

The Fair Use Rule: When Copying Is Not Cheating

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Abstract

When one pretends that another's work is one's own, we call it plagiarism. Other types of intellectual property violations include copyright infringement and abuse of the Fair Use Rule. This article raises some key questions that can be used when considering both legal and ethical standards surrounding the use of another writer's work.

Keywords: Ethics, Fair use, Plagiarism, Copyright infringement, intellectual property, informed consent

Introduction

Intellectual property violations of all kinds have been made easier by technology. With a few strokes of a mouse, anyone can copy and paste entire sections from nearly a limitless supply of documents on the Internet and claim it as his or her own work. Or documents can be uploaded in their entirety to blogs and discussion groups without the author's knowledge or permission. When one pretends that another's work is one's own, we call it plagiarism, a form of cheating. Plagiarism is stealing the intellectual property of another and claiming it as one's own. To combat this form of cheating, many colleges have employed the use of sophisticated software to help in identifying plagiarism (www.plagiarism.org). But there are more types of intellectual property violations than strictly defined plagiarism.

We were all taught as students to cite our sources. We need to quote and give credit when we report on the works of another author. But, quoting too much, *even if one gives credit* to the

original author, can be just as much of a problem when we reproduce and disseminate the work to a mass audience without permission. That is called a copyright violation. If plagiarism is stealing another's work, failure to ask for permission when lawfully required to is like taking someone's property without permission, a car for example, and using it for personal gain.

Many articles that are published in electronic form now contain an additional warning or clarification about the usual copyright notice "©" — explaining that the article can be shared among individuals but not reproduced in any medium without the permission from authors and publishers. To reproduce copyrighted works on a large scale, whether for profit or otherwise, without permission is a copyright violation and a violation of law. Nonetheless, the reproduction of copyrighted works is becoming a common everyday occurrence. Social work students, as well as seasoned social workers, even those with academic credentials, do not seem to be immune from intellectual property and copyright violations.

Go to any freestanding Internet discussion group for professional social workers or other mental health professionals, and on any given day one can find complete texts of news articles from major news sources and journals reproduced in their entirety. Rarely does one see evidence that permission from the author or publisher has been obtained.

The *NASW Code of Ethics* is clear about plagiarism. Section 4.08 on Acknowledging Credit states, "a) Social workers should take responsibility and credit, including authorship credit, only for work they have actually performed and to which they have contributed and b) Social workers should honestly acknowledge the work of and the contributions made by others" (NASW, 1999).

Nearly all works of creative expression are copyrighted, and in order to use substantial portions of copyrighted work (more than a small amount), permission is required even if credit is given. It is more than good manners; it is required by law. While the *NASW Code of Ethics* does not overtly mention copyright infringements, a powerful argument can be made that failure to obtain permission to use another's work when lawfully required is dishonest. Fredric G. Reamer (personal email communication, February 14, 2007) suggests that copyright infringements can be covered by The *NASW Code of Ethics* Section 4.04, Dishonesty, Fraud, and Deception, which states that "Social workers should not participate in, condone, or be associated with dishonesty, fraud, or deception" (NASW, 1999).

Many Internet discussion groups are freestanding in that they are not under the auspice of a professional organization, accrediting body, publisher, or some monitoring organization. There are usually no standards of professional conduct, other than some general notion of "Netiquette," a loose variation on the concept of etiquette, which is often vaguely defined, arbitrarily interpreted, and sporadically and selectively enforced. Servers that host such groups do have "Terms of Use" policies that include adhering to laws including copyright laws, but due to the sheer number of discussion groups and volume of posts, there is little monitoring. Rarely do you see on these groups' pages a copyright © symbol, the year published, and the name of the publisher or copyright holder with the statement that "This work was reprinted by permission." This is because permission from the author or copyright holder is rarely, if ever, obtained on many Internet discussion groups and e-mail lists. Often the posters of such content are professionals and/or academics, some of whom have their own copyrighted publications. As a result, they may feel they understand copyright requirements but are often misinformed or unaware of how laws apply to posting information on the Internet. Even if social workers have an awareness of the concept of intellectual property laws, few seem to understand its relevance today—what it means to adhere to these laws and the ramifications on the profession if such laws are disregarded.

