Fair Use for Nonfiction Authors

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Published by Authors Alliance


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III. FAIR USE APPROACHES TO COMMON SITUATIONS FACED BY NONFICTION AUTHORS
THIS SECTION DISCUSSES COMMON SITUATIONS faced by nonfiction authors in which fair use may apply. While there are seemingly endless ways that a copyrighted work might be used, nonfiction authors often want to either (1) criticize, discuss, or comment on copyrighted material or (2) use the copyrighted material to support a point made in the author’s work. Another use that is increasingly relevant to nonfiction authors is (3) using copyrighted material for non-consumptive research (e.g. copying works into digital databases in order to perform computational analysis across texts and/or images). This section provides examples of ways that nonfiction authors encounter these three situations, shares the fair use principles that creative communities and courts apply in similar situations, and
explains the limitations that apply to these principles. It also provides some real-world examples of how these situations have been treated in the courts and tests your knowledge through hypotheticals.

At the outset, it is important to note that these situations are concerned not with what the copyrighted material is (e.g., a poem, a song, a line of software code, etc.). A common misunderstanding is that fair use outcomes are highly dependent on whether the material being used is textual versus musical or visual, highly creative versus factual, or unpublished versus published. Though the “nature of the copyrighted work” is a factor in fair use analysis, other factors tend to carry far greater weight. Chief among them is whether a new use is sufficiently “transformative” of the original work, meaning that the new work alters the original with “a further purpose or different character, altering the first with new expression, meaning, or message.”

Therefore, considering the purpose behind an intended use is of paramount importance in determining whether the use is fair or infringing, and the principles and limitations described below apply regardless of the type of copyrighted material being used.
ONE: CRITICIZING, DISCUSSING, OR COMMENTING ON COPYRIGHTED MATERIAL

Nonfiction authors often engage in critical analysis of specific copyrighted works and want to use some or all of that material in their new works. In these cases, nonfiction authors are specifically discussing the copyrighted material: the copyrighted work is itself the focus of their social, political, or cultural critique. This type of critical engagement is exactly what fair use is meant to allow.

Guidance from Best Practices Statements

In nearly all of the best practices statements, creative communities have concluded:

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<th>Principle</th>
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<td>Fair use applies when the copyrighted material is being used for the purposes of criticism, commentary, or discussion of the work itself (subject to the limitations below). 11</td>
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Court decisions also strongly support this principle. Sometimes copying is essential to an author’s purpose and, without it, a reader wouldn’t be able to understand her critique. Also, on a broader level, the ability to freely investigate and criticize existing materials is considered essential to freedom of expression. For these reasons, courts often refer to fair use as a “safety valve” that prevents copyright law from being used as a tool of intimidation to silence unpopular or critical ideas. But it is also important to note that criticism, commentary, or discussion does not have to be negative to be eligible for fair use; fair use protects positive criticism, commentary, and discussion as well.

The right to criticize, discuss, and comment on copyrighted material is not absolute. Creative communities and courts have identified several important limitations that can guide authors.

A key limitation is that authors should only use as much of the copyrighted work as is reasonably appropriate to enable the reader to understand the criticism, commentary, or discussion.
Limitation
The amount copied should be reasonably appropriate in light of the analytical purpose.\textsuperscript{12}

Another limitation is that there should be a clear connection between the criticism, commentary, or discussion and the use of the copyrighted material. Authors should be able to explain the relevance of the copyrighted material to the critical comment being made.

Limitation
The use of copyrightable material should be justified by the analytical purpose.\textsuperscript{13}

Finally, it is considered best practice to credit, in a reasonable manner, the author of materials that are copied.

Limitation
Reasonable attribution should be given to the author of the copyrighted material.\textsuperscript{14}

U.S. copyright law does not require attribution.\textsuperscript{15} However, courts may weigh the fact that a work is
attributed in favor of fair use, and authorial communities consider it a mark of integrity—and just good manners—to acknowledge sources. Any attribution given should be in the form and manner customary to the relevant authorial community.

