



McHUGH EXPERT INTERVIEW

McHugh on Rights and Permissions

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INTRODUCTION

The purpose of this interview is to share with you my experiences in rights and permissions and to indicate what you should minimally know about rights and permissions. Your organization wears two hats when it comes to rights and permissions. The first is your organization's use of copyrighted material as a permission seeker, as a licensee.. The second hat is that of a licensor of your organization's copyright material, your role as one who grants permission. At times these two roles will intersect. The cost of not knowing the basics about rights can cause significant legal exposure that can lead to costly errors.

QUESTIONS AND ANSWERS

Q What interested you about the field of rights and permissions?

A Early in my career as an acquisitions editor I did "hands-on" permissions clearance for a couple of books and later I did some permissions clearance work, as a contractor, for a leading educational publisher. I discovered the area of rights and permissions was a lot more complex than I had envisioned.

Also, in my consulting business, in every publishing program I audit, I see potential rights problems and legal exposure. For that reason I keep conversant with the field so that I can alert clients to problem areas and advise them to retain competent copyright counsel.

Six Suggestions on How to Think About Copyright

A valuable skill to develop is learning *how to think* about copyright. Copyright is a complex, vast, and changing subject with precious few definitive answers. Here are six suggestions on how to think about copyright:

- Identify immediately the specific rights issue at hand. Is it a "fair use" or "public domain" question? Note also that other legal and intellectual property issues might exist in your particular situation; e.g., trademark, the right of publicity/privacy, trade secrets, etc.

- Once you have identified specific questions, consult your copyright publishing law library and knowledgeable colleagues.
- Be cautious and conservative about any decision you make regarding copyright issues. If you are wrong, the consequences could prove extremely expensive. Remember: Legal exposure is inherent in all copyright matters.
- Requesting permission is the cheapest insurance against possible copyright infringement.
- Rarely is there one correct answer to a rights question. In most instances, the answer is a matter of degree rather than absolute certitude
- If you still are unsure about your right to use copyrighted material and have questions, seek the advice of a qualified copyright/publishing law attorney.

Q What are some of the biggest risks and hazards in copyright and permissions for organizations?

A Some executives may ignore rights and permissions and try to avoid adding staff to handle rights and permissions, even on a part-time basis. Laxness and lack of expertise in the rights functions can result in potential copyright infringements by authors and developers and lost opportunities for licensing income. Consider also that licensing electronic rights is tricky and an

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organization may need a specialist who understands licensing in a digital environment.

Copyright administration is an overhead cost but a cost that is justified when one examines what is at stake. On the flip side, rights licensing, particularly digital, can produce a stream of high-margin income. But licensing income doesn't happen by accident, it takes a plan and someone to execute the plan.

Q What special risks do membership organizations, such as associations and societies, have with their management of rights and permissions?

A Members may expect favoritism. They may feel they can use an organization's copyrighted material with impunity—and without obtaining permission to use it. If they request permission and are denied usage, they may appeal to a higher authority (Executive Director) to intercede. It will always be to your advantage to avoid having the publishing staff in the middle of any dispute between the membership and the ED.

Second, nonprofit membership organizations must deal with affiliates, such as sections, and other subunits, who may fancy themselves as being in the education or publishing business reprinting the parent's organization's copyrighted material for distribution to the subunit's members without permission.

Q How can one avoid the association and society copyright pitfalls you previously mentioned?

A Educate members as most people know little about copyright and what it means. Point out that much of the information and content produced is copyrighted. Define and explain basic concepts such as fair use, infringement, and public domain. Write and distribute a clear and unambiguous rights policy. Make it easy to get permission to use copyrighted material. Use your website to automate the process. And most impor-

tantly, appoint one specialist to handle permissions for the organization. Remove roadblocks.

Q Some say "Copyright does not apply in the digital world" What is your opinion?