Are there times when one can legally and legitimately reuse or copy copyrighted content without permission?

Yes, there are a couple of situations in which this is permissible on a limited basis. For example:

In non-profit academic institutions, teachers may use copyrighted works as "hand-outs" for classroom instruction on a limited basis without necessarily obtaining permission from the copyright holder if the use can be considered "fair" under the Fair Use doctrine, section 107 of Title 17 of U.S. copyright law. This exception, however, was written before the use of technologies and the Internet, which allow for the ease of transmitting and broadcasting works. In 2002, Congress enacted the "Technology, Education and Copyright Harmonization Act," commonly known as the "TEACH Act," in an attempt to extend such privileges to distance education (National Education Association-Hot Issues). However, this exception, as it was written, applies to educational institutions only, and includes a number of requirements that the institutions must first meet before the exception can be utilized. While faculty involved in distance learning may include copyrighted materials, it is limited to portions and under strict conditions. "Stated more bluntly, this law is not intended to permit scanning and uploading of full or lengthy works,

stored on a Web site, for students (or anyone) to access throughout the semester—even for private study in connection with a formal course" (Crews, 2003). Therefore, freestanding discussion group Web sites and blogs are not covered by the TEACH Act.

The Fair Use exception doesn't just apply to the limited use of copyrighted works by educational institutions. One can lawfully and ethically reproduce copyrighted material without permission if such reproduction meets with the Fair Use standards. However, these standards are unfortunately often misinterpreted and misunderstood (Nolo, 2007). In essence "Fair Use" permits instances when one can legally and ethically use portions of a copyrighted work without permission from the copyright holder and disseminate or use it for one's own purposes, such as criticism or parody. However, it is important to note that these situations are very limited, and the formula can be tricky to interpret. Contrary to what students and social workers may be observing, especially on the Internet, fair use does *not* include copying entire articles to Web sites, blogs, or Internet discussion groups with little or no commentary. Simply claiming that you took a copyrighted work as fair use does not make it so.

When is copying without permission both legal and acceptable?

There is no simple answer. Copyright law is among the more complicated aspects of law. However, there are some basic questions that can guide students, faculty, and social work practitioners in addressing some of the issues. The courts considered a number of factors when adjudicating copyright infringement cases, and no one factor carries more weight than the other. These factors include: 1) the purpose and character of the use - is it for educational purposes or criticism, or for profit and entertainment? Is a new work being created or is it merely a reproduction of the original? 2) the nature of the work being used: is the original a highly creative work or a factual document? 3) the amount and substantiality of the portion being used: is it a small amount? Would that portion be considered the "heart of the work"? 4) the market effect of the new work being created: what will be the impact on the market? Is the work in direct competition with the original?

Each of these factors is discussed in more detail below.

What is the purpose of this new work? Is something new being created?

It is permissible under Fair Use to take portions, and sometimes liberal portions, of a copyrighted work if it is interspersed with specific commentary or rebuttal of points. This is criticism or commentary made throughout the text in a manner that adds value or interpretation and creates a new work that references the original. It is not a direct copy- paste job of the full text. For example, say you are a member of one of these Internet discussion groups. You see an article in *The New York Times* or a major news source about some presidential candidate's proposal for universal health care. You can, under Fair Use rules, quote portions of the article—perhaps even fairly substantial portions of the article— as long as you also provide enough original commentary of your own in either criticism or support. This means in essence that you have used the article to create a new work of your own, and the excerpts you took were merely augmenting or referencing your ideas and were necessary to make your point. This is the same standard that is expected of students when writing papers.

You *cannot* claim as Fair Use, copying the entire article from *The New York Times* or any other copyrighted source without copious comment. You are not permitted to copy or upload the article with no comment, or such sparse comments as, "This is an interesting article" or "I am for it" or "against it" and leave it at that. This does not meet the Fair Use rule.