**Guidance from Legal Cases**

Legal decisions evaluating the use of copyrighted materials also support the principle that fair use applies when copyrighted material is used to criticize, discuss, or comment on the copyrighted material. Here are some real-world examples:

When an author wrote a 168-page biography and career retrospective of the artist Basil Gogos, he included 24 copies of Gogos’ monster artwork that had previously been used for magazine covers. A court found this use to be a fair use, in part because the author used Gogos’ illustrations “to pay homage to his artistic accomplishments” and included commentary from those in the movie industry who discussed the quality of his work. The court also
observed that the author used only a “small portion” of the original magazines, and that he was not required to change the images to black-and-white or use smaller sizes because “making these changes would directly thwart one of the key purposes of the book....”

A scholar wrote a critical review of *Blood of My Blood*, an unpublished novel by Marjorie Rawlings. The Fourth Circuit found that the critical review was a fair use, in part because it was a scholarly appraisal of the work with the purpose of criticizing and commenting on the work. The court further found that while the paper quoted about four- to six- percent of the total novel and paraphrased additional portions, the scholar did not quote or paraphrase more than was necessary to effectively criticize and comment upon the work.
Art historian Martha Marx wants to include reproductions of Freddy Fresco’s paintings in her book *Class, Clout, and Color*, which analyzes how class and power struggles are reflected in the artist’s work. Does fair use apply?

Since Martha Marx is specifically discussing Freddy Fresco’s paintings, her use is fair-use eligible under the principle discussed above. However, Martha will need to review the limitations to this principle to ensure that her use does not exceed the limits of fair use.

When reviewing the limitations, Martha Marx will find that she should only use as much of Freddy’s paintings as reasonably appropriate to enable her reader to understand her analysis of how class and power struggles are represented in Freddy’s works. What amount is “reasonable” depends on context. In some situations, Martha may only need to use a thumbnail or section of one of Freddy’s paintings to communicate her point. In other cases, she may need to reproduce an entire painting in detail for her point...
to be clear. Further, Martha should make it clear in the text of her book why each work has been reproduced. Finally, she should credit the paintings to Freddy Fresco in a reasonable manner.

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*Carl Critic wants to include passages from the new novel For Whom the Phone Beeps in his literary review of the work. Does fair use apply?*

As with Martha’s use, Carl Critic’s use is fair-use eligible because he is commenting on *For Whom the Phone Beeps* in his literary review. But Carl will still need to review the limitations to this principle. When he does, Carl will find that he should limit the length of passages he uses from the book to those that are reasonably appropriate to help his readers understand the point he is making in his review. He should also tie the passages he uses to his critical analysis of the novel, and he should give reasonable attribution to the novel’s author.
TWO: USING COPYRIGHTED MATERIAL TO ILLUSTRATE, SUPPORT, OR PROVE AN ARGUMENT OR A POINT

Nonfiction authors regularly use copyrighted material to illustrate, support, or prove an argument. Unlike when an author is criticizing, discussing, or commenting on the copyrighted material, here the material being used is not itself the object of the author’s commentary. Rather, the material is being used to support a related point made by the nonfiction author. In other words, nonfiction authors want to use copyrighted material to “show their work” and lend credibility to their theories and arguments. For example, a nonfiction author may want to use passages from letters to support her theory that Percy Poet’s poems about fatherhood were based on his close relationship with his daughter.

Guidance from Best Practices Statements

In nearly all of the best practices statements, authorial communities have concluded:
Fair use applies when the copyrighted material is being used to illustrate, support, or prove an argument or a point (subject to the limitations below).¹⁸

This is also a longstanding principle reflected in court decisions.¹⁹ The principle recognizes that authors’ arguments are much stronger and clearer when they are supported by examples.

Existing best practices statements and courts identify several important limitations that can guide authors when they are using copyrighted material to illustrate, support, or prove an argument or a point.

Again, a key limitation is that authors should only use as much of the copyrighted work as is reasonably appropriate for the reader to assess the validity of their point.

**Limitation**

The amount copied should be reasonable in light of the illustrative purpose.²⁰
Another limitation is that merely decorative or entertaining uses of copyrighted material under the guise of illustration are inappropriate. Instead, there should be a clear connection between the copyrighted material and the point being made. That said, at least one statement of best practices explicitly states that “should a work chosen for its significance to an argument also be entertaining, that fact should not disqualify the use from being considered fair.”

**Limitation**

The copyrighted material should not be reproduced for its intrinsic, expressive purpose. Uses that are solely decorative or entertaining should be avoided.

