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Tuesday, November 11th, 2024
5:15 PM – 6:00 PM

10 Myths Every Documentary Filmmaker Should Know

By Melissa Georges

Published: July 24, 2024

The world of filmmaking abounds with misconceptions, perhaps most significantly in the documentary film realm where filmmakers must grapple with issues such as fair use, defamation, releases, and privacy concerns. Here's an overview of some common myths and some guidelines to think about. Of course, every fact situation is different and must be carefully analyzed.

1. **If a person interviewed in my documentary says something defamatory, I, as only the filmmaker, am not liable for publishing it.** *Not true. The filmmaker can be liable for publishing a defamatory statement made by an interview subject. That is why fact-checking and investigation and assessment of sources and their reliability is so important.*
2. **I don't need to worry about fictionalizing things about a subject in a docudrama, because I have "dramatic license" to do so.** *Be careful. While there is dramatic license to fictionalize scenes to some degree, the fictionalization should not be defamatory as the viewer doesn't know what is fictional and what is true, risking a defamation claim from the subject. In addition, if the fictionalization is significant, there could be a right of publicity issue in using the subject's name and likeness without permission.*
3. **I need "life rights" in order to make a documentary about a celebrity or other public figure.** *You don't. Life rights (a bundle of rights which may include rights of privacy and publicity, and waivers of potential defamation claims) are not required to do a documentary about a public figure, as information about public figures is generally considered newsworthy and in the public interest. But getting those rights can sometimes be advantageous. Insurers, distributors and networks are sometimes more comfortable having them, and having them might give you access to materials or anecdotes you wouldn't otherwise get.*
4. **As long as I use less than 30 seconds of a copyrighted work, it's fair use.** *Not true. Fair use requires an analysis and weighing of four specific factors to assess whether the defense is available. While the amount used is a consideration, an arbitrary percentage or number of seconds is not a determinative factor.*
5. **If someone posts it on social media, then I can use it without permission.** *Nope. Copyright protections still apply even if someone has posted a photo, artwork, a song, a poem, etc. on social media. To use, you should seek permission or have a lawyer analyze whether the fair use defense is available.*
6. **If I credit the copyright owner, then I don't need permission.** *Not true. Giving the copyright owner credit doesn't make an otherwise infringing use a fair use.*
7. **If music happens to be playing while I'm filming, I don't have to worry about clearing it because it happened in "real time."** *Not true. There is typically no fair use argument for music which happens to appear in a documentary. If it's only a few*

seconds, you may have the defense that the music was only incidental. (There is an incidental/de minimis defense to copyright infringement.) But any significant use requires a license or should be removed or replaced.

8. **If photos and artwork happen to appear in the background where I'm filming, I don't need to worry about it.** *You might. Sometimes, photos and artwork are truly incidental and fleeting (and thus subject to the incidental/de minimis defense). But anytime they are lingered on, a focal point, or used as the backdrop for an interview, there is a risk of copyright infringement if you don't get permission.*
9. **I can't show trademarks or brands unless I clear them.** *Good news. Trademarks, brands, and logos naturally appearing in "real world" footage do not generally need to be cleared. But products that are intentionally placed in footage or otherwise used in a manner suggesting sponsorship or endorsement may need to be cleared.*
10. **I can freely use photos and footage given to me by the subject of my documentary because the subject owns them.** *Not necessarily. Possession does not equal copyright ownership. The subject may have a collection of photos, for example, that were taken by a professional photographer, or video footage from a television show appearance. That material would either need to be cleared by the copyright owner or analyzed for use pursuant to one of the copyright infringement defenses.*

Citing Warhol, 10th Circuit Reverses Tiger King Fair Use Ruling

By Caren Decter

Published: March 28, 2024

Back in 2022, the U.S. Supreme Court issued an important fair use ruling in *Warhol v. Goldsmith*—holding that Warhol's use of Goldsmith's Prince photograph was not fair use. Our firm co-authored an [amicus brief](#) in that case on behalf of documentary filmmakers—warning that if the ruling is applied to documentaries, filmmakers will not be able to rely safely on the fair use doctrine to justify their use of pre-existing copyrighted material.

