I. INTRODUCTION
Nonfiction authors often use existing materials in their works: A historian excerpts a soldier’s letters to a loved one; an art critic reproduces a telling detail in a painting; a scientist quotes from a well-known article. Readers of nonfiction works expect new writing to reference and incorporate other works; indeed, the quality and integrity of nonfiction works frequently depend on the author’s skillful use of such materials. Although drawing from other works is common, it can often seem difficult to know when (and how much) unlicensed copying is permissible and whether certain unlicensed uses of another’s work put you at risk of copyright infringement.¹

Sometimes, authors need to seek permission or pay for a license to use copyrighted materials. An author may even need a license to use her own works
because she signed over her copyrights to her publisher. But not always. In some situations, unlicensed use may be legally permitted by virtue of the “fair use” doctrine, a well-known (but oft-misunderstood) limitation to copyright in the United States. Fair use is a powerful tool, but unfortunately many nonfiction authors find it tricky to know when to rely on fair use and when to seek permission. That’s where this guide comes in.

In addition to providing background information on copyright law and fair use, this guide identifies three common situations that nonfiction authors encounter when incorporating existing materials into their works and then discusses general fair use principles and limitations that apply in these situations. This guidance is based on broadly shared norms found in the leading fair use statements of best practices, as well as existing case law. We hope this guide will help demystify fair use for nonfiction authors.

WHO IS THIS GUIDE FOR?
Are you a nonfiction author? Have you ever wanted to know whether you needed permission or a paid license to use
copyrighted material in your work? Would you like to learn more about fair use?

If you answered yes to these questions, then read on! This guide is designed for all nonfiction authors—from biographers to science writers, historians to literary critics, memoirists to academics, and beyond—who want to know more about using copyrighted materials. This guide will help nonfiction authors who want to do things like:

- Include song lyrics in an academic paper discussing musical trends;
- Quote from a novel to analyze the author’s use of metaphors in a work of literary criticism;
- Incorporate a photograph in an article about the photographer’s use of light and shadow;
- Use a chart in a scientific paper critiquing a researcher’s methodology and findings; or
- Quote from unpublished letters in a memoir.

HOW WAS THIS GUIDE CREATED?

This guide was prepared by the Authors Alliance, a nonprofit organization that provides educational materials and advocates for the interests of authors
who want to share their creations broadly in order to serve the public good. To further this mission, Authors Alliance created this guide to help nonfiction authors understand reasonable strategies for the application of fair use in common situations that nonfiction authors encounter. In this way, Authors Alliance hopes to help nonfiction authors to create their best possible works, distribute those works widely and, in turn, enhance the public’s access to knowledge and culture.

This guide is based on the common situations in which nonfiction authors incorporate copyrighted materials into their works. In order to identify these scenarios, we interviewed and collected surveys from nonfiction authors, scholarly communications officers, and copyright experts. We are grateful for the partnership of the American Association of University Professors, the American Council of Learned Societies, the American Historical Association, and the Modern Language Association, who helped us to reach a wide range of nonfiction authors by distributing the survey to their members. In total, we were in contact with more than sixty nonfiction authors and experts who
shared nearly 150 stories about their experiences. In parallel with this outreach, we consulted sixteen existing fair use best practices statements developed by other authorial communities.⁵ In general, the issues most frequently addressed in these fair use best practices statements overlapped with the issues that nonfiction authors raised in our interviews and surveys.

After identifying the common situations that nonfiction authors encounter, we conducted an analysis of the sixteen existing best practices statements to analyze the principles and limitations other authorial communities have deemed applicable to these situations. As others have noted, a “meta-consensus” is emerging across various fields on how fair use applies to given scenarios.⁶ From this body of work, we identified and distilled common approaches to these situations. In some places, we have directly incorporated language from existing codes. In addition, we consulted existing fair use case law to provide real-world examples of how these common situations have been resolved in court.
WHAT THIS GUIDE ISN’T

While this guide provides information and strategies for authors who wish to better understand how fair use works in the United States, it does not apply this information to any individual author’s specific situation. This guide is not legal advice, nor does using this guide create an attorney-client relationship. Because the applicability of fair use is context-dependent, this guide does not provide bright-line tests or rules for any legal analysis of fair use. The examples here are meant to illustrate common scenarios in which fair use does apply, but they may not apply in your case. Authors’ ability to use copyrighted works may also be limited by restrictions other than copyright (e.g. contractual restrictions or privacy laws).

Although all countries include some accommodations for use of copyrighted works in their national laws, copyright law varies by country and the information in this guide applies only to the use of copyrighted material in the United States (regardless of where the copyrighted material originates). This guide does not cover reproductions, distributions, performances,
or other uses outside of the United States, including web-based uses specifically targeted toward other countries, to which those countries’ laws may apply.

This document also does not delineate the limits of fair use rights, nor is it an exhaustive guide to all possible applications of fair use. Fair use extends beyond what this guide covers. Indeed, nonfiction authors may make compelling arguments for fair use even outside of the scenarios identified in this guide. Moreover, fair use is not static. It evolves in response to technological changes and, over time, will likely encompass uses that are not addressed in this guide. In addition, nonfiction authors may be able to use copyrighted works based on considerations apart from fair use (e.g., based on permission granted under the terms of a Creative Commons license).

Finally, nonfiction authors do not need to rely on fair use for works that are in the public domain (either because they were never subject to copyright protection or because such protection has expired). But where a work’s copyright status is unclear, nonfiction authors may still want to understand whether the use of the
material would be permitted by fair use should the material be protected by copyright.

Please consult an attorney if you would like legal advice about your rights, obligations, or individual situation.