

Copyright

A basic understanding of copyright principles is essential for any blogger, researcher, reporter, photographer, or anyone who publishes their creative works. It's important for two reasons. First, you should understand how you can properly make use of someone else's work – quoting from it, reprinting it, summarizing it, even satirizing it. And second, you should understand how you can protect your own legal rights in what you create, so that others don't take unfair (even unlawful) advantage of it.

Like any area of the law, copyright can get complex at its outer limits. However, a working knowledge of copyright law is not hard to acquire and will guide you through nearly all the situations you are likely to face in your day to day work.

What Copyright Covers

Let's start with some of the building blocks. First, all copyright law is federal law and therefore uniform across the country (in theory). States have no role, because the Constitution gives Congress the sole "power . . . [t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress first exercised this power to establish copyrights (and patents) in its first meeting in 1791, and it has regularly revised and updated the law ever since. Though the last comprehensive copyright revision was enacted in 1976, Congress has passed many new copyright laws and amended others – sometimes after highly contentious lobbying and debate – in the digital era.

Second, copyright law covers an extraordinarily broad range of creative work. The law calls them "works of authorship" but copyright protects almost all creative work that can be written down or otherwise captured in a tangible medium:

- *Literary works* – which is basically prose, whether a news story, scientific paper, novel, poetry, or any other form of "words-only" (or words-and-pictures) creative work.
- *Musical works* – both the lyrics and the music, whether from advertising jingles to symphonies.
- *Dramatic works* – plays, including any accompanying music.
- *Pictorial, graphic, and sculptural works* – photographs, drawings, paintings, and any other kind of two- or three-dimensional art.
- *Motion pictures and other audiovisual works* – movies, television shows, YouTube videos, and any kind of multimedia.
- *Sound recordings* – in addition to the copyright on words and music (above) a separate copyright protects a recording artist's rendition of a work
- *Architectural works* – blueprints and similar plans for buildings.

For more information on works protected under copyright law, see the section in this guide on Copyrightable Subject Matter.

Copyright Ownership

Owning a copyright gives you the exclusive right to publish, copy or otherwise reproduce the work; to distribute the work publicly (or not so publicly); and to perform or display the work, if it is a work of performance or visual art. Owning a copyright also gives you the exclusive right to prepare "derivative works," which are the original works in new forms – for example, a translation into another language, or a movie made from a novel, or a revised or expanded edition of an existing work. Someone who does these things without your permission is infringing your copyright, and the law provides recourse to you. For more details on the exclusive rights granted to a copyright owner, see the section on Rights Granted Under Copyright.

Third, copyright is extraordinarily easy to acquire. In fact, you really need do nothing at all – the law provides that copyright springs to life and protects an author's work from the time the work is "fixed in a tangible medium of expression...from which [it] can be perceived reproduced, or otherwise communicated" So when words are put on paper, or paint to canvas, or sights to a videotape, digital camera or cellphone, or even when any of the above are stored in a computer's memory – they're copyrighted. That's it. They don't have to be published. There is no requirement to put a copyright notice on it (though that is often helpful). There is no requirement that it be registered with the Copyright Office in the Library of Congress (though commercial publishers routinely do that, to show up in the database of copyrighted works.) If you are interested in registering your work with the Copyright Office, consult the section on Copyright Registration and Notice.

The law requires only that copyrightable works of authorship be "original" – but that is an easy hurdle to clear. Unlike the patent laws, there is no requirement that a work be innovative, meritorious, or even particularly bright or interesting. A work of authorship just can't be a copy of anyone else's work, and it must have some modest degree of creativity to it. In 1991, the Supreme Court ruled that an ordinary white-pages telephone book was not sufficiently creative to be copyrighted, but that gives you an idea of how low the barrier is. Any "work of authorship" that you create in the honest application of your own skills will likely be sufficiently "original" to be protected by copyright.

So what is the catch? None, really, but there are two cardinal principles of copyright that – fortunately – limit its reach. First, copyright protects the form in which ideas are expressed (the essay, the novel, the news story in the paper or on the blog) but it does not protect the ideas themselves. Nobody owns ideas. You might write the most insightful, original, and brilliant blog post on how to achieve peace in the Middle East or reduce carbon emissions, but from the moment you publish the post anyone may seize upon that idea to expand upon it, analyze it, criticize it, or discuss it in any way they like. What they can't do is reprint your expression of the idea, without your permission. (And, at least in academia and among reputable publications, they ought not to present the idea as their own, or even to discuss it without first acknowledging that it is your idea. However, because copyright does not protect ideas, the law does not punish plagiarism of ideas. For more information on the distinction, refer to the section on Copyright Infringement.)

Second, copyright does not protect facts. No matter how long and hard you work to uncover and report facts, no matter how significant the impact of your reporting, you don't own those facts. Anyone can repeat them, so long as they do not copy your story itself. By the same token, of course, you can appropriate facts that someone else has reported, without copyright concerns. (You ordinarily have an ethical obligation to credit the source of your facts, but it's not a copyright obligation.) For more information on the types of works not covered by copyright, consult the section on [Works Not Covered by Copyright](#).

