

# Exceptions to Copyright: what are the limits for citations?

10.11.2022 7 min read

## Authors

Tathyana Milana Candu

## Related areas

Intellectual Property

## Topics

Intellectual Property

Creations of the spirit are considered authorial works, provided they are expressed by any means or fixed on any support. The protection of the author's work starts at the time of its creation, regardless of registration and lasts for 70 years counted from January 1 of the year following the death of its author or its fixation, depending on the type of work.

The Copyright Law grants<sup>1</sup> the author the so-called moral and patrimonial rights. The first are those of a personal nature, perpetual and inalienable, and aims to guarantee the preservation of the author's personal bond with his work (arts. 22 and 24 of the LDA). The patrimonial rights are related to the economic exploitation of the work, giving the author the right of exclusive use of his creation (arts. 28 and 29 of the LDA), including, for example, the right to prevent the reproduction of the work in whole or in part by third parties.

However, just as the Law protects copyright, it also imposes certain limitations to the exercise of such rights (Chapter IV of LDA). Therefore, some uses of the work will not depend on the authorization of its holder. As Professor Leonardo Macedo Poli explains<sup>2</sup>, "each one of the limitations provided by the LDA derives from the legal reception of one or another constitutionally guaranteed principle", such as, for example, the "right to privacy and private life" or "culture, education and science".

The Superior Court of Justice has already expressed its understandings on several occasions about such limitations and their relation to the constitutional principles. In the trial related to the RESP 1.380.341 – SP, for example, Minister Paulo de Tarso Sanseverino pointed out that "the scope of effective protection of copyright consider the limitations provided in articles 46, 47 and 48 of Law 9.610/98, interpreted and applied in accordance with fundamental rights and guarantees, and the consideration of the fundamental rights and guarantees themselves. Values such as culture, science, intimacy, privacy, family, national development, freedom of the press, religion and worship must be considered when shaping the right to copyright". A similar position to this had already been expressed by such Justice years before when judging the case REsp 964.404-ES.

Specifically regarding citations, the Law brings two exceptions to copyright, in items III and VIII of Article 46,<sup>3</sup>. Item III allows the quotation of passages of any work provided that it is for purposes of study, criticism or controversy, and in the extent justified for the purpose to be achieved. Item VIII allows the reproduction "of small passages of pre-existing works, of any nature, or of entire work, in case of fine arts, as long as the reproduction itself is not the main objective of the new work and that does not harm the normal exploitation of the reproduced work or cause unjustified damage to the

legitimate interests of the authors".

Although the legislator intended to detail such exceptions, the fact is that the legal text leaves some gaps that may bring doubts to the application of the provisions and makes the interpretation of limitations always take into account the concrete case. The main doubts regarding the exceptions refer to (i) the extension (size) of the quotation and the so-called "small excerpts", as well as (ii) the possibility of use by third parties for profit purpose.

As to the first question, in fact there is no objective criterion to accurately determine the percentage of passage to be cited/reproduced in relation to the work. Therefore, it is necessary to resort to the words of the legislator: the quotation must be "to the extent justified for the purpose to be achieved", and the reproduction of a short excerpt cannot be "the main objective of the new work". In other words, a "mathematical" parameter was not defined, and we should take into consideration, primarily, the role of the citation/reproduction in the new work.

By the way, the Superior Court of Justice decided, recently, that there was no copyright infringement in the case in which a poem by the writer Cecilia Meirelles was reproduced in full, without authorization, in a textbook (Resp. 1.450.302-RJ). At the time, the Court pointed out that it would be "undisputed that the context of citation of the poem in the textbook is related to educational diffusion (teaching) and the 'justified measure for the purpose to be achieved', constitutes and requires the full study of the poem considering the orthographic and semantic analysis (...)". In this sense, "the only partial quotation of excerpts/excerpts/passages from poetry would certainly impair the understanding of the intellectual creation of the famous poet Cecília Meireles and could generate a semantic misrepresentation of the writing and, consequently, would violate the moral rights of the author as provided for in article 24, item IV of Law 9.610/98". For the STJ, the "justified measure of the end to be achieved" would be both the pedagogical purpose and the preservation of the completeness of the literary text.

