



CODE OF BEST PRACTICES IN FAIR USE FOR POETRY

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INTRODUCTION

The impetus for developing this code of best practices arose from a broader conversation around poetry's place in new media. During 2009, a group of poets, editors, publishers, and experts in copyright law and new media came together under the auspices of the Poetry Foundation's Harriet Monroe Poetry Institute with the goal of identifying obstacles preventing poetry from coming fully into new media and, where possible, imagining how to remove or mitigate these obstacles. The group's work culminated in a wide-ranging report, "Poetry in New Media: A Users' Guide" (<http://www.poetryfoundation.org/foundation/newmediaproject.html>).

Embracing the overarching value of access to poetry as its theme, the group saw that business, technological, and societal shifts had profound implications for poets publishing both in new and in traditional media, and also that poets have an opportunity to take a central role in expanding access to a broad range of poetry in coming months and years. Almost immediately, the group's conversation focused on barriers to poetic innovation and distribution caused by clearance issues. Some of these clearance issues develop from the business structures underlying poetry publishing, but a significant number, the group discovered, relate to institutional practices that might be reconsidered, including both poets' and publishers' approaches to quoting and other types of possible fair use. Soon after its first meeting, the group began discussing the possibility of developing "best practices" for poets and publishers.

As the Harriet Monroe working group became aware of the uncertainties and tensions around fair use at play in the poetry community, its members realized that the poetry community urgently needed to clarify for itself what "best practices" might be for fair use in poetry. As the group was finishing the new media report, the HMPI contacted Peter Jaszi and Patricia Aufderheide at American University, who (through the Center for Social Media and the Program on Intellectual Property and Information Justice) have assisted various groups in developing fair use best practices documents for their specific communities. Working with the two professors and with Jennifer Urban at University of California–Berkeley, the HMPI supplemented the already extensive information gathering done for the new media report with an additional information-gathering meeting in Boston in November of 2009. The Center for Social Media and the HMPI then held six additional small group

meetings, each with 10 to 20 participants—two at the 2009 MLA convention in Philadelphia, two at the 2010 AWP convention in Denver, and, in April 2010, two at the Poetry Foundation offices in Chicago.

Poetry is more than a body of writings or a typology of forms; first and foremost, it is an evolving set of practices that engage, and are engaged by, the creative work of others. During the extensive conversations leading up to this document, a few central themes about poetic practice emerged. The first was that poets generally (though not universally) want their poetry to be as widely available to potential audiences as possible, both during their lifetimes and beyond. However, poets, especially those not working in and for new media formats, expressed anxiety about how new media might affect their ability to make money from their work and to establish and advance academic careers. And they were concerned about the ease with which new media enable others to distribute and alter their poems without permission. At the same time, poets urgently expressed their need to use material derived from the poems of others (including twentieth and twenty-first century writers) in their own work, and their desire to do so in ways that were both ethically and legally appropriate.

Poetry, as a highly allusive art form, fundamentally relies on the poet's ability to quote, to copy, and to "play" with others' language, and poetry scholars and commentators equally rely on their ability to quote the poetry they are discussing. In fact, poets generally acknowledge that essentially everything they do in their workaday lives, from making their poems to writing about poetry to teaching poetry, builds on the work of others. In the group conversations, poets communicated a general sense that their ability to do their work with confidence was often impeded by institutional regulations based on very straitened interpretations of copyright. They lacked clear guidance as to what material might be available in the public domain. Moreover, they were constrained by their own lack of certainty about what uses are and are not fair within the practices of poetry. While they certainly wish to appropriately control their own work, and to make money where money is to be made, poets also expressed a strong wish to affirm the importance of their ability to make reasonable unlicensed uses of copyrighted material and their support for such uses by others of their own works. In this, the poets both exemplified the tensions inherent in copyright law and the fair use doctrine and heartily endorsed the values undergirding fair use.

THE GOALS OF THIS DOCUMENT

Fair use is widely and vigorously employed in many professional communities. For example, historians regularly quote both other historians' writings and textual sources; filmmakers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. Fair use is also healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed.