Finally, it is considered best practice to credit, in a reasonable manner, the author of materials that are copied.

**Limitation**

Reasonable attribution should be given to the author of the copyrighted material.
As discussed above, U.S. copyright law does not require attribution. Still, authorial communities consider it a best practice to acknowledge sources and courts may weigh the fact that a work is attributed in favor of fair use. Attribution should be in the form and manner customary to the relevant authorial community using the copyrighted material.

**Guidance from Legal Cases**

Legal decisions evaluating the use of copyrighted materials support the principle that fair use applies when copyrighted material is used to illustrate, support, or prove an argument or a point. Here are some real-world examples:

The Second Circuit held that an author’s use of L. Ron Hubbard’s writings in a critical biography was a fair use, in part because the author used the quotes to support the points he was making about Hubbard’s character. The court stated that some of the quotations were used “to convey the author’s perception of Hubbard’s hypocrisy and pomposity,”
and that these qualities “may be best (or only) be revealed through direct quotations.” Further, the court found that the author used only a “small percentage” of Hubbard’s work and that “some conjuring up of the copyrighted work is necessary” for the author’s purposes.

When a biographer quoted from Richard Wright’s unpublished letters and journal entries, the Second Circuit found that the use was a fair use. According to the court, the “biography’s use of Wright’s expressive works is modest and serves either to illustrate factual points or to establish [the author’s] relationship with [Wright], not to ‘enliven’ her prose.”
Test Your Knowledge: Using copyrighted material to illustrate, support, or prove an argument or a point

Bernard Biographer theorizes that Francie Francophile’s two years in Paris had a profound influence on her songwriting. Bernard wants to use excerpts of the Francie’s diary and lyrics from her songs in his biography, The Sway of the Seine, to document the connection between Francie’s Parisian adventures and the themes in her discography. Does fair use apply?

Since Bernard wants to use the copyrighted material from Francie’s diary and songs to lend credibility to his theory, his use is fair-use eligible under the principle described in this section. However, if he wants to stay comfortably within the bounds of fair use, Bernard will need to review the limitations to this principle. Bernard will find that the limitations suggest that he should limit the length of excerpts from Francie’s diary and lyrics from her songs to an amount that will allow his reader to assess the validity of his theory about her time in Paris and her songwriting, but no more. What
amount is “reasonable” depends on the context. For example, at some point in his book Bernard may need to copy several entries from Francie’s diary to lend credence to his theory, but at another point, a choice quote or two may be sufficient. Likewise, in some cases Bernard may need to use several verses from Francie’s songs to support his point, while in other cases a line or two will suffice. Moreover, Bernard should avoid including passages from Francie’s diary or lyrics from her songs that are entertaining but unrelated to the points he is making in his biography. Finally, Bernard should credit the material to Francie in a reasonable manner.

Eva Equality wants to use images from magazine advertisements in her book, (Ms.)placed Messaging, to illustrate her argument about gender stereotypes in the mid-20th century. Does fair use apply?

Eva’s use is fair-use eligible because she wants to use the copyrighted advertisements to illustrate her argument. But, like Bernard, she will need to review the limitations to this principle to make sure her use does
not exceed the limits of fair use. Eva will find that the limitations suggest that she should only use as much of the advertisements as reasonably appropriate to enable her reader to assess the validity of the point that she is making. In some cases, she may need to copy the entire advertisement to illustrate her point. In other cases, a telling detail from a section of the advertisement or a small-scale version of the image may be enough. She should avoid just showcasing advertisement images without adding additional content that makes it clear how these images support her argument about gender stereotypes. Finally, she should credit the magazine advertisements in a reasonable manner if the original authors are known.
THREE: USING COPYRIGHTED MATERIAL FOR NON-CONSUMPTIVE RESEARCH

Advances in technology offer exciting new research tools for nonfiction authors as well as cutting-edge cases for fair use eligibility. One of these new tools is software that enables nonfiction authors to copy works into digital databases in order to perform computational analyses across aggregated sets of texts or images. In these cases, the nonfiction author is not reading, displaying, or sharing large portions of the copyrighted material, but is instead using data mining technology to derive factual information about the works and incorporate those findings into her writings. For example, a nonfiction author may import works into a database and then use data mining technology to count the number of times a word appears in a collection of works, or to understand how frequently a particular species of mouse is used as a test subject.

