Fair Use for Nonfiction Authors

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IV. FREQUENTLY ASKED QUESTIONS
THIS SECTION COVERS SOME OF THE MOST frequently asked questions about fair use and clears up some common misconceptions about when it may apply.  

**Can I still claim fair use if I am using copyrighted material that is highly creative?**

Yes. While courts do consider whether the copyrighted material used is primarily factual or creative under the second factor, “the nature of the work,” this factor is rarely decisive on its own. Courts still must weigh all four factors, including the “purpose of the use.” Where the purpose of the use is transformative, such as when a nonfiction author comments on copyrighted material
or uses copyrighted material to support a point, and
the amount used is reasonable, the second factor rarely
affects the final outcome of fair use cases. \textsuperscript{32}

\textbf{Can I still claim fair use if I am using copyrighted material for commercial purposes?}

Yes. While “noncommercial” uses may be a plus in a fair use analysis, there are no categorical rules: Commercial uses can be fair use, and not all noncommercial uses will be fair use. In fact, some of the important court victories for fair use over the past two decades have been won by defendants whose activities were commercial, including musicians, publishers, and artists who sell their work (sometimes at substantial prices).

\textbf{Can I still claim fair use if I ask the copyright owner for permission to use the material and permission is refused?}

Yes. You do not have to ask permission or alert the copyright holder when a use of materials is protected by fair use. But, if you choose, you may inquire about permissions and still claim fair use if your request is
refused or ignored. In some cases, courts have found that asking permission and then being rejected has actually enhanced fair use claims. In fact, the Supreme Court has said that asking for permission may be a good faith effort to avoid litigation.33

Can I still claim fair use if I want to use copyrighted material that is unpublished?

Yes. Congress amended the Copyright Act in 1992 to explicitly allow for fair use when using unpublished works after several court decisions suggested that the use of unpublished materials would rarely be fair use. Under current copyright law, the fact that a work is unpublished “shall not itself bar a finding of fair use if such finding is made upon consideration of all the [fair use] factors.”34 While a court may still consider a work’s unpublished status to weigh against fair use when evaluating the “nature of the work,” this factor is rarely decisive on its own and courts still must weigh all of the fair use factors, including the purpose of the use. The purpose of the use may weigh against fair use if the unpublished material is being used in a frivolous
or exploitative manner. On the other hand, the purpose of the use may weigh in favor of fair use if the unpublished material transforms the original material (by, for example, using the original material as the object of criticism or commentary) and contributes to the public’s interest in advancing knowledge.

**Are charts, graphs, and tables protected by copyright and, if so, can I rely on fair use to incorporate them into my nonfiction work?**

Charts, graphs, and tables may be protected by copyright, but the underlying facts are not copyrightable. See **Section V** for more information about copyright eligibility. Creative choices in the way that facts are presented in a chart, graph, or table may be sufficiently original to warrant copyright protection. That said, where applicable, you may still be able to rely on fair use to use a chart, graph, or table that includes expressive elements. A good place to start is to see whether your use fits within the principles and limitations addressed in **Section III**.
How does a work’s copyright status affect fair use?

Copying of works that are not protected by copyright is not copyright infringement, regardless of fair use. But sometimes it can be difficult to determine whether a work is protected by copyright. For example, you may not be able to determine whether a work’s copyright has expired, or you may not be sure whether a scientific chart has the requisite level of creativity to warrant copyright protection. Even where you cannot determine a work’s copyright status, you may still want to understand whether the use of the material would be permitted by fair use should the material be protected by copyright. In fact, in some cases determining whether the use would be permitted by fair use may be easier than resolving the work’s copyright status.

How does a work’s orphan work status affect fair use?

Orphan works are works for which it is difficult or impossible to identify or locate the work’s copyright owner, even after a diligent search. The use of an orphan work may be permitted by fair use, just like any other work. In fact, orphan works often have charac-
characteristics that make fair use more likely. For example, orphan works are by definition not active in the market, limiting any resulting economic harm to rightsholders. In some cases, determining whether the use of an orphan work would be permitted by fair use may be significantly easier than securing permission from a rights holder that, by definition, is difficult or even impossible to track down.

*Can contractual terms governing access to a work restrict the availability of fair use?*

Yes. For example, some archives, museums, and commercial collections that control access to works place contractual restrictions on the use of those works, even when use of the work would otherwise be permitted by fair use (and, in some cases, even when the work itself is in the public domain!). This is beginning to change, and some archives and museums have already abandoned these practices. However, if you are a party to such a contract, your ability to use materials you’ve accessed may be limited by the terms of the contract. For example, a biographer who accesses her subject’s
personal papers through an archive may find that, as a condition of accessing those materials, the subject’s estate forbids quoting from the materials without the express permission of the estate. Similarly, an art critic may find that he has agreed to terms governing the use of photographs he accessed through an online archive.

At least some courts have held that such contracts may be enforced, even if the restricted use would be fair use as a matter of copyright law. In these cases, nonfiction authors cannot rely on fair use since demands for permission in this context are based on contractual claims, not copyright. As such, nonfiction authors should pay careful attention to the conditions of access to source materials and may want to consider negotiating for better terms that do not restrict their research and writing goals.

*Does the information in this guide still apply if my work will be published outside of the United States?*

No. “Fair use” as described in this guide is unique to U.S. copyright law. The information in this guide does not apply to 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. That said, a growing number of countries have similar “fair use” or “fair dealing” limitations and exceptions, and criticism and commentary are often protected by these regimes. If your work is being published in a country other than the United States, you may want to consult an attorney about similar limitations and exceptions that may apply.

Does the fair use analysis change when the copyrighted material I want to use is owned by a litigious estate?

No. Some estates are notoriously aggressive in trying to prevent the use of materials to which they own the copyrights. However, just because a copyright owner is forceful in asserting copyright claims doesn’t make fair use any more or less likely. It may, however, change your assessment of the practical risk that a copyright owner might complain or sue. Authors in this situation may be especially interested in obtaining errors and omissions coverage prior to publicizing their work.
What can I do if my publisher asks me to obtain permission instead of allowing me to rely on fair use?

Some publishers may require that authors get permission to use copyrighted materials in their works instead of allowing them to rely on fair use. If you find yourself in this situation, you may find it helpful to ask your publisher to reconsider its position and to explain why your intended use is protected by fair use based on your analysis of the principles and limitations in this guide. You may also want to share with them related codes of best practices, if relevant. If fair use is important to you or essential to your project, you may want to search for a publisher that recognizes fair use before signing a publishing contract.

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