Some of these other professional communities have also set forth their understandings in consensus documents that may be useful to poets, teachers, scholars, and others involved with creative practices. Although specific groups create such codes, no one needs to be a member of any professional group to benefit from their interpretations.

What follows is a code of best practices devised specifically by and for the poetry community. It is meant to enhance the ability of poets, teachers, scholars, and others to rely on fair use by serving as documentation of commonly held understandings about best practices in fair use drawn from the experience of the poetry community itself and supported by legal analysis. The code is meant as both an illustration of and a guide to which uses of copyrighted materials, as described below, are considered reasonable and appropriate within the poetry community.

HOW THIS DOCUMENT WAS CREATED

Poets working in traditional forms and those exploring new media were both strongly represented in the small group discussions. In each conversation, participants were asked to discuss a series of brief hypothetical examples designed to raise questions about fair use and its limitations. As the conversations revealed, members of this community believe both in copyright as an important source of protection for poets and in the importance of access to copyrighted material as a factor in enabling learning and new creativity. Their understanding of fair use, represented below, is grounded in this balanced understanding of copyright law. To ensure the legal validity of those conclusions, this document was reviewed by an outside panel of three distinguished copyright experts.

WHAT THIS IS

This code of best practices is meant as an aid in interpreting the copyright doctrine of fair use as it applies to creating and quoting poetry. Fair use is the right to use copyrighted material without permission or payment under some circumstances, especially when the cultural or social benefits of the use are predominant. It is a general right that applies even in situations where the law provides no specific authorization for the use in question.

This guide identifies seven situations that represent the poetry community's current consensus about acceptable practices for the fair use of copyrighted materials. The principles and related limitations discussed below reflect the shared views of a community of poets, many of whom also practice in other fields, as teachers, scholars, publishers, web curators, and more. In those other roles, they—like so many others—integrate poetry into their daily practices and seek to introduce poetry to wider audiences. The first categories relate to the practices of creating poetry as such. The five that follow apply across the board, to a range of creative and educational activities that involve incorporating references to existing poetry into new writing, art, scholarship, teaching, or performance.

These are the issues around which a clear consensus emerged over two years of discussions. The groups also talked about other issues; on some, there seemed not to be a consensus, and group members found others to be less urgent. The community may wish to revisit them in the future, particularly those involving translation and making anthologies. In the meantime, it is important to emphasize that the principle of fair use can and does operate in these (and other) areas of practice, along with the ones specifically addressed below.

WHAT THIS ISN'T

This code is not a guide to using published and unpublished material that is already free to use without considering copyright, such as material in the public domain (copyright.cornell.edu/public_domain/). This generally includes material published before 1923 and unpublished poems whose authors died more than seventy years ago. Likewise, it's not intended to apply in situations where the extent of the use is

so small (a few words or a short phrase) that copyright protection would not apply. For more information about “free use,” consult “Yes, You Can!” (centerforsocialmedia.org/files/pdf/free_use.pdf).

This code of best practices does not tell you the limits of fair use rights where copyrighted material is concerned. Instead, it describes how those rights should apply in certain recurrent situations. These situations are merely common examples. And fair use rights do extend to other situations as well. One example is the fair use of unpublished but still-copyrighted poetry in criticism or commentary. Although the poetry community has not reached consensus on a general set of circumstances in which such quotation would be fair use, it recognizes that there may be particular ones in which the doctrine would apply to unpublished material, while believing that specific restrictions representing the poet’s intent (including those that might be imposed in connection with an archival gift or deposit) deserve considerable deference.

Likewise, the community recognizes that there may be occasions on which public performances other than literary readings may incorporate quotations from copyrighted poetry under fair use. But this code of best practices limits itself to readings, rather than addressing (for example) theatre pieces, because this is the most common performance context for poetry. Other dramatic or musical performance-based uses can and should be considered on a case-by-case basis.

This code is not a guide to using material that people give the public permission to use, such as works covered by Creative Commons licenses. Anyone can use those works the way their owners authorize in addition to ways permitted under the fair use doctrine. Likewise, it is not a guide to the use of material that has been specifically licensed, which may be subject to contractual limitations.