We have been closely monitoring the court dockets to see how courts are analyzing fair use in the wake of the *Warhol* ruling—especially as applied to documentary films. This week's Tenth Circuit decision in *Whyte Monkee Productions et al. v. Netflix, Inc. et al.* (the “Tiger King” copyright case) provides a first glimpse.

Many of us watched “Tiger King” during the first months of the pandemic—the seven-part documentary series about an eccentric Oklahoma zookeeper named Joe Exotic. The series included short clips from eight videos that were filmed by plaintiff Timothy Sepi. Sepi sued Netflix for copyright infringement, contending that the clips were used without his permission. The federal trial court held that Sepi did not own the copyrights in seven of the videos, because they were works for hire (Sepi shot the clips for *Joe Exotic TV*). Although Sepi owned the copyright in the eighth clip—a video of Exotic's husband's funeral—the trial court found that Netflix's use of that clip was fair use.

On appeal, the Tenth Circuit reversed the trial court's fair use ruling. Citing *Warhol*, the Tenth Circuit held that the first fair use factor—the “transformative” factor—weighed in favor of Sepi, because defendants did not comment on Sepi's video itself, but rather used Sepi's clip to comment on Joe Exotic's “megalomania, even in the face of tragedy.” The Tenth Circuit reasoned:

Warhol has deemed such a use to not be sufficiently transformative. Indeed, in *Warhol*, Andy Warhol himself targeted a character—the artist, Prince—but the Court determined that his work was not sufficiently transformative in part because Mr. Warhol did not target the original work—viz., Lynn Goldsmith's photograph of Prince.

Relying further on *Warhol*, the Tenth Circuit held that the commercial nature of Netflix's use of Sepi's clip also weighed against a fair use finding.

As to the other factors, the Tenth Circuit held that the second and third factors weighed in favor of defendants, because Sepi's clip was “more factual than creative” and only a small portion was used. The court declined, however, to rule on the fourth factor (the effect of defendants' use on the potential market for Sepi's clip) because it found that the factual record had been inadequately developed.

By declining to rule on the fourth factor, the Tenth Circuit punted on the question of the overall sufficiency of the fair use defense. Thus it remains to be seen how the ultimate balancing of the four factors will play out. But the Tenth Circuit's ruling on the first factor—which is often outcome-determinative of fair use—validates our concerns regarding the impact of the *Warhol* decision on the ability of filmmakers to rely on this defense. We will follow this case closely and keep you posted.

Do I Really Need to Worry About Those Photos in the Background?

By Melissa Georges

Published: September 29, 2023

Michael Kelley v. Morning Bee, Inc. and Apple, Inc., No. 1:21-cv-8420-GHW2023 WL 6276690 (S.D.N.Y. Sept. 26, 2023)

If you work in the world of documentary film, you've undoubtedly encountered a situation in which you're filming in *verité*, and you can't help but capture artwork or photographs appearing in the background. It must be okay, you think, because you're not intending to film these works, it's not the purpose or focal point of your shot, and you can't even see the works clearly anyway. But could the copyright owner in those works still sue you for copyright infringement? The answer, of course, is yes. But the good news, for documentary filmmakers at least, is that that kind of incidental capture of copyrighted material isn't necessarily an infringement, as a federal court in New York recently determined.

The case involved a documentary about Billie Eilish, in which the filmmaker followed the then 19 year old musical artist on the road, onstage, and at home with her family. In one scene, Eilish arrives at the Auckland Airport in New Zealand, one stop on her world tour. She is greeted by the Hatea Kapa Haka, a Maori cultural group, who performs a rendition of one of her songs, accompanied by dancing and the donning of traditional Maori attire. The performance happened to take place adjacent to three walls of a photo display featuring ten photos of an exhibit entitled "Airportraits," which appeared behind and to the sides of the performers. The scene with the performers lasted about a minute, but the photographs appear on onscreen for only about 15 seconds.

