



That's Covered Under 'Fair Use' Isn't It? (Probably Not.)

IF YOU READ STEPHEN KING'S NOVELS, YOU MAY HAVE NOTICED THAT HE LIKES TO REFER TO SONG TITLES AND LYRICS. WHAT YOU MIGHT NOT HAVE NOTICED IS THE COPYRIGHT INFORMATION THAT'S INCLUDED. AND WHAT YOU MIGHT NOT KNOW IS THIS: KING PAID FOR THE RIGHT TO USE THOSE WORDS.

I am not an attorney but I try to keep my clients from making mistakes that might subject them to legal action under copyright laws. Admittedly, this isn't an entertaining subject but you can read this article in 5 minutes or less and it might keep you out of court.

Question 1: Can you claim "fair use" if you copy an entire article from the *New York Times* and post it on your website? The clear answer is NO; that's a copyright violation.

Question 2: What if you paraphrase the article from the *New York Times* instead of copying the entire article? NO; that's plagiarism.

Illegal vs. Unethical

SO NOW YOU'RE THINKING WELL, WHAT CAN I USE AND HOW CAN I USE IT? THE ANSWER ISN'T ALWAYS CLEAR BUT THERE ARE SOME GENERALLY ACCEPTED GUIDELINES AND THOSE ARE THE TOPIC OF THIS ARTICLE.

Let's start with *fair use*. This description is from Wikipedia, which is a Creative Commons source and that means I can quote without fear: "Fair use is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. In United States copyright law, fair use is a doctrine that permits limited use of copyrighted material without acquiring permission from the rights holders."

You can claim *fair use* if you quote someone else's work and combine it with commentary, criticism, news reporting, research, teaching,

library archiving, and scholarship because the law provides for the "legal, unlicensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test."

The term *fair use* originated in the United States. A similar principle, *fair dealing*, exists in other common law jurisdictions.

The other essential term to consider is *plagiarism*. Wikipedia defines that term as "wrongful appropriation, close imitation, or purloining and publication of another author's language, thoughts, ideas, or expressions and the representation of them as one's own original work, but the notion remains problematic with nebulous boundaries."

Copyright violation is a legal issue while plagiarism is an ethical issue.

The Wikipedia article notes that the modern concept of plagiarism emerged in Europe in the 18th century, particularly with the *Romantic movement*, while in the previous centuries authors and artists were encouraged to "copy the masters as closely as possible" and avoid "unnecessary invention."

The 18th century morals have been institutionalized and enforced prominently in the sectors of academia and journalism, where plagiarism is considered academic dishonesty and a breach of journalistic ethics, subject to sanctions like expulsion and other severe career damage.

This is not so in the arts, Wikipedia notes, where copying is a fundamental practice of

the creative process, but with the boom of the modernist and postmodern movements in the 20th century, this practice has been heightened as the central and representative artistic device.

Plagiarism remains tolerated by 21st century artists but is disapproved more on the grounds of moral offence, and cases of plagiarism can involve liability for copyright infringement.

Simplyfying a Complex Subject

IF ALL THIS MAKES YOUR HEAD HURT, JOIN THE CLUB. IT'S COMPLICATED.

The *fair use* article in Wikipedia is long and legalistic. Practically, though, there are a few key considerations that you should review before using someone else's words. The following comprise the "four-factor balancing test":

What is the purpose of the work? Reviews of copyrighted information or parodies are generally considered to be protected under *fair use*, as are commentary, reporting, research, teaching, and other activities.

What is the nature of the copied work? Few people can claim this protection because it deals primarily with copyrighted information that should be freely available and Wikipedia offers this example: *The Zapruder film of the assassination of President Kennedy, for example, was purchased and copyrighted by Time magazine. Yet their copyright was not upheld, in the name of the public interest, when they tried to enjoin the reproduction of stills*

from the film in a history book on the subject in *Time Inc v Bernard Geis Associates*.

What is the “amount and substantiality” of the quoted material? Copying an entire article is clearly not covered by fair use, regardless of how the article is presented.

Some people have attempted to define acceptable uses by stating that quoted information must be limited to a certain number of words but this is foolish regardless of the number of words selected.

My recommendation is to quote the fewest number of words possible, add your own commentary, and attribute the original work to the author. This doesn't guarantee that you won't receive a call from the copyright holder's attorney but it does help to clearly illustrate your intent.

