

OPINION

Figuring on fair use

Nobody argues with quotations. When a scholar inserts a quotation from some earlier author into a new article or book in order to reinforce her own point, or to argue with the earlier author, or whatever, it does not raise eyebrows. It is a normal part of scholarly practice. But when what is being ‘quoted’ is a figure, chart, graph, or image, many authors, and some publishers, become confused. So I would like to try and disentangle some of the strands of reasoning one often finds in these discussions and suggest a better way to ‘figure’ out the fair use of figures, etc.

When discussing any copyright problem, the way to begin is by asking if the material being used has a copyright at all. Many problems can be avoided if we begin here, because sometimes we will discover that the work is in the public domain, perhaps because of its age, or because it is a work of the US federal government, or because it is just ideas, not protectable expression at all. This last possibility is one we must consider when an author wants to use data from a previously published work. US law does not protect mere facts, nor are ideas subject to copyright. So if an author is taking nothing but facts and ideas – if, for example, she is extracting data points from a published figure to use them in a different way – there is no copyright to worry about.

If individual data points do not get copyright protection, so that extracting them and representing them in a new way does not even implicate copyright, what about reusing the figure or graph as a whole? This is

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How does US copyright law, and especially the doctrine of fair use, impact reusing figures drawn from a previous publication? Does it help if we redraw those figures in an attempt to evade copyright restrictions?

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where we begin to see some issues. Although our law does not protect facts, a sufficiently original selection and arrangement of facts can be protected. The classic case on this issue involved phone books, and found that the ‘white pages’, made up of names, addresses, and phone numbers arranged alphabetically, were not entitled to copyright.¹ But even a marginally more creative approach, as in the ‘yellow pages’, for example, probably is; the standard for originality is quite low. So a graph or figure where the data has been selected and arranged to make a specific point is likewise almost certainly protected. What that means is that copying the figure exactly as it appears in an earlier publication probably does implicate copyright, even though extracting the data would not.

At this point in the discussion, a curious idea often arises: what if the figure, graph, chart, or image is redrawn? The idea seems to be that if a chart or graph comes from a different hand, it is a ‘different’ copyright, so there is no problem. Unfortunately, we know this is not true; simply rewriting text does not prevent a verbatim reproduction from being a potential infringement.



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A musician may be guilty of infringement if her song sounds too much like an earlier one, even though she wrote out all of the notes herself. So the confident assertion we sometimes hear that redrawing a figure will solve the issue is often a kind of magical thinking applied, oddly, to graphics and imagery, even though we can easily see that it does not work for other types of copyrighted material.

When I hear the suggestion that an existing graphic should be redrawn for a new publication, I immediately ask why. What is the purpose of redrawing the figure? If it is because

the new author wants to make changes, perhaps in order to correct, supplement, refocus, or improve the original, then redrawing seems like a good idea. After all, since the copyright in these figures probably only extends to protecting them from exact reproduction, changes made to fit in better with a new argument or thesis really might help avoid a copyright concern. And anything that makes the incorporated material a more integral part of the new work supports fair use.

Consider, for example, redrawing a map in order to focus on a specific section of the whole. Imagine that the new author is copying only a portion of the original, and the drawing is in a different style, perhaps with altered labels that fit the point being made in the author's new work. The specific geographical features being redrawn, of course, are simple facts of the external world. So the redrawn map may not implicate copyright at all. But even if it does, it is still almost surely a fair use of the original.

On the other hand, many suggestions to redraw a figure, map, or graphic do not intend to make any changes; they just hope to avoid copyright based on the magical thinking described above. Surprisingly, the approach we should take to these proposals is very similar; we should ask if they might yet be fair use. Of course, if the use of the original material is fair, redrawing is unnecessary. If it is not fair use, redrawing by itself does not address the potential infringement.

So we find ourselves back at a fundamental issue: what is fair use when incorporating previously published materials into a new work of scholarship? Whether the older material is redrawn or merely copied and pasted into the new article, fair use is the most likely justification for reuse. And as we know, fair use is open-ended; there are no bright-line rules for fair use, just a set of factors that

are to be balanced. So how do we make fair use decisions? Even more curiously, why do these specific fair use decisions about charts, graphs, and figures seem so much more difficult than fair use for quotations?

A quotation is a classic example of a 'transformative' use, and we know that over the past 30 years our courts have come to give great weight to this issue of transformation. When a court finds that a use is transformative, it will nearly always find that that use is fair (although the inverse is not necessarily true). A quotation is transformative because a portion of an earlier work is made part of a new work, given a different meaning and made to serve a new thesis. When we apply this reasoning to a 'graphical quotation', such as using a figure or chart from an earlier work, the previous discussion makes some sense, I hope. If the chart is changed in some way to make it a better fit for the new argument or thesis, that improves the sense of transformation. But even if it is not changed, just copied and pasted, the use can still be transformative if the older material is made the subject of criticism, comment, or argument in order to advance a new thesis.

Fair use was created by judges 175 years ago in order to ensure that copyright does what it is intended to do – support the ongoing creation of new works of creativity and knowledge. When parts of an older work become the building blocks of new scholarship, that purpose is fulfilled, so fair use is especially applicable to both the quotation and the 'graphical quotation'. In both cases, that which is old becomes part of something new. There need be no difference in how we think about fair use in regard to these different genres of scholarly quotation. It is transformation that is the key question, not format.

Based on this reasoning, lots of reuse for figures, charts, graphs, and images in scholarly articles is likely

to be fair use. Redrawing may be a good idea when changes are needed for the point being made, but it is not necessary. New meaning can be created without a new hand drawing the chart. Nevertheless, many examples of pretty obvious fair use are challenged by publishers who are uncertain of the boundaries and unwilling to rely on fair use. This creates an ironic situation where an author has built an argument and used her building blocks correctly, only to be told she must get permission for uses that the law intentionally exempts from the need for permission. So our task is to make fair use better understood both amongst academic authors and academic publishers.

In 1996, the International STM Association adopted guidelines that 'concern the granting of permission by one signatory STM publisher to another STM publisher to reuse limited amounts of material from *primary* published works in subsequent publications'.² These guidelines have been revised over the years, and the 2014 version recommends that gratis permission be granted for specific amounts of reused materials, including 'up to three figures (including tables) from a journal article or book chapter'. I want to suggest that where the STM Association recommends gratis permission, it is because no permission at all is needed. The quantity limits are artificial, of course, since no quantity rules are specified in the fair use provision of the copyright law. But nevertheless, these guidelines are a helpful way of looking at the permission question. If no transformation is taking place, they are reasonable rules for relationships amongst the member publishers. But where transformation does occur, as it does so often when scholars incorporate older material into a new argument, these guidelines offer a quick way for a publisher to decide if permission is needed at all. If the guidelines say permission should be

gratis, it is reasonable to ask if it is needed at all.

Fair use is an indispensable element of scholarly writing. No advances are made without ‘standing on the shoulders of giants’, and fair use is the ladder the law gives us to achieve that vantage point. So authors and publishers need to recognize the role of fair use and embrace it as a doctrine that makes their

work possible. There is no reason to exempt specific formats from fair use, and no reason to require permission, even gratis permission, where true transformation has occurred.

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