And it’s not a guide to using material that someone wants to license but cannot trace back to an owner. However, these so-called “orphan works,” are fully subject to fair use consideration, both in the situations detailed below and more generally.

This is not a guide to the etiquette of quotation and reproduction. The poetry community is strongly of the view that it is generally appropriate as a matter of

simple politeness to seek permission for use, even when the use could be made without it. By the same token, members of the poetry community also recognize that there may be special circumstances in which it would be difficult or impossible to request permission in advance of use. In addition, they also understand that a legal rationale for fair use will apply with undiminished force even when permission has not been requested or has been denied.

This code applies to activities of using the copyrighted material in question in the United States, regardless of where in the world it originates. Copyright law is territorial in scope, and most other countries do not recognize fair use as such, although most have some exceptions for uses of copyrighted works built into their national laws.

Finally, although the code incorporates consensus-based community standards that are consistent with current U.S. law and its prevailing interpretation by U.S. courts, it is not a comprehensive or exhaustive guide to all possible applications of fair use in and around poetry—even in the recurrent situations detailed below. Individuals may be able to make persuasive arguments for fair use even where they go beyond the shared norms expressed here. Moreover, this dynamic legal doctrine will continue to evolve along with poetic, scholarly, and artistic practice.

INFORMATION ABOUT COPYRIGHT AND FAIR USE

Law provides copyright protection to creative works in order to foster the creation of culture and the discussion of ideas. Its best known feature is protection of owners' rights. But copying, quoting, and generally re-using existing cultural material can be, under some circumstances, a critically important part of generating new culture and promoting intellectual exchange. In fact, the cultural value of copying is so well established that it is written into the social bargain at the heart of copyright law. The bargain is this: we as a society give limited property rights to creators to encourage them to produce culture; at the same time, we guarantee that all works eventually will become part of the public domain and, in the meantime, we give other creators and speakers the opportunity to use copyrighted material without permission or payment in some circumstances. Without the second half of the bargain, we could all lose important new cultural work and impoverish public discourse.

United States copyright law has several structural features that permit unlicensed quotations from copyrighted works, including the specific exceptions contained in Secs. 108 and 110. Fair use, which has been part of copyright law for 170 years, is the most important of these features. Where it applies, fair use is a user's right. In fact, as the Supreme Court, recognizing that new creation inevitably incorporates existing material, has pointed out, fair use keeps copyright from violating the First Amendment. As copyright protects more works for longer periods than ever before, creators face new challenges: licenses to incorporate copyrighted sources become more expensive and more difficult to obtain—and sometimes are simply unavailable. As a result, fair use is more important today than ever before.

Because copyright law does not specify exactly how to apply fair use, the fair use doctrine has a flexibility that works to the advantage of users. Creative needs and practices differ with the field, with technology, and with time. Rather than following a prescriptive formula, lawyers and judges decide whether an unlicensed use of copyrighted material is “fair” according to a “rule of reason.” This means taking all the facts and circumstances into account to decide whether an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner.

This ambiguity in the law can lead creators to be uncertain about whether or not their own uses are fair. However, fair use is flexible, not unreliable. For any particular field of critical or creative activity, lawyers and judges consider expectations and practice in assessing what is “fair” within that field. In weighing the balance at the heart of fair use analysis, judges refer to four types of considerations mentioned in the law: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called “four factors”). This still leaves much room for interpretation, especially since the law is clear that these are not the only permissible considerations. So how have judges interpreted fair use? In reviewing the history of fair use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?

- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

If the answers to these two questions are “yes,” a court is likely to find a use fair. Because that is true, such a use is also less likely to be challenged than other types of uses.

Both key questions touch on, among other things, the question of whether the use will cause excessive economic harm to the copyright owner. Courts have told us that copyright owners aren’t entitled to an absolute monopoly over transformative uses of their works. By the same token, however, when a use supplants a copyright owner’s core market, it is unlikely to be fair. Thus, for example, a textbook author cannot quote large parts of a competitor’s book merely to avoid the trouble of writing her own exposition. Yet another consideration influencing the way in which these questions are analyzed is whether the user acted reasonably and in good faith in light of standards of accepted practice in his or her particular field.