The photographer sued the film's producers for copyright infringement, and the producers moved to dismiss the complaint. The court in the Southern District of New York granted the producers' motion, finding not only that the appearance of the photos in the film was a *de minimis* use, but was also a fair use under U.S. copyright law. On the issue of *de minimis* use, the Court observed that in the 140 minute film, the photos appeared only a total of 7 to 14 seconds per photo. In addition, the photos were often obstructed, out of focus or under low lighting, or displayed at an angle. At all times, the photos appeared in the background only, and were never discussed or commented on by anyone in the film. As such, the appearance of the photos in the Film did not meet the requirement of "substantial similarity" for copyright infringement, as the use "has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity." (quoting *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 74-75 (2d. Cir. 1997).

The Court went on to state that even if the use of the photographs in the film were not *de minimis*, the use would be permissible under the doctrine of fair use. The Court analyzed the appearance of the photographs pursuant to the four statutory fair use factors. The first factor, the purpose and character of the use of the work, focuses on whether the alleged infringing use has a further purpose or different character than the original use, called a "transformative" use. The Court observed that the photographs and the Film served very different purposes: the photographs commented upon the spirit of modern aviation and appeared only incidentally in the film, which had the larger purpose of documenting Eilish's life and career. The Court concluded that the momentary depiction of the photographs in the film comprised "a transformative purpose

of enhancing the biographical [story]... a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

On the second factor, the nature of the copyrighted work, the Court found it neutral with respect to both parties. Because the photographs were both creative and published, the Court determined this factor did not weigh strongly in either party’s favor and in any case, noted that the second factor “does not carry much weight in the fair use analysis.” On the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the Court found it weighed heavily in favor of a finding of fair use as the portion used was minimal, brief and indistinct, and certainly “reasonable in relation to the purpose of the copying” (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 480 (2d Cir. 2004). Finally, on the fourth factor, the effect of the use on the potential market for the copyrighted work, the Court determined that the film’s “fleeting use of the photographs in the background of a scene depicting a cultural performance cannot reasonably be expected to harm Plaintiff’s ability to license his photographs for publication and use.” In finding fair use in favor of the producers, the Court concluded:

To hold otherwise would require documentarians to either blur, or obtain permission and pay licensing fees for every such fleeting, incidental, and momentary capture of any work of art in the background of a completely unrelated scene – where the work has not been consciously chosen for any decorative or thematic purpose, is simply present during the filming of unpredictable, unfolding, real-life events, and does not in any way supplant the market for the original work. Such a holding would not serve the copyright law’s goal of promoting ‘the Progress of science and use Arts.’ (quoting U.S. Const., art. 1, sec. 8, cl.8).

This decision is a win for documentary filmmakers, who should be able to include incidental material as filmed, because to do otherwise could result in an alteration and thus falsification of reality, a practice which would be inconsistent with the documentary filmmaking process and with the values of criticism and journalism that inform reality-based filmmaking.

The Girl with the Tiger King Tattoo Loses Copyright Infringement Lawsuit Against Netflix

By Brian Murphy

Published: September 25, 2023

Tattoos again. (See [here](#) and [here](#).)

In the early days of the pandemic, tattoo parlors across the country - including one owned by plaintiff Molly Cramer - were shuttered due to the threat of viral transmission between ink slinger and client. In an attempt to generate enough income to reopen her shop when lockdowns ended, Cramer ran a promotion: customers who purchased a gift certificate for future services could vote on their favorite tattoo design from among several she had created, and the winning design would be inked onto her husband's thigh. (The court's opinion doesn't specify whether his left or right thigh would serve as the canvas.)

Around the time the promotion was hatched, Cramer, like so many (myself included), fell under the spell of Netflix's *Tiger King*. The docuseries focuses on the bitter rivalry between Joseph Allen Maldonado-Passage (aka "Joe Exotic"), a big cat breeder in Oklahoma, and his nemesis Carole Baskin, a self-styled animal rescuer who accused Joe of abusing and exploiting the animals under his care. According to *Ad Week*, 34.3 million Americans streamed *Tiger King* during the first ten days it was available on Netflix, making it [COVID-19 lockdown's first smash hit](#). Resistance to its charms was futile.

