

PLAGIARISM

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QUESTION: I want to use part of another writer's work. Is this okay or is it plagiarism? Also, I have heard that I can copy another writer's work, so long as it's fair use. What's fair use and is it different from plagiarism?

ANSWER: We're all familiar with the concept of plagiarism and learned in school that it is an academic and writing no-no. But what exactly is plagiarism from a legal viewpoint? It is defined as "the act of appropriating the literary composition of another, or parts or passages of his writing, or the ideas or language of the same, and passing them off as the product of one's own mind" (Black's Law Dictionary, Fifth Edition).

Just last month there was a newspaper article about Laurence Tribe, a constitutional law professor at Harvard, who used without proper attribution or permission a 19-word passage from Henry Abraham's 1974 book "Justices and Presidents" in his 1985 book "God Save This Honorable Court". After this came to light, Tribe released a statement in which he acknowledged the mistake and said his "well meaning effort to write a book accessible to a lay audience through the omission of footnotes or endnotes — in contrast to the practice I have always followed in my scholarly writing — came at an unacceptable cost: my failure to attribute some of the material." So, even a little bit of copying, inadvertent or not, can land a writer in trouble.

What's considered copying? Obviously, using the work of another author verbatim is copying. But there is also non-verbatim copying. The legal test for determining if an author's work has been copied or infringed is whether the accused copier had access to the original work and if the copied work bears substantial similarity to the original work. These are questions of fact that are considered in each circumstance of copying. While access may be somewhat easy to determine, a determination of the degree of similarity is made on a case-by-case basis and, unfortunately, is not governed by a definitive rule or test.

What should a writer do to stay out of trouble? Simply stated, a writer should give proper attribution when using the words of another and do so within the bounds of fair use. That is, be sure to place direct quotes in quotation marks and to identify the speaker or writer, and be sure to attribute through footnotes, endnotes, etc., passages and ideas of another. Numerous references are available for guidance on proper attribution and citation mechanics.

Are there legal consequences for inadvertently neglecting to properly attribute the work of another? Usually, the consequences will be professional embarrassment, rather than legal. However, the concepts of plagiarism and fair use are related to one another and to step outside the bounds of either may expose a writer to legal ramifications.

What is fair use? "Fair use" is a legal construct that allows writers to use original material of others within certain parameters. Under copyright law, there is a bundle of copyrights exclusive to the author of an original work. Regarding written works, these are the rights to: (1) reproduce the work; (2) prepare derivative works based upon the work; (3) distribute copies of the work; (4) publicly perform the work; and (5) publicly display the work. By default, only the author has the right to copy any portion of his work, which means any copying of an original work by another is copyright infringement. However, there are some exceptions to this general rule.

These exceptions are known collectively as fair use. Limited copying or use of an original work is permitted for the purposes of criticism, commentary, news reporting, teaching, scholarship or research. Fair use for these purposes is further determined by consideration of several factors, none of which is dispositive nor exclusive: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

One should proceed with caution and note that in and of itself, attribution of the copied, original material does not transform the copying into fair use. Fair use is factually dependent and the totality of the circumstances should be considered when determining fair use of a portion of another's work. In other words, there is no definitive rule to decide whether use of another's material is fair or not — such as copying 18 words verbatim is permissible, but copying 19 words is not.

Generally speaking, minimal copying of an original work with proper attribution most likely would not be plagiarism and would be considered fair use. However, if in doubt, a writer has three alternative courses of action, either not to use or copy at all, seek the advice of legal counsel as to whether the usage or copying is fair use, or seek express permission from the author to reproduce a portion of the original work.

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