BEST PRACTICES

GENERAL POINTS ABOUT THE PRINCIPLES

This code of best practices identifies seven sets of common current practices in the use of copyrighted materials in and around poetry—“Principles”—to which the doctrine of fair use clearly applies. It does not exhaust the full range of situations in which unlicensed use of copyrighted material by poets, teachers, scholars, and others may be considered fair use. Not only will there be circumstances today in which particular uses not covered by this code would be fair, but as the field evolves, new sets of such circumstances will arise.

In general, the situations identified involve uses in all forms of media. Except as otherwise indicated, a digital copy is the same as an analog or paper one for purposes of fair use. The situations concern the unlicensed fair use of copyrighted materials, not the way the copy from which the user works was acquired. When a user’s copy was obtained illegally or in bad faith, that fact may negatively affect fair use analysis; similarly, special restrictions (such as conditions on the use of archival material) may circumscribe fair use.

The principles are all subject to a “rule of proportionality.” The fair use rights of poets, teachers, scholars, and others extend to the portions of copyrighted works that they need to accomplish their goals. Thus, while in some cases fair use may extend to an entire work, in others relatively brief portions may constitute “too much.” Importantly, there are no numerical rules of thumb that can be relied upon in determining whether a use is fair.

PRINCIPLES AND LIMITATIONS

1. PARODY AND SATIRE

DESCRIPTION: Although judges sometimes distinguish parody and satire, both are forms of commentary achieved by non-literal imitation of previous work, including poetry. Such imitation (often with a humorous edge) can be a way to express appreciation of or affiliation with a poet or a body of work; members of the poetry community felt strongly that there was no rational basis on which to discriminate between adverse and friendly imitation. Likewise, satiric imitations of well-known poems are an effective tool for adding to the overall common stock of meaning, and need not detract from the value of the poetry employed.

PRINCIPLE: Under fair use, a poet may adapt a poem or a portion of a poem in order to (1) offer a direct or indirect critique of that poem, its author, or its genre; (2) present a genuine *homage* to a poet or genre; or (3) hold up to ridicule a social, political, or cultural trend or phenomenon.

LIMITATIONS:

- Poets should provide attribution to sources, according to the conventions appropriate to the use in question, unless the original is readily recognizable by the intended audience.
- Poets should avoid slavish imitation of source material, in which the re-use adds no significant value to the original.
- If use of type (3) occurs in the context of an anthology or other collection of similar material, the author or editor generally should take care that the source material is drawn from a range of different poets’ work, unless a focus on one or a small number is appropriate to the purpose of the collection.

2. NEW WORKS “REMIXED” FROM OTHER MATERIAL: ALLUSION, PASTICHE, CENTOS, ERASURE, USE OF “FOUND” MATERIAL, POETRY-GENERATING SOFTWARE

DESCRIPTION: What is now called remixing is a contemporary version of allusion or pastiche and has long been an important part of poetic practice. In general, it takes existing poetry (or literary prose) as its point of reference. In some cases, however, the stuff of poetic remix may come from other sources, including (but not limited to) advertising copy and ephemeral journalism. Members of the poetry community also recognize that technology has extended the range of techniques by which language from a range of sources may be reprocessed as new creative work.

PRINCIPLE: Under fair use, a poet may make use of quotations from existing poetry, literary prose, and non-literary material, if these quotations are re-presented in poetic forms that add value through significant imaginative or intellectual transformation, whether direct or (as in the case of poetry-generating software) indirect.

LIMITATIONS:

- Mere exploitation of existing copyrighted material, including uses that are solely “decorative” or “entertaining,” should be avoided.
- Likewise, the mere application of computer technology does not, in itself, render quotation or re-use of an existing poem fair.
- If recognizable in the final product, quotations should be brief in relation to their sources, unless there is an articulable rationale for more extensive quotation.
- The poet should provide attribution in a conventionally appropriate form unless it would be truly impractical or artistically inappropriate to do so.