As these principles suggest, copyright in its classic formulation is an effort to balance two often-conflicting goals. We want to encourage people to report the news, create art, publish works of history and science, and generally advance knowledge. The law provides the creators the exclusive ownership of their works for a limited time so that they can make money from them. On the other hand, we want to encourage a free flow of ideas, discussion, and intellectual synergy. Facts and ideas are put into the public domain at the moment of birth. In the words of Oliver Wendell Holmes, "the best test of truth is the power of the thought to get itself accepted in the competition of the market.... That at any rate is the theory of our Constitution." [Abrams v. U.S.](#), 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Using the Work of Others and Licensing Your Work

This effort to achieve balance naturally produces conflict. How can you challenge a blog post proposing a new way to reduce carbon emissions unless you can quote from the copyrighted post itself? Requiring you to get the original author's permission would certainly inhibit the free flow of ideas and would come very close to giving that author control over the idea. To ease this conflict, the law recognizes a principle known as "[fair use](#)," which is simply the freedom to use another's copyrighted work in the course of creating your own copyrighted work.

There have always been unspecific but sensible limits to this principle – you generally can't, for example, "quote" another's work by reprinting it in its entirety, even if you threw in a few new words of your own (on the other hand, if the original work was only a few paragraphs long, you might even be able to do that in some circumstances). Generally, courts recognize that if the borrowing is not excessive, that if it advances the creation of a new work, and if it does not undercut the market for the original work, the use is fair. The section on [Fair Use](#) in this guide provides more information on the fair use doctrine.

In the digital era, "fair use" has become a battleground. No one challenges the original principles, but instant reproduction and worldwide distribution of any digital work is within everyone's reach. Some creators of copyrighted works – record labels and movie distributors most prominently – have imposed electronic lockdowns, known as [digital rights management](#), on their works. This has led some to claim that these lockdowns extinguish their fair use rights.

There is another aspect to this political battle. The Constitution authorizes Congress to protect writings and discoveries for "limited times." In the 19th century, a "limited time" meant no more than 28 years after publication. For most of the 20th century, it meant up to 56 years. But since 1998, it has meant for the life of the author and for an additional 70 years. So, if a 25-year old author creates a work in 2008 and lives another 60 years, that work is protected by copyright until 2138, an extraordinary 130 years. By that measure, most of the works of Henry James and Mark Twain would still be copyrighted today. Many critics of the current copyright structure point to this lengthy protection as an unwarranted distortion of "limited time," but the Supreme Court upheld the law in 2003. (As a rule of thumb, any work published before 1923 is probably now in the public domain; any work published since then probably is not, but there are exceptions to both those guidelines.)

Because a copyright is intangible property (hence, "intellectual property," a field that also includes patents, trademarks, trade secrets, and now URLs and domain names), it can be bought, sold, given away, bequeathed at death, and licensed to others. Indeed, licensing is an active field in copyright law. An author's contract with a publisher is a license; while the author may retain the copyright, the publisher shares the revenue and edits, prints, and distributes the work. Works may also be sold outright, as newspapers often require freelancers to do. Ownership may also vest in the employer from the outset, if creating copyrighted works is part of one's employment. For more information, visit the sections on Licensing Your Content and Getting Permission to Use the Work of Others to use someone else's work.

There are other aspects to copyright law that can be useful to know. For example, works of the US Government are never copyrighted and hence can be reproduced without payment or permission. Copyrighted works such as music, movies, and drama may be performed or displayed (but not copied) without permission in the course of face-to-face teaching and distance learning in schools and universities. A library user is generally entitled to make a single copy of a copyrighted work for private study and scholarship.

In the sections that follow, we lay out further specifics about the principles described above. This guide is not a full treatise on copyright law, but it does provide what we hope is a good understanding of what you need to know, both to make intelligent use of others' creative works and to protect your own.

- **What Copyright Covers** - Describes copyrightable subject matter and the rights granted under copyright.
- **Copyright Ownership** - Explains different types of authorship, the registration and notice process, and how to license your work to others.

- **Using the Work of Others** - Describes the types of works not covered by copyright, the doctrine of Fair Use, linking to another's work, getting permission to use another's work, the issues that arise from circumventing copyright controls, and copyright infringement.
- **Notice-and-Takedown** - Outlines the steps involved in issuing and responding to a DMCA takedown notice related to copyrighted material and explains the immunity provision for user-submitted content under the DMCA.

Copyrightable Subject Matter

Copyright protection automatically applies to "original works of authorship" that are "fixed in a tangible medium of expression." The definition is less complicated than it sounds. If you create a blog post, podcast, or article, your work is covered by copyright the instant it is created in a tangible form, such as on paper, in a blog post, email, or video. You do not need to do anything more, such as signing or filing any papers or provide specific notice to the world that the work is covered by copyright. (You may however wish to provide copyright notice and register your copyright; see the section on Copyright Registration and Notice for more information.) Assuming it meets the requirements for protection, a work is automatically copyrighted in the U.S. and in over 160 other countries from the moment of its creation.