In this situation, in which you merely wish to share the article, the appropriate legal and ethical behavior would be to give a short excerpt, usually no more than 25 words, and the link or URL. Anyone interested in reading further is free to go the original source to read further. The claim often mentioned that it is too inconvenient, or that the original source Web site may clutter their version with unwanted advertisements, is hardly a justification. The source, whether it is a news source or professional journal, derives its income from those "pesky" ads, without which they might not have been able to publish in the first place. Even though copyright law is not necessarily intended to protect the publishers' rights to make money from ads, it does protect the rights of the copyright owner to reproduce, distribute, perform, and otherwise use their work in a manner they choose (Brigham Young University, 2006). It's simple really. Ask yourself, would you want someone using, distributing, or otherwise reproducing your work without your permission?

Competition with the source.

Many social workers and other health professionals who use Internet discussion groups and e-mail lists interpret the concept of competing as meaning that they are competing financially. Since most people who upload copyrighted material are not doing so for money and may genuinely want to share information, they believe they are safe on this issue. Not necessarily so, according to John Gile of the National Writers Union. One can violate another's copyright if you impair or ruin the market for their work, even if you yourself are not competing with them for actual profits. Gile suggests that posting an article to the Internet can interfere with the author's intent to market the work in other venues. If it's posted on the Internet, it becomes used in a sense, or old news, thereby diminishing its value. He goes on to say that the author's work could also be misinterpreted and/or be used to convey something other than the author's intent. So, it is not just when it is sold for profit that competition with the source may be an issue (Riolo, 2006c). For example, someone may have written an Op Ed piece for a major newspaper, but they may also plan on using their research for a related but different article in another venue, such as a journal article. Non-authorized publications from the Op Ed piece could reduce the value or timeliness of the journal article. This is certainly true when unpublished manuscripts or manuscripts under submission to journals find their way to the Internet without the author's permission. Most journals expect new and un-published works and may not accept an already posted article (Riolo, 2006b). If reproducing another's work diminishes its value to the author or copyright holder, it is not likely to be considered Fair Use.

The amount of material used.

The more material from copyrighted work you use, the less likely it will be considered Fair Use. It's one thing to take a brief excerpt, cite the source, and provide the reference or link. It's quite another matter to cut and paste large excerpts or the full article. There is no specific limit, and each case would need to be evaluated separately, but cutting and pasting an entire article and attaching a statement that it is copied as Fair Use, as can be sometimes seen on Internet discussion groups, is in no way providing protection to the poster. In fact, claiming something is Fair Use when clearly it is not could be used to demonstrate that the copier understands the work is copyrighted and is aware of the concept of Fair Use and disregarded it (Ed Colburn, publisher of Harvard Press, personal e- mail communication, October 31, 2006).

The significance of the material used.

Sometimes even reproducing a small portion of a copyrighted work can create a problem.

The more important the material is to the original work, the less likely its use without permission will be considered a Fair Use. The example often cited by many sources is the use of relatively small portions of former President Gerald Ford's book. The magazine, *The Nation*, obtained a copy of Gerald Ford's memoirs, *A Time to Heal: The Autobiography of Gerald R. Ford* (1979). While *The Nation* only published about 300 words dealing with the pardon of President Nixon, it was enough to violate Ford's copyright, since that was a centerpiece or "heart" of the book (NOLO, 2007).

Fair Use and giving credit are different concepts.

A common misconception is that it's okay to copy the entire work as long as credit is given, such as mentioning the author's name or listing the original source or URL where the work can be found. Giving credit and Fair Use are completely separate concepts. "Either you have the right to use another author's material under the Fair Use rule or you don't. The fact that you attribute the material to the other author doesn't change that" (NOLO, 2007).

This is perhaps one of the more difficult concepts to understand. Giving credit is a matter of honesty and integrity. It is ingrained in our education, and it is also specified in Section 4.08 of the *NASW Code of Ethics* (NASW, 1999). Fair Use has to do with permission and the law, while giving credit is an ethical issue.

When do we need permission to use another's work? This is the question answered by a Fair Use analysis.