Non-consumptive research has been common for some time in scientific and technical fields. Now, non-fiction authors in a wide variety of disciplines, including
social sciences and humanities, are also starting to harness new technologies to use copyrighted material for non-consumptive research. While this scenario has not been widely addressed in the existing best practices statements, existing case law strongly supports non-consumptive uses of copyrighted material.

This section addresses nonfiction authors who create their own digital databases of the works on which they want to do nonconsumptive research. It also applies to nonconsumptive research carried out on databases as to which there are no contractual restrictions on text or data mining.

**Guidance from Legal Cases**

Legal decisions evaluating the use of copyrighted materials for non-consumptive purposes provide strong support for such uses being fair. Here are some real-world examples:

Libraries made digital copies of the books in their collections to create a full-text searchable database of the scanned books, among other uses. The
Second Circuit held that this was a fair use, finding that “the creation of a full-text searchable database is a quintessentially transformative use... [as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.”

Google made digital copies of millions of books and made them available to search through its Google Books service so that users could identify relevant words, terms, or snippets from the scanned text. The service allowed users to, for example, “track the frequency of references to the United States as a single entity (“the United States is”) versus references to the United States in the plural (“the United States are”) and how that usage has changed over time.” The Second Circuit held that Google Books service was a fair use, finding that “the purpose of Google’s copying of the original copyrighted books is to make available significant information about those books,” a different function from that of the original books.
A company created an online plagiarism detection service that included copies of student papers in its reference database. The Fourth Circuit held that the use of student papers in the database was a fair use, in part because the company used the papers for an entirely different purpose than the original: to prevent plagiarism and protect the students’ written works from plagiarism.

Guidance from Best Practices Statements
As mentioned above, it is too early for meta-consensus to have emerged across best practices statements about this scenario. However, one existing best practices guide closely related to nonfiction authors does address this point. The Code of Best Practices in Fair Use for Academic and Research Libraries explains that libraries can offer scholars digital databases of collection items on which to perform computerized analyses and notes that these non-consumptive uses are highly transformative, creating powerful new scholarly resources that are not at all a mere substitute for the original works. The Code also notes that courts have found
search engines, which copy millions of web pages into their indexed databases in order to help users find relevant sites, to be fair uses because they reveal facts about a collection of works rather than focusing on the protected expression in any single work.

*The Code of Best Practices in Fair Use for Academic and Research Libraries* concludes that it is fair use for libraries to develop and facilitate the development of digital databases of collection items to enable non-consumptive analysis across the collection for both scholarly and reference purposes.\(^{29}\) The statement acknowledges that the case for fair use will be at its strongest when the database includes information such as rich metadata that augments the research or reference value of its content.

As the Code acknowledges, scholars can employ such databases to develop new and powerful reference tools.
**Principle**

It is fair use for nonfiction authors to develop digital databases in order to perform non-consumptive analysis of copyrighted materials for both scholarly and reference purposes (subject to the limitations below).

The statement also flags some important limitations to this principle.

**Limitation**

Copyrighted material digitized for non-consumptive uses should not be employed in other ways (e.g., to provide digital access for ordinary reading) without independent justification, either by a license from the rights holder or pursuant to a statutory exception.\(^30\)
Test Your Knowledge: Using Copyrighted Material for Non-Consumptive Research

In her scholarly book on the effect of the Roswell UFO conspiracy on pop culture, Gail Galaxy wants to demonstrate that science fiction writing has become more down to earth in recent years. To do so, she wants to copy the text of sci-fi bestsellers since 1947 to create a database of the aggregated text to count the number of times the words “UFO,” “alien,” and “extraterrestrial life” appear in the collection. Does fair use apply?

Because Gail wants to create a digital database of copyrighted material for non-consumptive analysis across the collection for scholarly purposes, her use is fair-use eligible under the principle described in this section. However, Gail will need to review the limitations to this principle to ensure that her use stays within the bounds of fair use. Gail will find that the limitations suggest that she should not use the copyrighted material in the sci-fi bestsellers database in other ways (for example, to provide digital access to the entire text of the books),
unless she has an independent justification for doing so (such as a license from the rights holder).