Original Works of Authorship

The level of creativity required for a work to be "original" is extremely low. A work satisfies this requirement as long as it possesses some creative spark, "no matter how crude, humble or obvious it might be." Feist Publ'ns, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 345 (1991) (internal citations omitted). A work that originates from the author and contains any level of creative expression will satisfy the originality requirement. In the Feist case, the Supreme Court held that listing names alphabetically in a phone book is not creative; almost anything more creative than that probably qualifies.

Sometimes, a creative work will have both original and unoriginal elements. In that case, the owner of the copyright to the work may assert rights over the original elements, but not the unoriginal elements. For example, a hip-hop music publisher recently sued the famous rapper, 50 Cent, claiming that his popular song, "In Da Club," infringed the publisher's copyright in a song called "It's Your Birthday" (written by another hip-hop artist named Luther Campbell). Lil' Joe Wein Music, Inc. v. Jackson, No. 06-16342 (11th Cir. 2007). The lyrics to "It's Your Birthday" include the phrase "Go [name], it's your birthday" with various proper names used in succession. 50 Cent's "In Da Club" also includes a section where he sings "Go Shorty, it's your birthday." The court found that the phrase "Go [name], it's your birthday" in Campbell's "It's Your Birthday" was not original -- the evidence showed that Campbell borrowed this phrase from chants popular at hip-hop nightclubs in the early 90s. Although the rest of Campbell's "It's Your Birthday" was protected original expression, the music publisher could not hold 50 Cent liable for infringement because he had only used the "birthday" phrase, which was not original to Campbell.

Fixation in a Tangible Medium

A copyrightable work is considered "fixed in a tangible medium" if it can be perceived, reproduced, or otherwise communicated for more than a transitory period. This includes any electronically readable formats (e.g., a blog post, email, or even storage in computer memory), audio recordings, and video. It does not matter whether the work has been "published" (i.e., made available to the world), as copyright protection is available to both published and unpublished works, so long as it is otherwise fixed in a tangible medium.

Some examples include:

- Text, audio files, video content, and photographs that you see on a website (or elsewhere, for that matter)

- Sound recordings, including spoken and musical content of a podcast
- Articles found in magazines and newspaper
- Songs recorded on a CD, saved to a harddrive, or notated on sheet music
- Literary works such as books
- Musical works (including the accompanying words)
- Dramatic works (including the accompanying music)
- Choreographic works
- Pictorial, graphic, or sculptural works
- Motion pictures and other audiovisual works
- Architectural works

This list is not exclusive. Copyright protection can apply to *any* work fixed in *any* tangible medium of expression, whether this medium is currently known about or is yet to be developed, so long as the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. See [17 U.S.C. Sec. 102](#).

Some works cannot be copyrighted; visit the section on [Works Not Covered By Copyright](#) for more information.

Works Not Covered By Copyright

You may want to use or incorporate someone else's work into your own. While the works of others may be protected by [copyright](#), there are a class of works that fall outside the scope of copyright law. The following categories of work are not eligible for copyright protection, regardless of when they were created and whether or not they bear a [copyright notice](#).

- [Facts](#)
- [Works created by the United States Government](#)
- [Works not fixed in a tangible form of expression](#)
- [Ideas, concepts, principles, or discoveries](#)
- [Words, phrases, or familiar symbols](#)

Additionally, even works that qualify for copyright protection fall into the [public domain](#) after a certain period of time.

Facts

You can use facts in your online work without the fear of [liability](#) because facts are not protected under copyright law. As we explain in the section on [Copyrightable Subject Matter](#), copyright protection applies to "original works of authorship." Although the level of creativity required to be "original" is extremely low, facts do not have the requisite level of creativity. For example, baseball scores, telephone numbers, dates of birth, and the number of people at a protest are noncopyrightable facts.

However, there may be situations in which a *compilation* of facts may be protected if the creator of the original [publication](#) selected, coordinated, or arranged the facts in an original way. For example, a sports almanac may arrange baseball scores in a creative way, a genealogy chart may arrange birth dates in an original way, or a cookbook may

arrange ingredients in a creative and original way as part of its recipes. In each of those instances, the creator of the work would have a copyright in the creative arrangement of the facts, but not the facts themselves.

Works Created by the United States Government

You can use any work of the United States Government because copyright law does not cover such works. Works of the United States Government include:

- federal judicial decisions
- federal statutes
- speeches of federal government officials given in the course of their employment
- federal government press releases
- federal government reports (such as census reports)

However, note that copyright law may protect works created by others that the United States Government receives by assignment, bequest, or otherwise.