If you use someone's intellectual property, giving them credit may not matter much to them, or the law, unless you had the legal right for the use in the first place. Using copyrighted work without permission will not always lead to prosecution or legal difficulties, since authors and publishers rarely take legal action. The reasons vary why this is, which may include that they may be unaware that their intellectual property has been taken. Or, even if aware, because of the sheer volume and frequency of copyright violations, they can only take action in the most egregious of cases. However, from an ethical viewpoint, does it matter whether or not the rightful owner takes legal action? Can social workers justify their actions based on the fact that the chances of getting caught and suffering consequences are small?

Perhaps one way of understanding the importance of respecting intellectual property is to make the conceptual connection to informed consent. Informed consent is ingrained in us as social workers. Before we disseminate information about our clients, we obtain their consent to do so, after they have been informed of the benefits and risks. There may be exceptions, but those exceptions are usually rare, and there are overriding compelling reasons to do so. Obtaining the client's permission, however, is the default option (NASW *Code of Ethics*, Section 1.03, 1999).

When disseminating the copyrighted works of others, copyright laws basically require that we obtain the informed consent of the author or copyright holder. This default position is a matter of law, not just an ethical issue. Fair Use addresses those limited exceptions in which obtaining the informed consent of authors is not required, but it should NOT be viewed as the default position.

Few, if any, social workers would argue that informed consent is optional or that there only is a problem if the clients can demonstrate harm by our failure to obtain their consent. Informed consent, we argue, is necessary to protect the client's self determination. However, if informed consent and self determination are important for clients, should we not offer the same respect for others we deal with including colleagues, peers, and even those we may not know personally?

Conclusion

In conclusion, we can claim Fair Use if one is engaged in scholarship, criticism, comment, parody, or in news reporting. In essence, it means that you are engaging in creating a new work entirely different from the original source. Copying entire articles is not Fair Use and is a copyright violation. Giving credit or citing the source is not the salient issue, but rather whether or not one has the legal right to use the material. Anything else is as problematic as outright plagiarism and cheating.

Unfortunately, the technology that has enabled both plagiarism and copyright violations to occur with great frequency is moving faster than our ability to develop standards to keep up. Monitoring the sheer volume of content on the Internet is an almost impossible task. Virtually all Internet hosts have clear policies prohibiting copyright infringements; however, enforcement has been difficult. Publishers and copyright holders are being selective in how they pursue copyright infringements. Only the most egregious or frequent copyright violators are being investigated and the number of actions (i.e., users whose accounts are suspended or content removed) is not easily

known or not made public. This tends to give a false impression that one can upload all kinds of content and there will be no consequences.

This may not be the case at all. Ed Coburn, Publishing Director of the Health Publications division of Harvard Medical School cautions that "I think the 'wild west' (of the Internet) days are drawing to a close and there will be more and more enforcement. The record and movie businesses already spend a lot of money on awareness-building and enforcement. Technology is making it possible to track sources of postings and track pass-along readers" (Riolo, 2006a).

Whether or not we see stricter enforcement of copyright laws in the future, it is important for our profession to take a stand just as strongly as we would against plagiarism and cheating for a number of reasons including:

- If social workers, through the acts of a few, earn a reputation for having no regard for copyright laws as important and fundamental, it will not speak well of us as a profession.
- If we selectively obey some laws and not others, for no other reason than convenience or low possibility of facing consequences, what impact will this have on our profession?
- If we refuse to obtain permission of authors to use their hard work, which is protected by law, how will our prospective clients really be sure we will obtain their permission or informed consent before disseminating their personal information to others?

As a profession do, we really have a choice but to examine these issues more closely and do a better job of educating ourselves and others?

Additional Resources

- United States Copyright Law - Title 17 <http://www.copyright.gov/title17/>
- Copyright Management Center at Indiana University-Purdue University <http://www.copyright.iupui.edu/index.htm>
- Fair Use checklist from the University of Louisville & Copyright Management Center <http://www.iecc.edu/occ/lrc/copycklst.htm>
- Copyright & Fair Use Overview, Chapter 9: Fair Use Stanford University Libraries http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/index.html
- TEACH toolkit from North Carolina State University Libraries <http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html>

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