

ALL'S FAIR IN LOVE AND WAR (BUT NOT NECESSARILY IN COPYRIGHT)

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Two pros show you how to avoid copyright infringement

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We often get questions from writers about their ability to use material in their writing that was obtained from other sources. Maybe you are writing a historical work and want to use other historical works as background. Perhaps your hero and heroine are slow dancing to a popular song, and you want to “show, not tell” by including the lyrics. Or, maybe putting a snippet of your favorite poem in italics at the beginning of each chapter is just the effect you need. What if you are criticizing or comparing text written by someone else?

In all of these instances, writers often wonder if they can use any of this material without getting permission from the original author.

So, what’s the answer? Get used to these words: it depends.

We know that’s a frustrating answer to hear, and it probably feels like lawyers don’t ever give a clear yes or no answer, but that’s the nature of the law. There are lots of shades of gray involved. You can learn the legal concepts, but much is dependent on the facts of the particular case, so small differences in similar situations may result in a different answer. Therefore, it is very difficult to give a black-or-white answer without knowing the specific circumstances of each case. However, if you have a general understanding of the legal concepts governing when you need to ask for permission

to use other’s material, you will have a better understanding of what you can and can’t do when writing.

So, what is the law in this area? The answer to this question is governed by two important concepts: (1) the public domain and (2) the doctrine of fair use.



The Public Domain

If a work is in the public domain, you do not need permission from the author and should feel free to copy away. Works in the public domain include any work that is not actively protected by a copyright. Copyright law provides protection for a work for the life of the author plus 70 years or, in the case of works made for hire, anonymous, and pseudonymous works (if the author’s name is not revealed to the Copyright Office), the protection extends 95 years from publication or 120 years from creation, whichever is shorter.¹

We’re going to digress slightly here and stress a very important point that you probably already know, but it’s still important to reiterate. You do not need to register your copyright in order to have a valid copyright. Copyright subsists in an original creative work once it is “fixed” in a tangible medium. We’re putting “fixed” in air quotes because it is a term of art, and we could write multiple, long articles just on this concept alone. Search the Internet if you need examples, but suffice it to say that once your words or design or whatnot is on the page, it is protected under copyright, although you won’t obtain all the very important procedural advantages unless you register your work.

The Fair Use Doctrine

For works that are copyrighted, the question of whether you can use portions of the work without being liable for infringement is governed by the doctrine of Fair Use. This doctrine originated in the “common law” (law made by judges) in the United Kingdom in 1740, from which U.S. judges drew to develop the U.S. version of fair use at least as early as 1841. It was not actually codified until Congress passed the 1976 Copyright Act.

The Fair Use clause of the Copyright Act says that it is fair to use a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, without the consent of the copyright owner.”

Every fair use case is a question of facts. The test for fair use is very easy to state, but very difficult to apply, and the outcome is even more difficult to predict. Fair use is determined on a case-by-case basis, meaning that if you ask someone, “Would it be fair use to do _____?” the most likely answer you’ll receive is (altogether now!), “It depends.” The reason you’ll hear this answer so often is that each scenario needs to be analyzed based on its specific facts and circumstances based on the following four factors: (1) the purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes; (2) the nature and character 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 unauthorized use on the market for or value of the copyrighted work.

Courts weigh these factors when faced with questions of copyright infringement (after the person whose material was taken without permission objects to that taking). But while these are the only factors specifically mentioned in the Fair Use clause, it doesn’t mean that these are the only things at which the court can look. A court also may consider any other factor it deems relevant and place different weights on the four factors listed above.

While you do not need to engage in the detailed reasoning a court undertakes when deciding if you need to seek permission, you should be aware of the above factors and keep them in mind when using others’ materials in your own work. So, what does this mean for your writing?

Purpose and Character of the Use

This factor looks at whether the new work was created for a commercial purpose or for a nonprofit/educational purpose.

You’re reading this article in the *RWR*, so most likely your work will be created for a commercial purpose (we’re all career-minded writers here in RWA, after all), and that characterization will tend to weigh towards a need to ask for permission.

The court also will look to whether your work is “transformative,” essentially taking elements from an existing work to create a new, creative work, and whether the work provides a social benefit to the public. Another element of this factor is your intent in taking the copyrighted work: Did you copy the existing work with the intent to exploit it and/or gain a commercial advantage, or is your copying incidental to the creation of your work?

Get used to these words: it depends.

Nature and Character of the Copyrighted Work

This factor reviews the work that you have copied. Was the copied work fact or fiction? Has it been published? Was the work created for a commercial or nonprofit purpose?

Generally speaking, if you have copied an unpublished fictional work, this factor will weigh against fair use because you have eliminated the author’s ability to exploit her own work. In addition, it may be necessary to copy portions of a factual work, such as a news account, biography, or history in order to add your own material to the work, but it is usually not necessary to do so with a fictional work.