While federal copyright law does not expressly apply to the works of state governments, state *laws* are similarly uncopyrightable. See Tim Armstrong's analysis in [Can States Copyright Their Statutes?](#) for more information. However, be aware that Oregon recently asserted copyright ownership "in the arrangement and subject-matter compilation of Oregon statutory law, the prefatory and explanatory notes, the leadlines and numbering for each statutory section, the tables, index and annotations and such other incidents as are the work product of the Committee in the compilation and publication of Oregon law." See our blog post, [Oregon Claims Copyright in Its Statutes -- Well, Sort Of](#), discussing the validity of Oregon's copyright claim.

Works Not Fixed in a Tangible Form of Expression

Copyright protection only applies to "original works of authorship" that are "fixed in a tangible medium of expression." Consequently, if you attend an improvisational speech that has not been notated or recorded, you may publish the speech in your online work without fear of liability. (However, you should cite the speech in order to avoid the taint of [plagiarism](#).)

Ideas, concepts, or principles

Copyright does not cover ideas, concepts, and principles themselves, only the form in which they are expressed. For instance, merely coming up with an idea does not make you the copyright owner because you haven't actually expressed anything. You become the copyright owner only when you put that idea into "expression" through words (e.g., in a blog post) or other tangible form (e.g., in a video, a photograph, or a podcast).

For example, Einstein's theory of special relativity is not copyrightable because it is an idea (or concept or principle). However, Einstein's article, "On the Electrodynamics of Moving Bodies," in which he explained and expressed the theory, was copyrightable.

If you come across an idea/concept/principle, you can use it in your online work with out fear of liability as long as you do not use the form in which it is expressed (which may be copyrightable). However, you should consider citing to the source in order to avoid a claim of plagiarism.

Words, Phrases, or Familiar Symbols

In general, copyright does not protect individual words, short phrases, and slogans; familiar symbols or designs; or mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents. (However, copyright protection may be available, if the artwork of the symbol or design contains sufficient creativity.)

While copyright protection may not apply, be aware that trademark law protects certain words, short phrases, slogans, symbols, and designs. For example, trademark law protects the word "Apple," the slogan "Got Milk?" and the Nike symbol of the "swoosh." See the Trademark section for more information on using a trademark protected word, phrase, symbol, or other indicator that identifies the source or sponsorship of goods or services.

Works in the Public Domain

You can use any work in the public domain without obtaining permission of the copyright owner. A work falls into the public domain when the copyright term expires or, in the case of works published between 1923 and 1989, if the work lost copyright protection because the copyright owner neglected to take the necessary steps under then-applicable copyright law. Additionally, a copyright owner can directly dedicate a work to the public domain. This is done expressly, through language such as "Everything on this site to which we own copyright is hereby released into the public domain," or by using the Creative Commons Public Domain Dedication.

Determining whether any particular work is in the public domain is a complex task, and the answer often depends upon when the work was published, whether it was published with notice, and whether the copyright holder subsequently registered the work.

However, there are some rules of thumb that will help you with this analysis:

- First, any work that was published before 1923 is in the public domain.
- Second, any work published without a copyright notice between 1923 and 1977 is in the public domain.
- Third, works created after 1989 generally are not in the public domain, regardless of notice or registration, unless the work has been dedicated to the public domain.

If you want to go beyond these rules of thumb to understand more of the specifics, Cornell Law School has an excellent chart that shows when different types of works

(published, unpublished, published outside the US) will fall into the public domain based on an analysis of pre- and post-1978 copyright law. Additionally, the [Creative Commons' Podcasting Legal Guide](#) has a terrific discussion on how to determine whether a work is in the public domain.

A word of caution about using public domain works. You should check whether a public domain work has already been incorporated into another work. Although the public domain portions of that new work are not protected, the author's new expressive content and selection and arrangement of the public domain work may be protected by copyright. [Creative Commons' Podcasting Legal Guide](#) gives two examples that illustrates this potential issue:

- Photographs of the Mona Lisa that are designed to precisely replicate the original work will likely not enjoy copyright protection because they are intended to capture Leonardo Da Vinci's expression of the painting as closely as possible. However, a photograph of a sculpture that is in the public domain may be protected by copyright because of the skill and creativity involved in composing the photograph.
- The text of a book in the public domain may be used freely, but a current publisher of the book may have copyright rights to the expressive elements of a recently published edition (e.g. the new layout, cover art, etc.).

< [Using the Work of Others](#)

Fair Use

The policy behind [copyright](#) law is not simply to protect the rights of those who produce content, but to "promote the progress of science and useful arts." [U.S. Const. Art. I, § 8, cl. 8](#). Because allowing authors to enforce their copyrights in all cases would actually hamper this end, first the courts and then Congress have adopted the [fair use](#) doctrine in order to permit uses of copyrighted materials considered beneficial to society, many of which are also entitled to First Amendment protection. Fair use will not permit you to merely copy another's work and profit from it, but when your use contributes to society by continuing the public discourse or creating a new work in the process, fair use may protect you.

