

FYI



A Writer's Guide to Fair Use

Just how much of another writer's copyrighted work can you use without running afoul of the copyright law? Ten percent? Two hundred and fifty words? The lesser of 10 percent or 250 words? The greater of 10 percent or 250 words?

Whether you're a music critic publishing reviews, an English professor analyzing modern poetry, a political satirist composing song parodies, or a novelist introducing chapters with catchy quotes, you need to understand the boundaries of copyright protection, including the privilege to make "fair use" of copyrighted works.

Copyright fundamentals

According to the U.S. Constitution, the copyright laws are meant to "promote the progress of science" by giving authors and artists an incentive to create, in the form of a bundle of "exclusive" rights that protect their original "works of authorship." This bundle includes the rights to copy and adapt their works, to publicly perform and display their works, and to control the "first sale" of their works to the public. Thus, from the moment a person fixes some original expression (such as an article, story, song or picture) in tangible form, that person can claim copyright in the work.

However, there are limitations on these rights. First, copyright protects expression, not ideas—anyone is free to use the ideas, concepts and facts in

a work, provided they do not use the author's original expression. Second, certain limits are built into the rights themselves: For example, the copyright owner controls public but not private displays and performances (so you can play that CD at home without worry), and controls the "first sale" but not subsequent sales of each copy of the work (so once you buy a book, you may sell or transfer that physical copy as you wish). Third, the copyright owner's rights are limited by the "fair use" doctrine.

Fair use analysis

Section 107 of the Copyright Act states that "the fair use of a copyrighted work, including such use by reproduction in copies, ... for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research, is not an infringement of copyright." It also states that in determining whether a use is fair, at least four factors must be considered.

1. The purpose and character of the use. Certain uses receive more latitude for copying, such as non-commercial research, teaching, comment and news reporting. Though most commercial uses are inherently suspect, so-called "transformative" uses, such as parodies, get preferred treatment. Be aware that even experts often disagree on what's "transformative" and what's merely an infringing derivative.

2. The nature of the copyrighted work. Works of fact, such as science and history, receive less protection than works of fiction and imagination. (Indeed, since copyright protects only original expression, and facts themselves cannot be copyrighted, the only copyrightable element in a compilation of facts—such as a white pages phone directory—would be its original selection or arrangement, if any.) Quoting fiction for purposes of criticism or review is generally found to be fair use, provided the amount taken is reasonable. Quoting previously unpublished material of any kind, fact or fiction, is rarely considered fair use.

3. The amount and substantiality of the portion used in relation to the work as a whole. Both the quantity and quality count. Most courts consider the percentage of the original work used; but other factors are so important that one can't state a uniform rule. For example, when *The Nation* quoted 300-400 words (plus paraphrasing) from Gerald Ford's unpublished memoirs, the Supreme Court held this was not a fair use. In another case, the court held that it could be fair use for individuals to record entire television programs for later viewing. With rulings stating that under 1 percent is not fair use and that 100 percent can be fair use, it's impossible to provide percentage guidelines that always work.

Much of the reason for this is that

in law

The boundaries of copyright protection aren't as firm as you might think. A copyright attorney explains.

By Howard Zaharoff

the “substantiality of the portion used” must also be viewed qualitatively: If the use includes the “heart” of a work, this is generally not fair use even if the number of words copied is insignificant. That was why *The Nation* lost: By copying Ford’s short, but previously unpublished, description of the pardoning of Richard Nixon, the magazine had stolen the critical heart of his work.

Though less significant, some courts also consider the portion used in relation to the new work. For example, one court held that, although under 1 percent of *The Implosion Conspiracy* consisted of the copyrighted letters of Julius and Ethel Rosenberg, this could still be too much to constitute fair use of those letters.

4. The effect on the market. For most courts the pivotal factor is whether the new use deprives the original author of the commercial value of the work. Thus, quoting substantial portions of a work, such as a poem, even for purposes of legitimate criticism, could be deemed unfair if buyers of the critique receive a copy of the entire poem without payment to the origi-

nal author. (The importance of other factors here is clear: A professor copying the poem to hand out and critique in several sections of freshman English would have a stronger fair use defense than *The New Yorker* publishing a critical review.) On the other hand, creating a parody of a poem, song or other work will probably not provide a market substitute for the original and so may still be a fair use even if substantial portions are used. Naturally, fair use is hardest to establish when the use is in a related medium and performs similar functions—such uses are most likely to cause market harm under factor four and least likely to be transformative under factor one.

Fair use principles

Based on the above, authors determining how much they may borrow from another work should consider these guidelines:

- Ideas, themes and facts are not copyrighted. (However, “events” in a fictional work are not “facts”—as the publishers of *The Seinfeld Aptitude Test* learned when a court found its “643 trivia questions and answers about the events and charac-

ters depicted in *Seinfeld*” not a fair use.)

- Commonplace features (or “scenes a faire,” like showdowns in westerns) are also generally not protected.

- If getting permission is practical and affordable, get it! (Being denied permission shouldn’t count against your later fair use defense.) Make sure the permission is clear, complete and in writing.

Without permission

If you don’t get permission for whatever reason, it just makes sense to limit your borrowing:

- Quote or closely paraphrase as little as possible to make your point: under 10 percent is best; above 20 percent is high risk (though a recent case allowed that, where mainly facts were copied).

- Avoid using the “heart” of the original, what most people would buy the work to read.

- Avoid uses that replace (i.e., are market substitutes for) the original.

- Keep the borrowed portion as insignificant as possible a part of your new work, thus:

- Contribute significant original

material of your own.

- Where possible, transform the character of the original; add new expression, meanings or messages.

Fair use in an unfair world

So how much can a writer borrow without fear of reprisal?

The honest, and only accurate, answer is "it depends." The music industry often acts as if no one can quote lyrics without permission. Though the courts haven't agreed, still beware: If you're not doing music reviews, and you quote lyrics merely to enliven your writing, you may receive a nasty letter (or more!) from a music publisher.

The Internet seems to hold the opposite promise; and indeed the free presence of a work on the Internet may mean that the author

intends others to disseminate the work. But many works appear on the Internet without the author's permission. Besides, authorizing Internet distribution of a work does not equal authorizing its use in other people's books and articles. So, unless you have proof to the contrary, in your professional writing activity analyze the fair use of works found on the Internet as you would other works.

So how do you know if your use is fair? By hiring a copyright lawyer, of course! But if you can't afford one, or haven't the time, apply the above principles and follow the golden rule: Do not take more from the works of others than you would have them take from you. **WD**

Howard Zaharoff, a lawyer in Waltham, Mass., claims to use others' works fairly as he creates his frequent contributions to WD.

Some Fair Use Do's & Don'ts

- Don't steal manuscripts or use works you know are stolen or infringing.
- Don't lie or deceive (e.g., giving false reasons for research).
- Don't breach agreements (e.g., library restricted use contracts).
- Do remember there is a wider scope for using factual and representational works; less scope for using fanciful and imaginative works, little scope for using unpublished works, and no magical percentage or number that is always, under all circumstances, OK. Still, rarely should borrowing a couplet from a long poem or song for noncompetitive purposes, or 250 nonessential words from a book-length work, be deemed infringing.

—Howard Zaharoff