

TAKER BEWARE!

When does copying become copyright infringement?

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This column does not contain legal advice, but rather merely legal information. Always consult with a lawyer to discuss your situation and to review a contract for you.

As writers, we expect copyright to protect our literary works. On the other hand, we sometimes wish to excerpt the words of others in our creations. When is copying permitted, and when does copying amount to copyright infringement?

To answer that question, we begin with a few basics about copyright law. It is an infringement for any person to do, without the consent of the copyright owner, anything that only the owner has the right to do. Among the owner's rights is the sole right to reproduce an original work or any substantial part of it. To know whether a particular taking of a work is an infringement, we address four issues (see *How Much of a Literary Work Can I Copy?* page 9):

Issue 1—Is the literary work in the public domain? If the author has been dead for at least 50 years, then the work is in the public domain and can be used freely. If the author is alive or has died within the last 50 (soon to be 70) years, then the work is not in the public domain, and we must proceed to Issue 2.

Issue 2—Is the “taking” substantial?

If the taking is insubstantial, then there is no infringement. Only substantial taking constitutes infringement. The Supreme Court of Canada (SCC) affirms the reason for the substantial taking requirement: to balance protecting the author's skill and judgement against leaving ideas and elements in the public domain for others to use. Whether copying is substantial depends on several factors:

- Was the copying direct and literal, i.e., word-for-word excerpts?
 - If so, then one case says copying one or two pages of a published work that

does not exceed 2.5 per cent of the overall work is not substantial taking.

- In another case, taking 7 per cent of the overall work was considered substantial.
- In yet another case, the court reviewed York University's definition of a permissible “short excerpt.” That definition referred to 10 per cent of a work, one chapter of a book, and an entire artistic work, poem, or musical score if it was contained in a work containing other works, such as an anthology. The court said this was unfair and arbitrary.
- Was the copying more subtle, i.e., taking elements of a work?
 - In such cases, the SCC says a substantiality analysis should be qualitative and holistic. Many factors need to be considered.

As you can see, there is no fixed rule. The smaller the taking, the safer you are. If the taking is substantial, proceed to Issue 3.

Issue 3—Is the taking a fair dealing?

The eight fair dealing exceptions are shown on page 9, *Issue 3*. If the taking falls within criticism, review, or news reporting, then you must refer to the author/owner, i.e., attribution. If you seek to rely upon the fair dealing exception of parody, then you must show (a) an evocation of an existing work, while exhibiting noticeable differences; and (b) the expression of mockery or humour. The case law on the newest exceptions of parody, satire and educational purposes is still developing. Uncertainty prevails. If the taking falls within a fair dealing exception, then proceed to Issue 4.

Issue 4—Is the taking fair? If the taking qualifies as fair dealing, then you must still prove that it was fair. To determine fairness, you must follow the six-part test set out by the SCC, as shown in the accompanying sidebar. Here are comments that may assist your determination:

- If the goal or motive of copying was commercial gain, then that will often point to an unfair taking.
- If the purpose is to defame, then that will often point to unfair taking.
- If the amount copied is more than was necessary, or is qualitatively important, then it is likely unfair.
- If the content is published online, then the widespread character of the dealing may be unfair.
- If the dealing made a confidential or unpublished work public, then that would point to unfairness.
- If the owner of the work allowed unfettered access to it, which the taker then extended, the copying might not be unfair.
- If there were alternatives to the taking, for example, you could have paid for the dealing but chose not to, then that will point to unfairness.
- If the unauthorized copies compete with the original, or with authorized copies of the work, then this will point to unfairness.
- Where the dealing creates interest in a work, rather than replaces the work, then the taking might be fair.
- Where copying creates marketplace confusion as to the authorized source of the work, then the taking might be unfair.

As writers, we want copyright to protect our work. However, when using the words of others, the rules can be daunting. Taker beware! **Don't forget:** infringement occurs only when you reproduce without the owner's consent. Therefore, if after a rigorous analysis of your taking on the above points, you remain in doubt, then it's still possible you may copy the work—you just need to ask permission. ■

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HOW MUCH OF A LITERARY WORK CAN I COPY?

The law says:

How much you may copy without permission depends upon analysis to these 4 issues:

Ethics and morality ask:

Is it acceptable to use another person's property without their permission?

Issue 1:

Is the literary work in the public domain? Has the creator been dead for more than 50 years?



YES
Then proceed to Issue 3



NO
Then proceed to Issue 2

Issue 2:

Is the taking substantial?



YES
Then proceed to Issue 4



NO
Then copy freely without permission

Issue 3:

Does your use of the literary work fall within one of the fair dealing exceptions?

- 1) Research
- 2) Private Study
- 3) Criticism (attribution is required)
- 4) Review (attribution is required)
- 5) News Reporting (attribution is required)
- 6) Parody
- 7) Satire
- 8) Educational Purposes



YES
Then proceed to Issue 4



NO
Then you may not copy the work without permission

Issue 4:

Does your use of the work (your "dealing") meet the six-part test?

- 1) Purpose of the dealing must be fair
- 2) Character of the dealing must be fair
- 3) Amount of the dealing must be fair
- 4) There are no reasonable alternatives to the dealing
- 5) What is the nature of the dealing?
- 6) What is the effect of the dealing on the work or the market of the work?



YES
Then you may copy the work without permission



NO
Then you may not copy the work without permission