3. EDUCATION

DESCRIPTION: Members of the poetry community recognize that whether or not it qualifies as “criticism,” the teaching of poetry at every level of the educational system benefits the field. They recognize that whether teachers accomplish it through the use of anthologies and textbooks, photocopied materials, or online course sites, giving students’ meaningful access to the texts under discussion is critical to the educational enterprise.

PRINCIPLE: Under fair use, instructors at all levels who devote class time to teaching examples of published poetry may reproduce those poems fully or partially in their teaching materials and make them available to students using the conventional educational technologies most appropriate for their instructional purposes.

LIMITATIONS:

- This principle does not apply to the preparation or distribution of published or commercially distributed teaching materials including anthologies and textbooks.
- Quoted passages should be reproduced as accurately as possible, and as completely as necessary, to reflect the creative choices embodied in the poem.
- Teachers should provide conventional attribution for the passages reproduced.
- Teachers should limit reproductions of long poems to the portions actually taught and appropriate context surrounding those portions.
- Teachers' selections of poems should not substantially duplicate those of existing, commercially available anthologies or textbooks.
- Teachers should avoid reproducing all or most of the contents of a volume of poetry that is reasonably available for purchase by students.

4. CRITICISM, COMMENT, ILLUSTRATION

DESCRIPTION: Poetic quotations are frequently employed by writers and artists in other disciplines. Perhaps the most non-controversial example is that in which a scholar, critic, or reviewer quotes from a poem in order to make a point about the poet in question or about his or her work. Because poetry arises out of and speaks to the particular circumstances (social, cultural, economic) of its writing, members of the poetry community were also united in their opinion that scholars and creators in other fields should be entitled to use apt selections of poetry for purposes other than criticism. Thus, they were supportive of quotation both for textual “illustration” and in the practice of visual artists who take inspiration from poetic works.

PRINCIPLE: Under fair use, a critic discussing a published poem or body of poetry may quote freely as justified by the critical purpose; likewise, a commentator may quote to exemplify or illuminate a cultural/historical phenomenon, and a visual artist may incorporate relevant quotations into his or her work.

LIMITATIONS:

- This principle does not apply to reproductions in textbooks and anthologies where quotations appear without an independent critical apparatus.
- Quoted passages should be reproduced as accurately as possible to reflect, and not so minimally or selectively as to mislead about, creative choices embedded in the poem.
- Critics, commentators, and artists should provide conventional attribution for their chosen quotations.
- They should also have an articulable rationale for the relevance of their chosen quotations to their own work.
- Likewise, the extent of quotation should be appropriate to the purpose of the use.
- Uses that are solely “decorative” or “entertaining” should be avoided.
- Permissible quotations used for exemplary purposes generally should be briefer than those used for critical purposes.
- Visual artists generally should not incorporate entire poems in a merely decorative fashion without the copyright holder’s permission.

5. EPIGRAPHS

DESCRIPTION: The use of quotations from poems to introduce chapters or sections of other works is a time-honored literary practice. Generally speaking, these quotations are selected for the connection to the text in question, although occasionally they may be introduced for merely frivolous or decorative purposes. Members of the poetry community generally found this practice to be non-controversial.

PRINCIPLE: Under fair use, an author may use brief quotations of poetry to introduce chapters and sections of a prose work or long poem, so long as there is an articulable relationship between the quotation and the content of the section in question.

LIMITATIONS:

- Quoted passages should be reproduced as accurately as possible to reflect the poet’s underlying creative choices, except to the extent that modification is specifically justified by the purpose of the use.
- Authors should provide conventional attribution to sources unless the original is readily recognizable by the intended audience or the absence of proper attribution is justified by the purpose of the use.

- An author employing multiple epigraphs should draw from multiple sources unless there is specific justification for limiting quotations to one or a few sources.

