use doctrine. Accordingly, found footage filmmaking practices identify certain problems with copyright doctrine and suggest the need for certain revisions. Specifically, courts should define *transformativeness* more broadly, and should abandon the distinction between published and unpublished works, in order to enable the productive use of historically significant motion pictures.

* While many aspects of the US copyright laws have been standardized through international copyright agreements, copyright laws differ depending on country.

ENDNOTES

1. But see the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (*giving the author of a work of visual art certain rights of attribution and integrity that inhere in the tangible copies of a work*).
2. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The 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.”). Of course, there are alternative theories of copyright, some of which are non-consequentialist. See generally Menell (consult bibliography).
3. “Originality is a constitutional requirement.” Feist v. Rural Telephone Service Co., 499 U.S. 340, 346 (1991). Fixation is a statutory requirement, and may or may not be a constitutional requirement. See (Carpenter & Hetcher, 2014:2221, 2236) noting that *writings* arguably implies fixation.
4. Feist v. Rural Telephone Service Co., 499 U.S. 340, 345, 359 (1991).
5. Feist v. Rural Telephone Service Co., 499 U.S. 340, 345, 347-48, 359 (1991).
6. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547, 556 (1985) (explaining that “no author may copyright facts or ideas” because “copyright is limited to those aspects of the work—termed *expression*—that display the stamp of the author’s originality.”) (internal quotations and citations omitted).
7. Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930).
8. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985).
9. Feist v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”).
10. Feist v. Rural Telephone Service Co., 499 U.S. 340, 363 (1991) (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural’s white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark.”).
11. Copyright Law Revision (House Report No. 94–1476): “Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device *now known or later developed*.” However, a live broadcast motion picture does not satisfy the fixation requirement, unless it is “recorded simultaneously with transmission.” Copyright Law Revision (House Report No. 94–1476)
12. Feist v. Rural Telephone Service Co., 499 U.S. 340, 348 (1991) (“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.”).
13. See 17 U.S.C. § 101 (defining a *work made for hire*) and Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). See generally, (Vacca, 2014:42).
14. Eldred v. Ashcroft, 537 U.S. 186, 199 (2003).
15. The Copyright Act explicitly provides that works created by the federal government are in the public domain. 17 U.S. Code § 105. Authors may also choose to dedicate their works to the public domain.
16. For a useful chart outlining the copyright term, see Peter B. Hirtle, ‘Copyright Term and the Public Domain in the United States,’ at: < <http://copyright.cornell.edu/resources/publicdomain.cfm> >
17. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (holding that neither copyright nor trademark can prevent the unattributed use of a public domain work).
18. Plaintiffs typically prove access by showing that the defendant had a direct connection to the allegedly infringed work, or that the allegedly infringed work was famous. Greg Dolin has referred to these respectively as the *Kevin Bacon* (how many degrees of separation?) and *Leonard Cohen* (*Everybody Knows* the work in question) theories of access.
19. Sid & Marty Krofft Television v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).
20. See, e.g., Williams v. Bridgeport Music, Inc., No. LACV1306004JAKAGR, 2015 WL 4479500, at *17 (C.D. Cal. July 14, 2015) (affirming a jury verdict of copyright infringement based on the *total look and feel* of two songs, without specifically identifying any copied original elements).
21. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985).
22. See, e.g., Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass. 1841) (Story, J.) (adopting an early version of the fair use doctrine, based on English copyright law). See (Reese, 2006:259).
23. 1976’s Copyright Law Revision (House Report No. 94–1476)
24. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely *supersede[s]* the objects of the original creation, (...) or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is *transformative*.”).
25. But see Amy Adler (consult bibliography), who argues that the transformative test *has failed art* and should be abandoned.
26. See, e.g., Lawrence Lessig (consult bibliography) claiming that fair use “simply means the right to hire a lawyer.” But see Aufderheide & Jaszi (consult bibliography) arguing that fair use has become more predictable and useful.
27. Compare Faulkner Literary Rights v. Sony Pictures Classics, 953 F. Supp. 2d 701 (N.D. Miss. 2013) (holding that a quotation from William Faulkner’s novel *Requiem for a Nun* used in Woody Allen’s film *Midnight in Paris* was a transformative fair use) with Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005) (holding that the use of an altered 2 second sample from Funkadelic’s song *Get Off Your Ass and Jam* in N.W.A.’s song *100 Miles and Runnin’* was not a fair use).
28. Compare Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) with Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).
29. See, e.g., Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012) (holding that the use of unpublished photos was not a fair use).
30. The term *found footage* is also used to denote a film genre that presents a fiction film as if it were a documentary, typically representing that the film was made by one of the actors.
31. For example, Emile de Antonio’s *Point of Order* (1964) is a documentary film that consists entirely of found footage and Joseph Cornell’s *Rose Hobart* (1936) is a collage film that consists entirely of found footage.
32. 17 U.S.C. § 105 (providing that “[c]opyright protection under this title is not available for any work of the United States Government”).
33. Certain *de minimis* uses of elements of copyrighted works are not infringing uses, typically because the element used is insufficiently substantial to qualify for copyright protection. Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004) (holding that the unauthorized use of a three-note, six-second element of a musical work was *de minimis*).
34. United States Copyright Office, Circular 45: Copyright Registration for Motion Pictures, Including Video Recordings, at: < <http://copyright.gov/circs/circ45.pdf> > (“Publication of a motion picture takes place when one or more copies are distributed to the public by sale, rental, lease, or lending or when an offering is made to distribute copies to a group (wholesalers, retailers, broadcasters, motion picture distributors, and the like for purposes of further distribution or public performance.”).
35. See Animal Charm website, at: < <http://www.animalcharm.com/index.html> >
36. But see The Film-Makers’ Cooperative, and Canyon Cinema, which enabled amateur filmmakers to distribute films to the public, beginning in the mid-1960s.
37. Home movies filmed on 16mm, 8mm, and Super-8mm film were rarely copied, at least in part because of the expense, and typically exist only as camera originals. Home videos were also rarely copied, largely as a function of indifference. Typically, copies of home movies and home videos were created only in order to facilitate presentation in a new medium. For example, films were transferred to video, and analog videos were transferred to a digital format.
38. See: < <http://ournixon.com/about-the-film/> >
39. Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (finding a *right of first publication*).
40. The term *perfect film* was coined by Ken Jacobs, who observed: “I wish more stuff was available in its raw state, as primary source material for anyone to consider, and to leave for others in just that way, the evidence uncontaminated by compulsive proprietary misapplied artistry, *editing*, the purposeful *pointing things out* that cuts a road straight and narrow through the cine-jungle; we barrel through thinking we’re going somewhere and miss it all. Better to just be pointed to the territory, to put in time exploring, roughing it, on our own.” For examples of *perfect films* see Ken Jacobs, *Perfect Film* (1986); Hollis Frampton, *Works and Days* (1969); and Brian L. Frye, *The Anatomy of Melancholy* (1999).

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17 U.S.C. § 101 *et seq.*

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Copyright Act of 1909, 35 Stat. 1075 (1909)

Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (1974)

Copyright Act of 1976, 90 Stat. 2541 (1976)

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