Fair Use for Nonfiction Authors

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II. FAIR USE FUNDAMENTALS
COPYRIGHT LAW PROTECTS CREATIVE WORKS in order to foster the creation of culture. Its best-known feature is protection of owners’ rights. But copying, quoting, and generally reusing existing cultural material is critically important to generating new culture. In fact, the cultural value of copying is so important that it is written into the social bargain at the heart of copyright law. The bargain is this: We as society give limited rights to creators to encourage them to produce culture; at the same time, we give
other creators the chance to use that same copyright-ed material, without permission or payment, in some circumstances. Without the second half of the bargain, we could all lose important new cultural work.

*Fair use* is a feature of copyright law that, under certain conditions, permits quotations from copyrighted works without permission or payment. Where it applies, fair use is a user’s right. In fact, as the Supreme Court has pointed out, fair use keeps copyright from violating the First Amendment, as new creations inevitably incorporate existing materials. As copyright protects more works for longer periods than ever before, creators face new challenges: Obtaining licenses to incorporate copyrighted sources may become more expensive and more difficult. Sometimes, licenses may simply be unavailable. As a result, fair use is more important today than ever before.

By design, copyright law does not precisely specify how to apply fair use. This gives the fair-use doctrine a flexibility that works to the advantage of users and the public. Rather than following a specific formula, courts take into account all the facts and circumstances of a
specific case to decide if an unlicensed use of copyrighted material is fair. For this reason, whether an unlicensed use of copyrighted material is “fair” differs with the creative field, with technology, and with time.

In weighing the balance at the heart of fair-use analysis, judges are required to weigh four statutory factors: the purpose of the use, the nature of the work used, the extent of the use, and its economic effect. This still leaves much room for interpretation, especially since the law is clear that these are not the only permissible considerations. Despite its flexibility, however, fair use is not unreliable. In reviewing the history of fair-use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose or giving it a different meaning than that of the original, or did it just repeat the work for the same intended purpose and value as the original?⁹
• Considering the nature of the copyrighted work and the challenged use, was the material taken appropriate in kind and amount?

If the answers to these two questions are “yes,” a court is more likely to find a use fair. Because that is true, such a use is less likely to be challenged in the first place.

Both questions are related to whether the use will cause excessive economic harm to the copyright owner. While copyright owners aren’t entitled to an absolute monopoly over all uses of their works, when a use supplants a copyright owner’s core market it is unlikely to be fair. For example, a textbook author cannot quote large parts of a competitor’s book merely to avoid the trouble of writing her own. Whether the user acted reasonably and in good faith, in light of general practice in his or her particular field, may also influence a judge’s fair use determination.

Fair use is widely and vigorously used in many professional communities. Historians regularly quote other historians’ writings and textual sources; film-
makers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. In some instances, authorial communities have set forth their understandings of fair use in best-practice guides. This guide draws on these guides, from the experience of nonfiction authors themselves, and from related legal precedents. Read on to learn more about how fair use may apply to common situations faced by nonfiction authors.