[Section 107 of the Copyright Act](#) defines fair use as follows:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining

whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

- 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- 2. the nature of the copyrighted work;*
- 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;*
- 4. and the effect of the use upon the potential market for or value of the copyrighted work.*

Unfortunately, there is no clear formula that you can use to determine the boundaries of fair use. Instead, a court will weigh these four factors holistically in order to determine whether the use in question is a fair use. In order for you to assess whether your use of another's copyrighted work will be permitted, you will need an understanding of why fair use applies, and how courts interpret each part of the test.

The Four Fair Use Factors

1. Purpose and Character of Your Use

If you use another's copyrighted work for the purpose of criticism, news reporting, or commentary, this use will weigh in favor of fair use. See Campbell v. Acuff-Rose Music, 510 U.S. 569, 578 (1994). Purposes such as these are often considered "in the public interest" and are favored by the courts over uses that merely seek to profit from another's work. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004). When you put copyrighted material to new use, this furthers the goal of copyright to "promote the progress of science and useful arts."

In evaluating the purpose and character of your use, a court will look to whether the new work you've created is "transformative" and adds a new meaning or message. To be transformative, a use must add to the original "with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell, 510 U.S. at 579. Although transformative use is not absolutely necessary, the more transformative your use is, the less you will have to show on the remaining three factors.

A common misconception is that any for-profit use of someone else's work is not fair use and that any not-for-profit use is fair. In actuality, some for-profit uses are fair and some not-for-profit uses are not; the result depends on the circumstances. Courts originally presumed that if your use was commercial it was an unfair exploitation. They later abandoned that assumption because many of the possible fair uses of a work listed in section 107's preamble, such as uses for purposes of news reporting, are conducted for profit. Although courts still consider the commercial nature of the use as part of their analysis, they will not brand a transformative use unfair simply because it makes a profit. Accordingly, the presence of advertising on a website would not, in of itself, doom one's claim to fair use.

If you merely reprint or repost a copyrighted work without anything more, however, it is less likely to qualify for protection under this prong. If you include additional text, audio, or video that comments or expands on the original material, this will enhance your claim of fair use. In addition, if you use the original work in order to create a parody this may qualify as fair use so long as the thrust of the parody is directed toward the original work or its creator.

Moreover, if the original work or your use of it has news value, this can also increase the likelihood that your use is a fair use. Although there is no particular legal doctrine specifying how this is weighed, several court opinions have cited the newsworthiness of the work in question when finding in favor of fair use. See, e.g., *Diebold*, 337 F. Supp. at 1203 (concluding "[i]t is hard to imagine a subject the discussion of which could be more in the public's interest"), *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (noting "the public benefits from the additional knowledge that Morgan provides about William Burroughs and other writers of the same era").

2. Nature of the Copyrighted Work

In examining this factor, a court will look to whether the material you have used is factual or creative, and whether it is published or unpublished. Although non-fiction works such as biographies and news articles are protected by copyright law, their factual nature means that one may rely more heavily on these items and still enjoy the protections of fair use. Unlike factual works, fictional works are typically given greater protection in a fair use analysis. So, for example, taking newsworthy quotes from a research report is more likely to be protected by fair use than quoting from a novel. However, this question is not determinative, and courts have found fair use of fictional works in some of the pivotal cases on the subject. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

The published or unpublished nature of the original work is only a determining factor in a narrow class of cases. In 1992, Congress amended the Copyright Act to add that fair use may apply to unpublished works. See 17 U.S.C. § 107. This distinction remains mostly to protect the secrecy of works that are on their way to publication. Therefore, the nature of the copyrighted work is often a small part of the fair use analysis, which is more often determined by looking at the remaining three factors.

3. Amount and Substantiality of the Portion Used

Unfortunately, there is no single guide that definitively states how much of a copyrighted work you can use without copyright liability. Instead, courts look to how such excerpts were used and what their relation was to the whole work. If the excerpt in question diminishes the value of the original or embodies a substantial part of the efforts of the author, even an excerpt may constitute an infringing use.

If you limit your use of copyrighted text, video, or other materials to only the portion that is necessary to accomplish your purpose or convey your message, it will increase the likelihood that a court will find your use is a fair use.

Of course, if you are reviewing a book or movie, you may need to reprint portions of the copyrighted work in the course of reviewing it in order to make your points. Even substantial quotations may qualify as fair use in "a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985). However, substantial quotations from non-public sources or unpublished works do not enjoy the same protections.

4. The Effect of Your Use Upon the Potential Market for the Copyrighted Work

In examining the fourth factor, which courts tend to view as the most important factor, a court will look to see how much the market value of the copyrighted work is affected by the use in question. This factor will weigh in favor of the copyright holder if "unrestricted and widespread" use similar to the one in question would have a "substantially adverse impact" on the potential market for the work.

Although the copyright holder need not have established a market for the work beforehand, he or she must demonstrate that the market is "traditional, reasonable, or likely to be developed." Ringgold v. Black Entm't TV, 126 F.3d 70, 81 (2d Cir. 1997). An actual effect on the number of licensing requests need not be shown. The fact that the original work was distributed for free, however, may weigh against a finding that the work had publication value. See Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000). Likewise, the fact that the source is out of print or no longer sold will also weigh in favor of fair use.