The judgment in question is emblematic for the study of limitations on copyright since, in such ruling, the STJ considered lawful even the full reproduction of a work in view of its purpose in the context of the new work.

Regarding the possibility of use by third parties for profit, it should be noted that there is no prohibition in the law to obtain financial return with the work that contains the citation (or the reproduction of small excerpts). Although item III conditions the citation to the purpose of a critical or controversial study, these do not prevent a financial gain, for example, with the commercialization of the textbook or newspaper that contains the citation within the established legal limits.

This does not mean, however, that any and all use is permitted. Not only the doctrine, but also the national jurisprudence are clear in establishing that exceptions to copyright must consider the consequences of this use for the owner of the work. For this, it is necessary to observe the so-called "Three-Step Rule" provided for in article 9(2) of the Berne Convention<sup>4</sup>, to which Brazil is a signatory, and according to which it must be ensured that: (i) reproduction itself is not the main objective of the new work; (ii) it does not jeopardize the exploitation of the work cited/reproduced; nor (iii) generates unjustified damage to its author<sup>5</sup>.

When dealing with the subject, Eliane Abrão explains that "[i]n any of the hypotheses cited the legal permission is only applicable when such uses do not cause unjustified damage to the legitimate interests of the authors. If the artist lives from the income related from licenses or assignments of his work, any movement to the contrary may mean a loss to him. But it must be unjustified, which the legislator does not explain. The law, by prohibiting unjustified loss, gives the interpreter the notion of unjustified loss. Between hindering everyone's access to culture and knowledge, which is prohibited by the Constitution, and recognizing individual exclusivity, the interest of the community must prevail, and the damage is then justified."<sup>6</sup>

The Three Steps Rule reverberates the need to combine copyright and the interest of the community – access to education, culture and information. Such rule should be used as a tool for understanding the scope of copyright limitations and their correct application.<sup>7</sup>

In summary, limitations to copyright cannot be interpreted unrestrictedly. The balance between the fundamental rights and guarantees of the community for the use of copyright works needs to be compatible with the consequences generated by this use to the holder.

**>>> This article belongs to the e-book: "Intellectual Property". Click here to read more articles.**

#### **NOTES:**

<sup>1</sup> Law N° 9.610/1996.

<sup>2</sup> Copyright: general part. Belo Horizonte: Del Rey, 2008, p. 81.

<sup>3</sup> Article 46. It does not constitute an offense to copyright: III - the citation in books, newspapers, magazines or any other means of communication, of passages of any work, for purposes of study, criticism or controversy, to the extent justified for the purpose to be achieved, indicating the name of the author and the origin of the work; [...] VIII - the reproduction, in any works, of small excerpts of pre-existing works, of any nature, or of integral work, when of plastic arts, whenever the reproduction itself is not the main objective of the new work and that does not prejudice the normal exploitation of the reproduced work nor cause an unjustified prejudice to the legitimate interests of the authors.

<sup>4</sup> Berne Convention – Article 9(2): "The laws of the countries of the Union reserve the right to permit the reproduction of such works in certain special cases, provided that such reproduction does not affect the normal exploitation of the work or cause unjustified prejudice to the legitimate interests of the author."

<sup>5</sup> In this sense: SANCHES, Hércules Tecino. Copyright Legislation. São Paulo: LTR, 1999. p. 145.

<sup>6</sup> ABRAM, Eliane Yachouh. Comments on the Copyright and Related Rights Law: Law 9.610/98 with the amendments of Law 12.853/2013, and Jurisprudence of the Superior Courts. Rio de Janeiro: Lumen Juris, 2017. p. 180.

<sup>7</sup> BASSO, Maristela. The exceptions and limitations to Copyright and the observance of the Three-step-test rule. Revista da Faculdade de Direito da Universidade de São Paulo, v. 102, São Paulo, 2007. p.500 e 503.

› PROFESSIONALS

## Professionals who combine legal insight and market perspective



Tathyana Milana Candu