A *Copyright Law applies equally in the digital world as it does in the paper world.* Copyright Law makes no distinction concerning the media where the protected material appears. According to Attorney David Koehser, "The same rules for copyright and trademark infringement apply, regardless of the medium. Any reproduction, distribution, display or performance of a copyrighted work and any creation, publication or display of a work derived from that copyrighted work without the copyright owner's consent constitutes copyright infringement, and any use of an existing trademark or a mark that is similar to an existing trademark in a manner which is likely to confuse others into believing that the user's goods or services are affiliated with or endorsed by the trademark owner constitutes trademark infringement."

Q How do other organizations handle their rights and permissions? Is it generally the permissions editor who acquires the required permissions licenses and also grants permission to reprint? Do other organizations usually have full time permissions personnel on their staff? Do separate publishing divisions, for example periodicals or books, have their own dedicated permissions editor?

A I deal with a variety of organizations including commercial publishers (books and magazines) and nonprofits, including associations, foundations, and societies. There isn't any one standard approach to dealing with rights and permissions.

Determining factors include: the size of the organization, the type of publishing, the amount of licensing

John B. McHugh, Publishing Consultant

PO Box 170665 • Milwaukee, WI 53217-8056

414-351-3056 • jack@johnbmchugh.com • www.johnbmchugh.com

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income, the margins on licensing income, and the organization's understanding of the importance of rights and permissions. Generally, commercial publishers dedicate more resources to the management of rights and permissions than do nonprofit organizations.

At minimum, your organization should have one central point of contact where people can request permission to reprint the organization's protected material. That person also can handle licensing arrangements. Staffing is always contingent on the size of the organization, volume, and sales. But it is clear that you need one person in charge of the permissions department and this is usually sufficient. After that no one template exists for organizing the rights/permissions function.

Q What is Copyright Clearance Center (CCC)? Why is it important? Do you recommend CCC?

A CCC is a nonprofit clearinghouse for the processing of permissions requests. CCC offers a menu of services for publishers including: Pay-Per-Use; Annual Copyright License for Academic Institutions or Businesses; Rights Link; Rights Sphere®; and Ready Images.

Processing a large number of permissions requests internally can be expensive for your organization, and it may be cost effective to outsource certain routine permissions requests including photocopying, coursepacks, and requests to reprint journal and magazine articles. The cut of permissions fees taken by CCC may be worth the money you save by the reduced cost of processing routine permissions.

Utilizing CCC's services doesn't lessen the need for an organizational rights and permissions policy. As the rights holder, you must determine the terms and fees for granting permission. As the licensor you must set the decision parameters for granting permission. For membership organizations, this means thinking through

whether or not you want CCC to handle member permissions requests and, of course, whether you want to grant permission gratis or at a deep discount to members.

Q How can executives ensure that their staff and authors comply with Copyright Law?

A All content producers should have a basic understanding of Copyright Law. So in addition to publishing staff those needing background in rights and permissions are the managers in charge of certification, education, and conferences. Educating staff is the key. The one staff person in charge of rights and permissions should also be the resident expert. Work with an attorney who works with publishers and specializes in intellectual property. Develop a rights and permissions policy for staff and guideline for authors. Stock the company library with books on copyright.

Q What are "legacy" or "pass along" publishing agreements?

A Often organizations find themselves with publishing agreements that are passed on from generation to generation. If your standard publishing agreement and other licenses have not been reviewed in the last five years, schedule a review with your attorney. It is vital that your agreements reflect the latest developments in Copyright Law, particularly as it affects digital content.

Q When is it prudent to get the advice of an attorney?

This is always a judgment call. The most general answer I can give is to consult an attorney when you feel a situation presents serious legal exposure. For example, if someone threatens to sue you for copyright infringement, or as mentioned above if you need assistance in reviewing legacy agreements. You should also consult an attorney when you customize an agreement. A cease and

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desist letter sometimes has more clout when written by an attorney. Attorneys are expensive but well worth the cost to prevent undue legal exposure that can prove costly down the road.