6. POETRY ONLINE

DESCRIPTION: Poetry today is subject to a wide range of online uses. Many of these uses, of course, involve specific quotations for critical and illustrative purposes and are subject to the principles and limitations already described. In addition, however, a number of web sites make poems available in their entirety; these range from sites that permit members of the public to upload poems of their choice to others that are extensively and elaborately curated. Similarly, the number of blogs devoted primarily or substantially to poetry “sharing” appears to be on the increase. In some cases, bloggers offer well-developed individual responses to poems they quote, while in others they may do no more than express personal preferences for the works in question. Members of the poetry community believe that online forums are an important opportunity to build public awareness of poetry. At the same time, they are concerned that poets’ rights and preferences should be appropriately respected. In particular, they believe that when compilers pay copyright fees for the use of some poems, they should compensate other equivalent uses as well.

PRINCIPLE: Under fair use, an online resource (such as a blog or web site) may make examples of selected published poetry electronically available to the public, provided that the site also includes substantial additional cultural resources, including but not limited to critique or commentary, that contextualize or otherwise add value to the selections.

LIMITATIONS:

- Compilers of poetry sites should reproduce poems accurately, to reflect creative choices embedded in the poems they include.
- Compilers should provide conventional attribution to source material no less extensive than would be appropriate for use in a conventional publication.
- Where a poet’s work is reasonably available for purchase in volume form, compilers should restrict themselves to the use of single or isolated poems only.
- In itself, a compiler’s inclusion of simple finding tools on a poetry site is not sufficient to justify an assertion of fair use with respect to quoted passages or poems.

- Nor is the mere assertion of the compiler's admiration for or personal association with a particular passage or poem independently sufficient to justify inclusion.
- A blogger quoting a poem in a blog should use only as much of the poem as is necessary to the blogger's specific goals, whether the purpose is providing commentary or making some other discursive point.
- Poetry sites should formulate and enact policies to provide for prompt and reasonable responses to objections by poets (or their qualified successors) to either the fact or the form of any use.

7. LITERARY PERFORMANCE

DESCRIPTION: Live readings are a staple of the poetry scene in many communities across the United States. Frequently, readers are poets whose programs include both their own work and selections from the work of others. On occasion, poets and other readers also create programs that consist primarily of the work of poets they admire. On some occasions, these readings may constitute criticism or commentary on the works included, but that will not always be the case. Members of the poetry community strongly believe in the value of respect for poets and their work, and they generally agree that prior consent should when possible be obtained for the inclusion of particular poems in readings.

PRINCIPLE: Under fair use, a person other than the poet may read a poem to a live audience, even in circumstances where the doctrine otherwise would not apply, if the context is (1) a reading in which the reader's own work also is included, or (2) a reading primarily intended to celebrate the poet in question.

LIMITATIONS:

- Readers should present quoted passages or poems as accurately as possible, allowing for the nature of the performance event.
- Readers should provide conventional attribution to source material as appropriate to the nature of the performance event.
- Readers should refrain from the use of particular poems in an event if they are aware that the context would be (or would have been) objectionable to the poet, unless the use is permissible as commentary or criticism.

- Subject to the same qualification, readers should not repeat uses to which the poet (or a qualified successor) has objected.
- In events of type (1), readers should avoid disproportionate use of the work by one or a few poets in any particular reading; in events of type (2), readers should limit their reliance on fair use to one-time or occasional performances.
- Readings that include unauthorized copyrighted poetry may be recorded for archival purposes but not be made generally available without permission from the poet (or qualified successor).



The Program on Information Justice and Intellectual Property, led by Professor Peter Jaszi, promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C., led by Dean Claudio Grossman.



The Center for Social Media, led by Professor Patricia Aufderheide, showcases and analyzes media for social justice, civil society, and democracy, and the public environment that nurtures them. The center is a project of the School of Communication, led by Dean Larry Kirkman, at American University in Washington, D.C.



The Harriet Monroe Poetry Institute is an independent forum created by the Poetry Foundation to provide a space in which fresh thinking about poetry, in both its intellectual and its practical needs, can flourish free of any allegiance other than to the best ideas. The institute convenes leading poets, scholars, publishers, educators, and other thinkers from inside and outside the poetry world to address issues of importance to the art form of poetry and to identify and champion solutions for the benefit of the art.

P O E T R Y



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