The analysis under this factor will also depend on the nature of the original work; the author of a popular blog or website may argue that there was an established market since some such authors have been given contracts to turn their works into books. Therefore, a finding of fair use may hinge on the nature of the circulated work; simple e-mails such as those in the Diebold case (discussed in detail below) are unlikely to have a market, while blog posts and other creative content have potential to be turned into published books or otherwise sold. In addition, the author of a work not available online, or available only through a paid subscription, may argue that the use in question will hurt the potential market value of that work on the Internet.

Assessing the impact on a copyrighted work's market value often overlaps with the third factor because the amount and importance of the portion used will often determine how much value the original loses. For instance, the publication of five lines from a 100 page epic poem will not hurt the market for the original in the same way as the publication of the entirety of a five-line poem.

This fourth factor is concerned only with economic harm caused by substitution for the original, not by criticism. That your use harms the copyright holder through negative publicity or by convincing people of your critical point of view is not part of the analysis. As the Supreme Court has stated:

[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," the role of the courts is to distinguish between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it." Campbell, 510 U.S. at 591-92 (citations omitted).

The fact that your use creates or improves the market for the original work will favor a finding for fair use on this factor. See Nunez, 235 F.3d at 25 (finding fair use when the publication of nude photos actually stirred the controversy that created their market value and there was no evidence that the market existed beforehand).

In summary, although courts will balance all four factors when assessing fair use, the fair use defense is most likely to apply when the infringing use involves criticism, comment, news reporting, teaching, scholarship, or research. In addition, some general rules of thumb can be helpful in analyzing fair use:

- A use that transforms the original work in some way is more likely to be a fair use;
- A non-profit use is more likely to be considered a fair use than a for-profit use;
- A shorter excerpt is more likely to be a fair use than a long one; and
- A use that cannot act as a replacement for the original work is more likely to be a fair use than one that can serve as a replacement.

Some Special Considerations

Publishing the Contents of Private Letters and E-Mail (including letters from lawyers threatening legal action): Fair use may protect the publication of the content of private letters and email, including communications from lawyers threatening legal action. As mentioned above, unpublished materials sometimes enjoy greater protection than published documents. Although an author may argue that the "unpublished" nature of his or her correspondence warrants a finding against fair use, such an argument carries

weight only when the use involves a heretofore secret work “on its way” to publication, which is never the case for lawyers' cease-and-desist letters. Recently, two students at Swarthmore college posted an archive of internal emails among Diebold employees; an online newspaper linked to the archive in an article critical of Diebold’s voting machines. A court held that although the emails were not published, publishing them was nonetheless protected by fair use. *Diebold*, 337 F. Supp. 2d at 1203. The court found that the important fourth fair use factor weighed in favor of fair use because Diebold had no intention of selling the archive for profit and therefore it lost no value when the archive was published online. The court also noted the students and newspaper use was intended to support criticism of the company, which was a transformative use under the first factor.

Copyright as a Tool to Silence Criticism: Sometimes, copyright owners try to use copyright law as a weapon to squelch speech that is critical of them or their works of authorship. For example, in *Savage v. CAIR*, a conservative radio host has filed a copyright infringement lawsuit against the Council on American-Islamic Relations for using excerpts of his radio show in order to criticize his rabidly anti-Muslim views and to call for sponsors to withdraw their support from his program. CAIR's use of these audio excerpts, and similar uses of copyrighted material in order to criticize a copyright owner, are almost certainly protected by fair use. As EFF argues in its [brief](#) asking the court to dismiss Savage's lawsuit:

The fair use doctrine exists precisely to prevent copyright holders from doing what Savage attempts here -- abusing a limited monopoly granted to encourage creativity to punish dissenters and to chill speech aimed at criticizing copyrighted works. For all his ironic appeals to the First Amendment, Savage asks this Court to punish CAIR for publicly criticizing the offensive content of his radio program. That CAIR's criticism might result in Savage losing popularity (and advertisers) is of no moment to either a free speech or copyright infringement analysis and indeed, should be expected in the marketplace of ideas that the First Amendment and Copyright Act strongly protect.

For another case involving an attempted use of copyright to silence criticism, see our database entry, [ABC v. Spocko](#).

Practical Tips for Avoiding Copyright Liability

While there is no definitive test for determining whether your use of another's copyrighted work is a fair use, there are several things you can do to minimize your risk of copyright liability:

- Use only as much of the copyrighted work as is necessary to accomplish your purpose or convey your message;
- Use the work in such a way that it is clear that your purpose is commentary, news reporting, or criticism;
- Add something new or beneficial (don't just copy it -- improve it!);
- If your source is nonfiction, limit your copying to the facts and data; and

- Seek out Creative Commons or other freely licensed works when such substitutions can be made and respect the attribution requests in those works.