Q What is one single thought you want to leave with us?

A knowledge of Copyright Law, and it's corollary subjects—fair use and public domain—will enable you to determine whether or not you need to request permission to reprint material you plan to use in your publication. Understanding the doctrine of fair use and determining whether or not material is in the public domain will provide guidance for using copyrighted material without risking infringement. Copyright also underpins any co-publishing arrangement entered into by your organization. In order to understand publishing licenses, you need to understand the basics of copyright. For anyone entering into such an arrangement, knowledge of copyright is indispensable

Q What new McHugh Publishing Guides are you working on?

A Future *McHugh Publishing Guides*, all scheduled for January 2012 release, include:

How to Develop a Rights Policy and Establish Permissions Fees (R-9)

McHugh's 30 Rights and Permissions Questions Answered (R-24)

Self-Publishing: How to Evaluate the Feasibly and Eight Suggestions to Help You Succeed (B-8)

Book Acquisitions and Manuscript Delivery Dates: Pitfalls and Remedies (B-34)

Q What new McHugh Publishing Guides have you recently published?

A B-22, *McHugh's 10 Suggestions for Successful Book Acquisitions*, 2011, 4 pages, \$5.00

Contents: Book Acquisitions Are Vital; Four Truisms about Book Acquisitions; Ten Suggestions; Developing Acquisitions Talent: Investing in the Future

R-14, *McHugh's 42 Tips for Managing Rights and Permissions*, 2011, 5 pages, \$10.00

Contents: Decisions in Rights Management; Copyright in the Digital World; When to Consult with an Attorney; 9 Tips for Seeking Permission; 15 Tips for Licensing, Acquiring and Protecting Digital Rights; 18 Tips for Organizing the Rights Function

PM-1, *How to Prepare a Request for Proposal (RFP): Suggestions for Publishers*, 2011, 9 pages, \$20.00

Learn how to prepare an RFP and save many hours. Read about these valuable techniques in this *McHugh Publishing Guide*. A well-executed RFP can ensure a successful vendor relationship and save you a substantial amount of money. Written by a publishing industry expert who has prepared numerous RFPs for various organizations.

Contents: What is an RFP; Purpose of an RFP; Preparation Don'ts; How to Organize and Prepare; RFP Tasks and Preparation Calendar; Locating Qualified Vendors; How Many Vendors to Include; Topics to Cover; Selection Criteria and Decision-Making; When You Receive Proposals; Reasons to Disqualify Vendors; Vendor Site Visits; Legal Boilerplate

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Q How can one order McHugh Publishing Guides?

All McHugh Publishing Guides can be ordered at http://www.johnbmchugh.com/publishing_guides2.htm

FREE MCHUGH PUBLISHING GUIDES ON RIGHTS AND PERMISSIONS

These McHugh Publishing Guides are free at McHugh's website, www.johnbmchugh.com.

- R-6, *Rights and Permissions: McHugh's Recommended Books and Web Sites*, 2009, 3 pages
- R-23, *McHugh's Rights Permissions Glossary*, 2010, 8 pages

THE MCHUGH EXPERT INTERVIEWS ARE FREE AT MCHUGH'S WEBSITE:

- I-14, *Copyright Aspects of Social Media: An Interview with Attorney David Koehser*, 2010
- I-15, *Ebooks and Copyright: an Interview with Attorney David Koehser*, 2010

THESE MCHUGH PUBLISHING GUIDES CAN BE PURCHASED AT http://www.johnbmchugh.com/publishing_guides2.htm

