

Fair Use: A Statement on Best Practices for Biographers

We wish to articulate certain principles in the application of fair use as applied to the writing and publication of historical and biographical works. Fair use is embedded in U.S. copyright law. The purpose of fair use is to help to reconcile the interests of copyright holders with the freedoms guaranteed by the First Amendment. In the context of historical and biographical works, fair use encourages creators of original historical and biographical works to make use of older works for the general cultural benefit. Biographers are beneficiaries of the laws regarding not only fair use but also copyright. We do not seek to change current law; we seek to have the law observed and implemented to the fullest extent by publishers, archivists, and other partners upon whom we rely in creating historical and biographical works that advance and enrich the public's understanding and knowledge.

The following principles reflect what we believe to be a fair and productive balancing of the interests of copyright holders with the interests of the public in access to new historical and biographical works:

1. Fair use is a right of the user. It is a right that is claimed when quoting, paraphrasing, and summing up the words of others as part of a new work created by the historian or biographer. Copyright law, and hence fair use, applies only to forms of expression—that is to words and images. Ideas are not subject to copyright and are in the public realm.

2. Fair use is not a privilege conveyed by a grant of permission from copyright holders or their agents. Fair use is part of the historian or biographer's First Amendment rights, and failure to accord fair use its proper scope inhibits free speech and thought.

3. There are no word limits on fair use; the crucial factors are the amount and substantiality of material that the biographer uses in relation to the copyrighted work as a whole, and the effect of the biographer's use upon the potential market for or value of the copyrighted work. To adopt a narrow definition of fair use—for example, to apply rigid word counts of how much can be taken from a source—defeats the purpose of fair use, which U. S. copyright law defines as a standard, not a prescriptive set of hard and fast rules.

4. Whether the work being quoted or paraphrased is published or previously unpublished has no effect on the biographer's right to fair use. Congress amended the Copyright Act in 1992 to explicitly allow for fair use when using unpublished works. 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." 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.

5. Historical and biographical works are highly transformative; these works use parts of materials of others to create an original narrative that is more than the sum of its parts. As such, historical and biographical works fulfill copyright's mission of providing new learning to the public and should be accorded more latitude under fair use relative to works that are not transformative in nature.

6. Historical and biographical works benefit the public and contribute to our common culture. These benefits should be understood and balanced against any detriment to copyright owners. In many cases, fair use of pre-existing materials in new historical and biographical works increases the market value of those materials and increases public attention and, in many cases, market prospects, of the individuals whose life stories are told and of the works of those individuals, if they are authors themselves.

7. In sum, historical and biographical works should be given wide latitude under fair use. It is therefore inappropriate for publishers to presume that they can require their authors to obtain permission to use copyrighted materials in their works instead of allowing them to rely on fair use. In the absence of clear harm to the economic interest of the copyright owner, the historian and biographer are to be regarded as exercising their right of fair use, according to U. S. copyright law and the established best practices of biographers.

For more information see the Authors Alliance report on Fair Use:

<https://www.authorsalliance.org/wp-content/uploads/2017/11/AuthorsAllianceFairUseNonfictionAuthors.pdf>