What effect does the use have upon the work's value? This is the primary consideration that is in play for most of us. Quoting an entire article would severely reduce the value of the original work.

Wikipedia explains: *Courts often consider two kinds of harm to the potential market of the original work: First, courts consider whether the use in question acts as a direct market substitute for the original work.*

In the judgement of the Supreme Court in Acuff-Rose Music they decisively stated that, “when a commercial use amounts to mere duplication of the entirety of the original, it clearly supersedes the object of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.”

Second, courts also consider whether potential market harm might exist beyond that of direct substitution, such as in the potential existence of a licencing market. This consideration has weighed against commercial copy shops that make copies of articles in course-pack for college students, when a market already existed for the licencing of course-pack copies.

Common Misunderstandings

THE WIKIPEDIA ARTICLE LISTS A DOZEN COMMON MISCONCEPTIONS ABOUT FAIR USE. LET'S CONSIDER A FEW OF THESE.

Is copying an entire work ever legal under fair use? Earlier, I said “copying an entire article is clearly not covered by *fair use*” but Wikipedia counters: “Copying an entire work may make it harder to justify the amount and substantiality test, it does not make it impossible that a use is

fair use. For instance, in the Betamax case, it was ruled that copying a complete television show for time-shifting purposes is fair use.”

The lack of a copyright notice means the work is public domain. This is not correct. Copyright is the default for newly created works. For a recent work to be in the public domain the author must specifically opt out of copyright.

Any use that seems fair is fair use. In the law, the term *fair use* has a specific meaning that only partly overlaps the plain-English meaning of the words. While judges have much leeway in deciding how to apply fair use guidelines, not every use that is commonly considered “fair” counts as fair use under the law.

Acknowledgment of the source makes a use fair. Definitely not! Giving the name of the photographer or author may help, but it is not sufficient on its own. Wikipedia says “While plagiarism and copyright violation are related matters—both can involve failure to properly credit sources—they are not identical.

Plagiarism—using someone's words, ideas, or images without acknowledgment—is a matter of professional ethics. Copyright is a matter of law and protects *exact expression*, not *ideas*.

Strict adherence to fair use protects you from being sued. We live in a litigious society. *Fair use* is an affirmative defense against an infringement suit; it does not restrain anyone from suing.

The copyright holder may legitimately disagree that a given use is fair, and they have the right to have the matter decided by a court. Thus, *fair use* does not guarantee that a lawsuit will be prevented.

But I Paraphrased ... !

PLAGIARISM ISN'T A LEGAL MATTER BUT IT IS AN ETHICAL ISSUE.

If you encounter words in a book, article, or memor from a co-worker that exactly express a point that you wish to convey and you use those words without attribution, you have committed plagiarism.

Any attempt to pass off the words of another person as yours, even unintentionally, is plagiarism. Citing the source of the original work generally prevents accusations of plagiarism but is an insufficient defense against copyright violations.

Most of my clients and I fit into what might reasonably be considered journalistic areas and

the Wikipedia article addresses this concern well: “Since journalism's main currency is public trust, a reporter's failure to honestly acknowledge their sources undercuts a newspaper or television news show's integrity and undermines its credibility.

Journalists accused of plagiarism are often suspended from their reporting tasks while the charges are being investigated by the news organization.”

The problem is the ease with which plagiarism may be committed. “Journalists have been caught *copying-and-pasting* articles and text from a number of websites.”

The Bottom Line

JUST AS TYPOGRAPHIC ERRORS CAN CAUSE A WEBSITE VISITOR TO QUESTION THE SITE'S OVERALL BELIEVABILITY AND RELIABILITY, COPYRIGHT VIOLATIONS AND PLAGIARISM CAN CONVERT A WEBSITE VISITOR WHO BELIEVES IN YOUR MESSAGE TO ONE WHO CONSIDERS YOU TO BE A LYING BASTARD WHO STEALS OTHER PEOPLE'S WORK.

For this reason, my recommendations are as follows:

- When you quote someone, use attributions to make clear whose words you are using.
- Minimize the amount of information that you quote.
- Provide additional information (reviews, comments, suggestions) in addition to the quoted information.
- When you paraphrase information, make it clear that you are paraphrasing another's work and provide links to the original work.

If you write carefully and review thoroughly to ensure that there is no doubt about copyright violations or plagiarism for any information you include on your website or in a publication, you'll reduce the chances that someone will accuse you of copyright violation or plagiarism. Ω



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