- R-12, *Assessing the Permissions Needs of a Manuscript: Decreasing Your Exposure to Liability*, 2009, 7 pages, \$10
Contents: Importance of Permissions; Introduction to Copyright; What Copyright Doesn't Protect; Plagiarism and Infringement; Permissions Assessment; Items to Always Check; Copyright Terms Defined
- R-14, *McHugh's 42 Tips for Managing Rights and Permissions*, 2011, 5 pages, \$10.00
Contents: Decisions in Rights Management; Copyright in the Digital World; When to Consult
- with an Attorney; 9 Tips for Seeking Permission; 15 Tips for Licensing, Acquiring and Protecting Digital Rights; and 18 Tips for Organizing the Rights Function
- R-18, *Foreign Rights: An Introduction*, 2009, 3 pages, \$6
Contents: About Foreign Rights; Downsides; What to Charge; Agents; Sell Through Another Publisher; Suggestions and Recommendations
- R-19, *Sixteen Tips When You Grant Permission*, 2009, 3 pages, \$6
Contents: Get It in Writing; Use Your License; Nonexclusive; One-Time; Gift Copy; Commercial and Nonprofit Requests; Waive Fee for Your Members; Permissions Fees; Make It Easy to Request Permission; Use an Outside Company; Post Permissions Policy at Your Website
- R-20, *Copyright Basics, 2007*, 7 pages, \$8
Contents: Why Important; What Is Copyright; Five Rights of Copyright; Subsidiary Rights; What Is Not Protected; Fair Use; Public Domain; Infringement
- R-21, *Your Website and Copyright*, 2009, 5 pages, \$6
Contents: Websites and Copyright; Potential Legal Exposure; Tips to Protect Your Site; Eight Important Terms
- R-22, *Electronic Rights: How to Assess Their Value*, 2009, 3 pages, \$6
Contents: Inventory of Content Is Valuable; Membership Associations; Six Factors to Determine Licensing Fees

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MCHUGH RIGHTS AND PERMISSIONS SERVICES

John B. McHugh is an experienced publishing executive and consultant with special expertise in managing rights and permissions. His advice and insights cover all areas of intellectual property management for both print and electronic products.

Tap into McHugh's extensive information industry expertise to help you:

- Grow revenues by fully exploiting the income potential of your electronic rights. McHugh will help you effectively organize your rights management to take advantage of the exploding innovation in digital distribution.
- Educate yourself and your staff about the often confusing and ambiguous subject of copyright practice with McHugh's executive coaching and on-site workshops.
- Get a detailed analysis of the strengths and weaknesses of every area of your rights management with McHugh's Rights and Permissions Audit. He will make recommendations to optimize staffing, streamline management processes, and increase rights, revenues and profitability. Most importantly, McHugh will alert you to serious legal exposure and when you should contact a copyright attorney.

ABOUT JOHN B. MCHUGH, PUBLISHING CONSULTANT

John B. "Jack" McHugh, a 30-year veteran of the publishing business, is a long-time successful publishing consultant. He is the author of the *McHugh Publishing Guide Series*—51 practical papers on all aspects of publications management, which can be ordered at his website. He also publishes the *McHugh Expert Interview Series*, 10 interviews with publishing leaders on various publishing specialties, which are available free at www.johnbmchugh.com.

In the book publishing business, McHugh has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary's Press. McHugh is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality. For a two-year period, McHugh served as the Interim Publisher at the Project Management Institute.

McHugh has advised a variety of association publishers including: AASHTO, Alliance for Children and Families, ASCD, ASM International, ASTM, AWHONN, Boy Scouts of America, International Employee Benefit Foundation, NSTA, Police Executive Research Foundation, SAE, SMACNA and SNAME. McHugh has also worked for commercial publishers such as Butterworth Heinemann, Cardiotext, Kendall Hunt, and Llewellyn Worldwide.

Jack McHugh's specialties include association/nonprofit publishing, book publishing, executive recruiting, journal publishing, rights and permissions, organizational design, and startups.

Jack McHugh can be reached at jack@johnbmchugh.com or 414-351-3056
Website: www.johnbmchugh.com.

John B. McHugh, Publishing Consultant
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