Tattoo art often imitates life. One of the designs Cramer created for the promotion featured an image of Joe Exotic, encircled by floating corona viruses, a can of Lysol, and a toilet paper banner that read "Quarantine 2020." Cramer believed that Joe Exotic's "popularity, notoriety, and global recognition" would "receive a very large response by the public for the online sale of gift certificates." Turns out, she was right. Cramer sold nearly \$4,000 worth of gift certificates, and, true to her word, her husband now sports the design that received the most votes: the Joe Exotic tattoo.

In November 2021, Netflix released a second season of *Tiger King*. The first episode of the new season began with a montage that stitched together clips from season 1 with footage documenting the global reaction to the show, including viral videos of fans dressed as Joe Exotic, a clip of then President Trump mentioning Joe Exotic at a press conference, and the following split screen which included a photo of the Cramer's Joe Exotic tattoo in the lower left hand corner:



This photo, originally published by Cramer on her Facebook page, was used by Netflix without permission and appeared on screen for less than three seconds. When Cramer's demand for \$10 million (later reduced to \$50,000) was rebuffed, she sued Netflix for copyright infringement. Netflix moved to dismiss under Rule 12(b)(6) on fair use grounds. District Judge Stephanie L. Haines (N.D. Pa) granted the motion, making quick work of it.

Purpose and Character of the Use

The first factor weighs "strongly" in favor of Netflix. Netflix's use of the tattoo "as part of a visual and auditory compilation depicting the public's overwhelming fascination with and reaction to Joe Exotic in the early days of the pandemic" constitutes "criticism," "comment," or "reporting," all of which are among the uses called out in the preamble to § 107 that are commonly found to be fair. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (use of images of concert posters "as historical artifacts" in a book's timeline about the history of the Grateful Dead was transformative). By including the tattoo image in a multimedia presentation alongside other examples of the public's reaction to *Tiger King*, Netflix had created "something new, with a further purpose or different character, altering the first with new expression, meaning or message" (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)). Moreover, Cramer and Netflix used the tattoo for "fundamentally different purposes": whereas Cramer "posted the image of the Tattoo on her husband's thigh to promote her tattoo business and sell gift cards," Netflix used the image in a compilation to show "the magnitude of how the general public reacted to Joe Exotic after Season One of the *Tiger King* series." Because Netflix's use of the tattoo image was "independent from" Cramer's original purpose for creating it, "Netflix's use neither supersedes the object of the Tattoo nor serves as a substitute." Cf. *Andy Warhol Foundation vs. Goldsmith*, 143 S. Ct. 1258, 1274 (2023) (first factor did not favor fair use when the parties' use of the work shared "substantially the same purpose").

The Nature of Copyrighted Work

Since the parties agreed that the tattoo design was a creative work, the second factor would tend to favor Cramer. "However, the Court gives this factor limited weight as Defendants' use of the image of the Tattoo is transformative within the meaning of the first factor."

Amount and Substantiality of the Portion Used

The third factor also favors fair use. Although the tattoo image is shown in the episode in its entirety, "the image is less than life-size, depicted along with seven other images on screen, and shown for less than 3 seconds." Moreover, the use of the entire image was "appropriate to Defendants' transformative purpose of showing the public's reaction to Season One of the *Tiger King* series," specifically "to show the lengths viewers have gone to associate themselves with Joe Exotic, i.e., getting a tattoo of Joe Exotic's face."

The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth factor supports a finding of fair use because Netflix's "transformative use of the image of the Tattoo in no way usurps the market for the original." Cramer sells tattoos and gift cards for her tattoo business, and she does not allege that fewer people are in the market for her tattoos because of the image being shown in the episode.

Finally, the court concluded that it was appropriate to dispose of the case at the pleading stage. The plaintiff failed to identify how discovery would aid, inform or be relevant to a fair use analysis, and the record before the court - which included the tattoo image, the episode and the plaintiff's copyright registration - was sufficient to enable the court to conduct a full fair use analysis. "Even viewing the copyright infringement allegations in the light most favorable to Plaintiff, it is clear that the Court cannot grant relief under any set of facts that could be proven consistent with the record before the Court."

Cramer v. Netflix, Inc.,

Civil No. 3:22-cv-131, 2023 WL 6130030 (W.D. Pa. Sept. 18, 2023)