

# A Writer's Guide to Fair Use

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Just how much of another writer's copyrighted work *can* you use without running afoul of the copyright law? 10 percent? 250 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 4 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. (*But beware:* 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.) Still, quoting fiction for purposes of criticism or review is generally found to be fair use, provided the amount taken is reasonable. But beware: 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. Yet in another case it held that it could be fair use for individuals to record entire television programs for later viewing. With rulings ranging from under 1% is not fair use, to 100% can be fair use, it's impossible to provide percentage guidelines that always work.

Much of the reason for this is that 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 Nation* 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% 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 original 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 4 and least likely to be transformative under factor 1.

## 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 refused to find its "643 trivia questions and answers about the events and characters 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. If you don't get permission:

- Limit your borrowing, both

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

❓ *Qualitatively*: 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, by adding new expression, meanings or messages.

- *Act properly*, thus:

❓ 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).

- *Remember*, there is:

❓ 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 (e.g., 10%) or number (e.g., 250 words) that is always, under all circumstances, okay.* Still, rarely should borrowing a couplet from a long poem or song for noncompetitive purposes, or 250 non-essential words from a book-length work, be deemed infringing.

## Applying Fair Use Principles 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. Still beware: 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 proposed 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.

For further information on fair use issues, please contact the author **Howard G. Zaharoff**.