

Publishing Rights: Fair And Fit To Print

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Topic: General

Online aggregators have a pesky habit of repackaging content they've trolled from the web, rather than paying for and producing original content. You may have discovered this yourself, spotting your content or intellectual property cut up and republished without attribution or license by a third party. A nonprofit may even find their content is being used for an endorsement, or to sell advertising on an unauthorized platform without regard to the context of their original material. When confronted, the third party may make a claim of "fair use."

To reverse the scenario, a nonprofit organization engaged in publishing will want to use data, analytics and intellectual property to bolster their own content needs. They might find themselves in a position of crossing the line, and be confronted by the copyright holder. We get it. Publishing is incredibly resource-intensive, and many nonprofits struggle just to update their own websites on a regular basis, or coax writing out of their senior thought leaders, let alone conceive a publishing program with the appropriate safeguards in place. But avoiding copyright infringement is a critical risk management issue for nonprofits with publishing activities.

Nonprofits engage in a vast array of publishing, from substantive content posted on an organization's website, to publishing newsletters, conference proceedings, or producing fundraising and promotional materials. The material and expertise needed to support these endeavors include photographs, illustrations, maps, infographics and other media that are often protected by copyright. Using them without permission can put the organization at risk for claims of copyright infringement by the owner.

Fair Use Doctrine

The fair use doctrine is a widely invoked but little understood provision to U.S. copyright law, allowing for republication of copyrighted material for certain limited purposes, e.g., for criticism, commentary, news reporting, teaching, reviewing or research. The concept of fair use is regarded as essential to balance the interests of copyright holders with public's need-to-know, supporting the free circulation of information and ideas. It's important to remember that fair use is a defense, not an exemption, to copyright laws.

What actually constitutes fair use?

In our book, [*Exposed: A Legal Field Guide for Nonprofit Executives*](#), we lay out four factors considered by courts in determining the applicability of the fair use defense:

- **Purpose and character of use:** Begin by asking how your nonprofit will use the content. Are you using the content to further your charitable mission, or to generate sales of a product or service? Generally, use of the material that does not yield income is more likely to be fair use. Repackaging a significant portion of copyrighted material in a book, for instance, and selling it under your organization's imprint, would be considered infringement. Simply acknowledging the source of the material is not enough. You will need to seek permission from the copyright holder (usually a publisher or institution) and obtain rights, before publication.
- **Nature of the copyrighted work:** Unpublished and creative works enjoy greater protection than published works and those that can be characterized as fact-based. Consider whether the work being used or adapted by your nonprofit is a creative expression and therefore subject to greater protection. Is the work unpublished? If so, proceed with great caution. Authors have rights to control the first public

appearance their work.

- **Amount and substantiality of the copyrighted work:** How much of the original work has been used? Was the heart or key message of the original work used? The size of the material used isn't relevant. Whether the central theme, core thesis or main points of the original were used without permission is what matters.
- **Effect on the potential market for the copyrighted work:** Has the author of the original work lost an opportunity to sell that work because of your use? Does what you've created replace the original? Was your use of the material made in an effort to avoid paying for a copy of the original or obtaining permission or license to reprint?

Strategies to Guard against Copyright Violations

Consider whether the work you use has been transformed when compared to the work's original use. For example, was something added to the original in any way that altered the expression, meaning or message of the original? Transformative uses are more likely to be judged fair use; for instance, if you are commenting on, critiquing, or parodying copyrighted work. We are making a clear distinction between copyright infringement and plagiarism, which deals with a lack of attribution and taking credit for someone else's work.

Establish written guidelines for your print and electronic publications that emphasize the importance of obtaining written permission before using any published or unpublished content produced by persons outside the organization (including freelancers and consultants). Centralize responsibility for editorial review and approval of content that your nonprofit publishes.

Public Domain Sources

There are abundant materials that are in the "public domain," not protected by copyright, and that are available for anyone to use. A work is in the public domain if it is no longer under copyright protection. For example, everything Mark Twain wrote that was published before 1923 is now in the public domain.

Works in the public domain may be used freely without the permission of the former copyright owner. For information on the duration of copyright protection see U.S. Copyright Office: *Provisions of the Law Dealing with the Length of Copyright Protection*, found at www.copyright.gov/circs/circ15a.pdf. In general, works created after January 1, 1978, copyright protection lasts for the life of the author, plus an additional 70 years. For works created but not published or registered before January 1, 1978, the term lasts for the life of the author plus 70 years.

Think Visually

Many nonprofits invest heavily in publishing, research and their website, but then confine what they publish to words on a page. Take a cue from magazine designers, and break the visual monotony with subheadings, pull quotes, illustrations, maps, and photos.

Of all the content you are likely to publish, art and photography and multimedia will be the most costly and difficult to source. One solution is the vast array of public domain resources available to all:

- Search websites that provide public domain and royalty-free media such as Unsplash (<https://unsplash.com>), Wikimedia Commons (https://commons.wikimedia.org/wiki/Main_Page), Morguefile (morguefile.com), Flickr ([Flickr.com](https://www.flickr.com)), Pixabay (www.pixabay.com), and Creative Commons (<https://search.creativecommons.org/>).
- S. government agency sites such as the US Geological Survey, NASA, The National Parks Service, and others, offer a multitude of image galleries, digital archives, and multimedia resources.
- A fantastic source is the Smithsonian Institution with public illustrations, drawings, photos and other images from across the libraries: <https://library.si.edu/image-gallery>.
- Speaking of libraries, another marvelous source are the Digital Collections at The New York Public Library: <https://digitalcollections.nypl.org/>; and the British Library has over a million images onto Flickr Commons for anyone to use, remix and repurpose: [flickr.com/photos/britishlibrary](https://www.flickr.com/photos/britishlibrary)

Conclusion: Fair Thee Well

Work with your attorney to create a licensing agreement that will enable the use of your material under

conditions you establish, while protecting your rights as the owner of the material. If you believe your nonprofit's rights have been infringed, consult legal counsel about the next steps, which could include the mailing of a cease and desist letter.

We hear a great deal of confusion surrounding fair use from nonprofit managers who oversee publishing activities (and truth be told, from almost everyone else tasked with creating and licensing content). When a nonprofit becomes a publisher, it is placed under increased scrutiny. Explore the many options available to enhance creation, and to manage the risks that arise from publishing.

Related Resources

- [Online Social Networks, Cyber Risk and Your Nonprofit: What You Need to Know](#)
- [Respect Your Intellect!](#)
- [Reclaiming Fair Use: How to Put Balance Back in Copyright](#), by Patricia Aufderheide & Peter Jaszi

Contact the NRMCC team with questions and comments about publishing risk at info@nonprofitrisk.org or 703.777.3504.