Amount and Substantiality of the Portion Used

The concept of “fair” use is readily apparent in the evaluation of this factor, which looks at the amount and substantiality of the work you’ve copied in relation to the whole. Essentially, if you’ve copied only the necessary elements of a copyrighted work in order to create your new work, your copying will generally be viewed as fair use. On the other hand, if you copy the entirety of a work or the heart of a work (even if the heart of the work is captured in a small portion of the work in relation to the whole), it’s likely your act of copying won’t be considered fair use.

Effect on the Market

The final fair use factor evaluates the effect your copying has on the market for and value of the copyrighted work. Does your copying harm the work you have taken material from? Will your newly created work compete with the existing work, or does it fall into an entirely different market? These are the types of questions you should ask as you evaluate the effect your copying would have on the market.

As you can see, many of the fair use factors are closely related and dependent upon one another. The analysis, as well as how the court will weigh each factor, or whether the court may look at other issues, depends very much on the facts and circumstances surrounding each instance of copying. (Remember that catch phrase we taught you at the beginning of the article?)

In some situations, the importance of one factor may outweigh the other factors. Thus, as a general rule, you should not use any copyrighted material in your work without properly providing attribution, and you should use only what is absolutely necessary to create your new work.

If you have any doubts, you should always consult with an attorney and obtain permission from the copyright owner.

For example, let's look at the question posed above about using song lyrics to show, not tell, in your writing. If you include the entirety of a song or the main refrain, you'll definitely need to seek permission from the copyright holder. However, if you weave very short snippets of different song lyrics throughout the narrative (the key words here being "very short snippets"), with background information, you're only using what is necessary of the copyrighted material to set the scene of your characters hearing a song. Also, if you select songs that include the title of the song in the lyrics (important point: you can't copyright a title), your readers will immediately recognize the song from just a few words.

No, we're not going to give you a magic number for how many words is okay. This will always vary. (It depends, remember?) Nor will we say that you can always do this or guarantee that the owner of the work you used will not try to assert his/her rights. But it is important to remember that copyright only protects expression, and if you're using only a

few words, the portion that you've used may not even constitute protected expression. This is a case-by-case situation, and there is not one right answer.

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Obtaining Permission to Quote

So, you've evaluated the fair use factors and determined that you need to obtain permission to use a portion of a copyrighted work in your new novel. But, how do you go about obtaining this permission?

First, determine who owns the material you want to use. The U.S. Copyright Office's Web site (www.copyright.gov) allows you to search works that are covered by copyright registrations, although not all works protected by copyright have actually been registered.

The next step is to contact the copyright holder to request permission, preferably in writing. Keep in mind that you may need to pay a fee to use another person's copyrighted work. Depending upon the type of work, there are different places you can investigate to find information about the copyright holder and what is required to obtain permission.

The Copyright Clearance Center (www.copyright.com, not to be confused with the U.S. Copyright Office) can grant permission for those works for which they are able to grant permission. They do not hold rights to grant permission to quote all works, of course, but it's a good place to start. They will quote you the fee for the license to use the copyrighted material in your own work.

If you don't know the author of the work, contact the Authors Registry (www.authorsregistry.org), which is a clearinghouse for payments to authors. The Authors Registry is a database containing contact information for more than 30,000 authors and publishers. If the work is in print, the publisher may have the exclusive right to grant permission, not the author. Regardless, the publisher should be able to give you the ownership information. If you have trouble getting a response, your publisher's legal department might be willing to track down the owner for you and obtain permission.

To get permission to use song lyrics, you need to contact the music publisher who owns the rights. Use the searchable database on the Copyright Office Web site; contact ASCAP (American Society of Composers, Authors, and Publishers) at 212-595-3050; or BMI (Broadcast Music, Inc.) at 212-586-2000. They cannot grant permission to use song lyrics, but they can tell you how to find the claimant for songs in their repertoires.

Once you find the owner, you can secure permission with

a brief letter describing your project, the material you want to use, the extent of the rights needed, the credit line and copyright notice that will be given, and the payment (if any) that will be made. Permission fees are negotiable and will vary depending on the amount and nature of the material you want to use. You can find sample permission forms online.

If you have questions about fair use, obtaining permission, or copyright law in general, you should talk with your publisher's legal department or contact an attorney. While your actions can raise complicated issues, either your attorney or your publisher should steer you in the proper direction to help you avoid a claim of copyright infringement.

Notes

¹ For a handy way to figure out whether a particular work is still protected by copyright, check out the fabulous chart available at <http://www.copyright.cornell.edu/resources/publicdomain.cfm>



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RWR

A One-of-a-Kind Family by Holly Jacobs

She's kind of special...

Anna Chapel believes in people. She believes in helping them lead exceptional lives. Now the dedicated life coach wants to do that for different, yet special Colm Franklin. If Colm's breath-stopping, over-protective brother Liam will let her.

But the guilt-ridden computer programmer refuses to believe, to dream. Or could it be he simply needs to learn how? Anna's biggest challenge may be ahead: can one woman with a head full of wayward curls and a smile a mile long convince Liam they have a fighting chance? That, together, they can overcome anything to create a family that's truly one of a kind?



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