

Copyright Clarity: What Registered Dietitian Nutritionists Need to Know about the Basics of Copyright Law



COPYRIGHT LAW CAN BE confusing, particularly when it comes to developing websites, blog posts, and presentations with images and content—often from a medley of digital, print, and online sources. When creating educational materials, articles, presentations, etc—whether to help patients navigate food allergies or to provide a patient with a safe, effective weight-loss plan—registered dietitian nutritionists (RDNs) should have a basic understanding of copyright law and the type of materials it protects in order to minimize the potential downfalls and repercussions of using copyrighted materials without the proper license or permission.

WHAT IS COPYRIGHT?

The US Copyright Office defines copyright as a form of legal protection that permits authors, photographers, composers, and other creators to control distribution and reproduction of their work.¹ Copyright protects literature, music, graphics, pictorial works, photography, and other forms of creative expression.¹ In order to be copyrightable, a work must be original and created independently, and it must be “fixed in a tangible medium of expression”; in other words, written or printed on a piece of paper, saved on a computer file, or recorded. For example, at a session at the Food & Nutrition Conference & Expo, the live lecture cannot be copyrighted. However, the PowerPoint slides accompanying the presentation are copyrightable, as are any audio or video recordings of the presentation,

including recordings available online, linked from or embedded in a social media account such as Facebook or Twitter, or available on a blog or other website.

Copyright protection allows rights-holders, including authors, photographers, and other content creators, to do and to authorize others to do the following: reproduce the work in copies (in whole or part); prepare derivative content, such as dramatizations and translations, based upon the work; distribute copies of the work to the public by sale, gift, rental, or loan; and perform or display the work publicly. It is important, particularly for health care educators, to be aware of exceptions and limitations to these rights, notably the “fair use” provision outlined in section 107 of the 1976 Copyright Act, and to understand the proper scope of this provision.^{1,2}

FAIR USE OR INFRINGEMENT?

The fair use doctrine is a defense to copyright infringement available under the 1976 Copyright Act that allows excerpts from copyrighted material to be reproduced for limited and “transformative” purposes such as criticism, comment, news reporting, teaching, scholarship, and research.^{2,3} Determining whether a fair use defense is likely to be successful to any infringement claim can be challenging as lawmakers purposely created a broad definition of fair use that is flexible and, consequently, vague. There are no specifics in terms of number of words or lines that may be safely reproduced without acquiring permission, but Section 107 of the Act does provide four factors for courts to weigh when determining whether a given use qualifies as fair use.^{2,4,5}

- **The purpose and character of the use, including whether such**

use is of a commercial nature or is for nonprofit educational purposes. Courts are more likely to favor content that is reproduced for scholarship, research, education, and commentary functions, particularly in a noncommercial setting. It is important to remember, however, that a not-for-profit entity or function does not necessarily exempt the user from copyright infringement.

- **The nature of the copyrighted work.** This criterion is related to the content itself—the type of work that is being reproduced. A court is more likely to find fair use if the material is informational or scientific in nature. A short news brief containing facts and statistics is more likely to fall under fair use than material reproduced from a creative work such as a novel.
- **The amount and substantiality of the portion used in relation to the copyrighted work as a whole.** The larger the percentage of the reproduced work, the less likely a use qualifies as fair use, although copyright law does not provide an acceptable page number range or word count for determining fair use. Re-use of 25 words from a 100-word poem or song is less likely to be considered fair use than re-use of 25 words from a 1,000-page novel. In addition to quantity, the court also considers the quality of the reproduced work, particularly if it includes essential material that is deemed core content from the original work.
- **The effect of the use upon the potential market for, or value of, the copyrighted work.** This

*This article was written by **Tony Peregrin**, editor and writer for a Chicago-based medical association and freelance writer in Chicago, IL.*

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criterion is used to evaluate potential financial loss for the copyright holder. If it can be shown that the potential market for the work will not decrease as a result of reproducing the work, a use is more likely to qualify as fair use.

Ultimately though, as fair use is a retroactive defense that can only be determined by a court and not a proactive authorization to re-use the relevant material, the best way to safeguard against possible copyright infringement is to obtain permission from the rightsholder before reproducing the work. (The US Copyright Office cannot give this permission.) Citing or acknowledging the source of the copyrighted material does not substitute for obtaining permission.

Fair use of photos, particularly images obtained from online sources, is of particular interest to RDNs as high-quality, visually appealing images on Pinterest, Instagram, blogs and other websites are key to engaging new and existing clients and patients. If you took the photo yourself and it is not subject to a Work-For-Hire agreement (ie, your employer owns the work product you create), you likely own the copyright to that image. The general rule is “If you make it, you own it.”

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Alternately, if you're using a photo or graphic created by someone else, you'll generally need to secure permission to reproduce the image. Photos that are not copyrighted are available in public domain repositories, and may be used without permission. Works available in these repositories include materials for which the copyright term has expired or materials copyright owners have specifically released into the public domain, including government works that are not eligible for copyright protection.^{6,7} Use of photos can also be purchased from several online stock photography outlets.

WHAT CANNOT BE PROTECTED BY COPYRIGHT?

Several content categories are generally not protected under federal copyright law. According to section 102 of Title 17, copyright protection does not extend to facts, ideas, procedures, processes, systems, or discoveries.⁸ Ingredients for baking a cake are not in themselves copyrightable; however, a written recipe for baking a cake is copyrightable. An RDN adhering to copyright law wouldn't post someone else's recipe to their blog or website without securing permission, but he or she may link to the recipe from the owner's website or blog, as linking typically does not require permission.

While copyrights do not protect ideas and discoveries, a patent does, in fact, protect inventions or discoveries, according to the US Patent and Trademark Office.⁹ (It is important to note that copyrights protect works of authorship, so the manner in which an idea or discovery is expressed may be copyrightable though the idea or discovery itself is not.) Trademarks, on the other hand, protect a “word, phrase, symbol or design that identified and distinguishes the source of the goods of one party from those of others.”⁹

HOW DO YOU OBTAIN PERMISSION?

Works published on or after March 1, 1989, do not require a copyright notice to secure protection—which means you can't assume that if a photograph, graphic, or text is missing the telltale copyright symbol “©” you do not have to secure permission to reproduce the material. In other words, the absence of this notice does not mean a work can be freely copied, adapted, or distributed. When in doubt, the best way to ensure an intended use is not an infringement of the copyright owner's rights is to secure written permission.

Obtaining permission to reproduce a work involves two essential steps. The first step involves researching the identity of the copyright owner (also see following section on copyright transfer). If a work displays a copyright notice, such as a book's copyright page or a legal notice on a website, that information can sometimes be used to determine the rightsholder of the work. Another option for identifying the copyright owner is to check with

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