Getting Permission to Use the Work of Others

At some point you may want to use someone else's work. You should first determine whether the work is protected by copyright. Is the work copyrightable? Is it in the public domain? Is your use of the work barred by another area of the law such as trademark law? Keep in mind that a work doesn't have to have a copyright notice affixed to it to be covered by copyright.

Once you've gone through the above analysis and determined that the material you wish to use is protected by copyright, you should seek the copyright owner's permission to use the work. You will first need to identify the copyright owner, and then request permission for your specific use. If you are told that you cannot use the copyrighted work, this doesn't necessarily preclude you from using the work. **You will not lose the ability to assert that your use is a "fair use" even if the copyright owner refuses to give you permission to use his work.** For more on fair use, see the section on Fair Use in this guide.

1. Identifying the Copyright Owner

In many cases you will be able to quickly identify the copyright owner of the work. For some works, however, locating the copyright owner becomes an involved process. As you research, keep in mind that you may need to contact more than one person to get the necessary permission. For example, if the work you wish to use is the photograph of a person, you should seek permission from the copyright owner of the photograph as well as the person in the photograph if you will use the image of the person for commercial purposes, such as advertising. See the section on Rights of Publicity for more information on this issue.

You will likely find information about the copyright owner by searching several places:

Copyright Notice

First, examine whether the work contains a copyright notice. A copyright notice will have the copyright owner's name, which you can use to search for contact information. Note that if the work was first published before 1978, the complete absence of a copyright notice from a published copy generally indicates that the work is not protected by copyright. See the section on Works Not Covered By Copyright to learn more about this issue.

Author's Name

Check to see whether the work is attributed to an author. In some cases the author is also the copyright owner, but you should make sure that the author has the authority to exercise the exclusive right you wish to use--i.e. she has not licensed or transferred the exclusive rights, or that the author's creation is not a work-for-

hire. If the author is not the copyright owner, she can tell you who commissioned the work or to whom she transferred ownership.

U.S. Copyright Office

Use the Copyright Office's catalog to search copyright records online for information about the copyright owner, or any change in ownership that has been recorded with the Office. The online catalog allows you to search through records dated after January 1, 1978. In order to search for older records, you will need to either visit the Copyright Office and search the Copyright Card Catalog yourself, or pay a fee for a Copyright Office employee to conduct a search for you.

See Circular #23 for more details.

Search Engines

If the work is online and you are unable to find an author or contact information for the website owner, use Whois to search domain registrars for the website's registrant name and contact information.

Copyright Collectives

A copyright collective refers to an organization that licenses works on behalf of copyright holders. The most well-known copyright collectives license musical works and distribute the licensing fees to the copyright holders of the musical work. The three copyright collectives are ASCAP, BMI and SESAC. Similarly, you can turn to the Copyright Clearance Center or iCopyright to get licenses for published documents, such as articles from newspapers, magazines, books, journals, etc.

Although these collectives can streamline the request process for you, they often charge fees more suited to a large commercial operation. Consider visiting sites like CC Mixer for its musical works instead. See the discussion below on works covered by open content licenses.

As you conduct your research, refer to the Copyright Office's excellent resource on How to Investigate the Copyright Status of a Work.

2. Requesting Permission

Once you've identified the copyright owner, it is time to actually make your request. Often, an informal approach (by emailing or phoning the copyright owner) will work. If you opt for the informal route, be sure to follow up in writing. In many cases, misunderstandings arise over the scope of permission, and you can avoid such controversies by being explicit about how you wish to use the work.

Alternatively, you can go the formal route and send a letter to the copyright holder. In addition, if you need to contact a copyright collective to request a license, you should follow the procedures specific to their organization.

Your request should include:

- Your name and contact information
- Details identifying the work you wish to use (title, URL, etc.)

- The reason that you wish to use the work - for personal, research, commercial, commentary, criticism, review, or educational purposes
- How you intend to use the work - length of time, number of places (e.g. on your website, and your newsletter), etc.

For example, Jennifer Kyrnin at About.com, Indiana University-Purdue University's [Copyright Management Center](#), and the University of Texas' [Office of the General Counsel](#) have sample letters that you can use to create your request.

3. Responses from Copyright Owners

If the copyright owner gives you permission to use her work, you are nearly done. Your last step should be to keep a record of how you found the owner, and **a record of the permission that she gave you**. As the [Copyright Management Center](#) at Indiana University notes: contact information will help you if you ever wish to get permission from the same owner in the future, and a record of the permission will assist you in the event that any future disagreements arise over the scope of the permission.

You should record:

- The name of work and any additional information (e.g., url, etc.)
- Copyright owner and contact information
- Author of work (if different from owner)
- Date you requested permission and a copy of your request
- Date the owner granted you permission, the conditions contained in the permission, and the expiration of permission
- How you actually used the work
- Any fees you paid to the copyright owner

If you cannot locate the copyright owner, or the copyright owner's response includes a large fee or a flat out denial, then your remaining options are:

Fair Use

Regardless of the copyright owner's response, you can still use the work if your use comports with the fair use doctrine. The doctrine of [fair use](#) makes it legally permissible for you to use a copyrighted work without permission for purposes such as commentary, criticism, parody, news reporting, and scholarly works. Whether or not your use is lawful usually depends upon how different or "transformative" your use is from the original. Unfortunately, there is no clear formula to determine the boundaries of fair use. Refer to the section on [fair use](#) for a general discussion of the doctrine.

Link to the work

If the work is online, perhaps you can simply link to the work and still get your point across. If this is a viable option, refer to the section on [Linking to Copyrighted Materials](#) for the legal issues that may arise from linking to other online works.

Use Alternative Works

Another option is to find another work altogether. If you choose this route, you may wish to consider using works not covered by copyright or works that are covered by open content licenses, such as a Creative Commons license, so that you do not need to get explicit permission to use them. The following sites contain works covered by open content licenses:

- CC Mixer hosts a collection of music covered by the Creative Commons license. You can download and sample, remix and then share the results with "anyone, anywhere, anytime".
- Flickr allows its users to offer their work under a Creative Commons license. You can browse or search through the Flickr photographs under each type of license.
- Open Photo has a variety of stock photos that are licensed for free commercial and non-commercial use.

Copyright Infringement

It is a widely held misconception that works on the Internet are not covered by copyright and thus can be used freely. This is not true. Copyright law applies to online material just as it does to offline material, assuming the prerequisites for copyright protection are met. Thus, if you use someone else's work, you could be liable for what is called "copyright infringement." Basically, copyright infringement exists if you exercise one or more of the exclusive rights held by a copyright owner. A copyright owner enjoys the following exclusive rights:

- to reproduce the work in copies
- to prepare derivative works based upon the work
- to distribute copies of the work to the public
- to perform the work
- to display the copyrighted work
- and, in the case of sound recordings, to perform the work publicly by means of a digital audio transmission

See Rights Granted Under Copyright for more discussion.

In order to bring a successful claim of copyright infringement in the context of copying on a blog or website, the plaintiff must generally prove:

1. That she is the **owner of a valid copyright** in the work or has the legal authority to bring a lawsuit;
2. That the defendant actually copied the copyrighted work, either by direct evidence of the copying or evidence that shows: (a) the defendant had access to the original work and the defendant's work is substantially similar to the copyrighted work, or (b) the defendant's work has a striking similarity to the copyrighted work; and
3. The copied sections of the work are protected by copyright (i.e. not merely copying facts from the copyrighted work)

If the defendant is found liable for copyright infringement, the copyright holder will be entitled to recover his or her actual damages (e.g., lost profits) or, if certain conditions are met, statutory damages between \$750 to \$30,000 per infringement. If the plaintiff can prove the infringement was willful, the statutory damages may be as high as \$150,000 per infringement.

Defenses

There are three common defenses available to defendants who are faced with a copyright infringement claim:

- The work used is not covered by copyright (i.e. characterize the work as being factual only, without any expressive element).
- The defendant **independently created** the work herself. As discussed above, any claim of infringement must involve the defendant's use of an unauthorized copy of the plaintiff's work. Thus, infringement cannot occur in the absence of the defendant's copying the plaintiff's work. Additionally, no provision of copyright law bars another author from independently creating a work that is remarkably similar to another.
- The use is a fair use. The doctrine of fair use is the third, and most oft-cited, defense. The courts and Congress adopted the fair use doctrine to permit uses of copyrighted materials considered beneficial to society, many of which are also entitled to First Amendment protection. Fair use will not permit you to merely copy another's work and profit from it, but when your use contributes to society by continuing the public discourse or creating a new work in the process, fair use may protect you. Refer to our section on [fair use](#) for a more in-depth discussion on the doctrine.

Note that the infringing use of a copyrighted work cannot be cured by attribution (i.e. citing the copyrighted work). While citing to the original source is always a good idea, attribution will not protect you from a claim of copyright infringement.

Copyright v. Plagiarism

Plagiarism is the act of using another's work and passing it off as your own. While such a use could open you up to a copyright infringement claim, there is no legal liability associated with the act of plagiarism.

Nevertheless, it is a good idea to avoid plagiarism. The best way to avoid plagiarism is to adequately cite your work. Depending on the nature of your online work, your citations can be informal in style, or adhere to the more formal citation conventions. See the University of Iowa's [Guide to Citation Style Guides](#), and Yale College's guide to citing [blogs](#) for more information.

Since plagiarism and copyright infringement are similar concepts, a few examples may be helpful:

- If an author publishes a poem on his blog in which he substantially copies from Dante's *Inferno* but passes off the words as his own, he has committed plagiarism. However, the author has not committed copyright infringement because Dante's work is in the [public domain](#).
- In contrast, if a website owner publishes a compilation of contemporary short stories on her website without the permission of the original authors, she would be liable for copyright infringement, even if the compilation properly notes the original authors and thus avoids plagiarism.
- Finally, if a journalist uses content from yesterday's daily newspaper as his own original article in a weekly online magazine, the journalist has committed both plagiarism and copyright infringement.