



"Practical Problem-Solving Advice for Publishers"

How to Obtain Permission to use Copyrighted Material

By

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Who Should Obtain Permission?

This paper assumes you know the basics of copyright and why one must seek permission to use copyrighted material. Copyright, like any legal specialty, has its own special terminology, and one needs to understand that terminology in order to master basic rights literacy. For that reason at the end of this paper we provide you with 18 legal terms necessary for basic copyright literacy. We suggest you refer to this glossary as you come across a rights term you are unfamiliar with in this section,

That brings us to the question, namely, "Who should obtain permission to reprint copyrighted material?" As a general rule, the creator of the material obtains the permission. In book publishing, it is the author's responsibility to obtain permission as spelled out in the author's book contract. In a similar fashion, magazine and journal publishers require those who write articles to obtain written permission to use copyrighted materials. Work made for hire contractors are usually responsible of obtaining permission for any protected material appearing in their work.

Regardless of who obtains permission, make sure that it is understood who has the responsibility to obtain the necessary permissions before starting the work. If it is the book author, use a book contract that contains a provision outlining the responsibility of the author to obtain permission. Include a similar provision in your work for hire agreement. Don't let yourself be caught with a final manuscript ready for production, needing permissions, and not knowing who will obtain them or how they will be obtained or how much the permissions will cost. This situation will raise havoc with your book production schedule.

Plagiarism and Infringement

It's important to understand the distinction between plagiarism and copyright infringement. Plagiarism is the use of another person's ideas or writing without proper attribution. Plagiarism

is unethical but for all practical purposes not illegal, however, you don't want your authors plagiarizing. Copying another author's protected expression constitutes copyright infringement, and is illegal.

In her book, *Copyright Plain & Simple*, Cheryl Besenjak states: "Copyright infringement is an illegal act. While an act of plagiarism may also be an act of copyright infringement, only the copyright infringement is punishable by law (as a general matter copyright infringement isn't a criminal act — civil liability may be imposed.) If a student takes the words of Thomas Jefferson — which are in the public domain — he or she is guilty of plagiarism but not copyright infringement."

A Word about Trademarks

A trademark is a word, phrase, design, logo or other element that is used with goods or services, to indicate to consumers the source of those goods or services. FORD (for automobiles), DELTA (for airline services) and APPLE (for computers) are examples of trademarks. As a general rule, a trademark can be used in a book to identify products or services referred to in that book, as long as the trademark is not used in any manner which might cause readers to think that the book is published, licensed, sponsored or endorsed by the trademark owner. If you have questions about whether the use of a trademark in a book will constitute trademark infringement you should consult with legal counsel.

Assessing Your Permissions Needs

The starting point is to understand what copyrighted material needs permission from the copyright holder. Once one has an elementary knowledge of copyright, one should perform a permissions assessment. A permissions assessment will enable you to identify the material that needs permission if you are to use it in your work. A permissions assessment is the inspection of the manuscript to determine what permissions need to be requested to legally use copyrighted items. As one writes, it is a good practice to keep track of material that will probably need permission. Here is how to access the permissions needs of any work.

The first step is to understand the type of work you are assessing. Highly illustrated works, for example art books, probably use a great deal of copyrighted material. Also, highly illustrated are all types of textbooks. Textbooks also draw on numerous references, and therefore, use much copyrighted material. Anthologies obviously are heavy users of copyrighted material. Fictional works use little copyrighted material.

Develop a cautious mindset as you evaluate a manuscript in identifying copyrighted material needing permission. Challenge everything. *Remember obtaining permission is the cheapest insurance a publisher can buy against copyright infringement.*

Questions to Ask

Start by asking these questions:

1. Is this material copyrighted? Copyright protects an author's expression but it does not protect facts, ideas or concepts. Merely restating facts – for example, "The Mississippi River flows into the Gulf of Mexico" – does not require permission.

2. Is this material in the public domain? “Public domain” refers to works for which the term of copyright has expired. As of 2019, any work first published in the US before 1924 is automatically in the public domain. (However, be aware that any material added to a pre-1924 public domain work may still be protected by copyright.) Works first published in or after 1924 may or may not still be in copyright, and works which were unpublished prior to 1978 may still be protected by copyright. You should carefully examine the status of a work before concluding that the work is in the public domain.
3. Has the author copied from other sources without identifying the material as having been copied? An author may inadvertently quote other sources, without understanding the copyright implications, but this does not absolve the author or the publisher of liability for copyright infringement.
4. If the author received permission to use the material in a prior edition of the work or in another work, does that permission expressly extend to use the material in the current edition of the work, or will a new permission be required?
5. Does the use of the material qualify as fair use? The use of limited amounts of material for purposes of commentary, criticism or news reporting may qualify as fair use, but as a general rule it is advisable to seek legal counsel before determining that a use of material of others will qualify as a fair use.

Items to Always Check

As you scan the manuscript, there are elements you must immediately spot as they always have potential copyright implications. When you see these items, chances are they are protected by copyright, and, therefore, may need the permission of the copyright owner to legally use.

Checklist of Items to Always Examine

- Artwork
- Quotes (that are extensive)
- Exhibits
- Charts
- Tables
- Photos
- Poetry
- Song Lyrics
- Magazine/Newspaper Articles

When you spot any one of these items, look for a credit line citing the source. The credit line should indicate the name of the copyright owner and the publisher. Sometimes they are different parties. However, sometimes the copyright owner is not always the grantor. For example, many book publishers register copyright in their author’s name. However, we suggest that you first check with the publisher as permission probably comes from the publisher rather than the

author even though the book is copyrighted in the author's name. Similarly, photographers usually retain ownership of the copyright in their photos, but they may appoint an agent such as Getty or Corbis to grant permission to use those photos.

If permission is needed, the credit line usually reveals whom to contact. Conversely, if you see no credit line for the items, then you should be suspicious. In the event of no credit, ask the author what is the source of the material. If for example, a table of figures or a chart is reproduced ask: "Is this your material and do you hold copyright to it?"

Request Permissions Early

Plan permissions requests as soon as you decide about the material you will include in your work. Obtaining permission will take you much longer than you think. We estimate that, obtaining permissions for an "average" book will take at least three to six months.

An early start is imperative because the copyright owner or the person authorized to issue permissions on behalf of the owner may not answer immediately. The address for the publication may have changed or the copyright may have changed hands. Most publishers receive a large number of permission requests. Just because you have not received an answer, don't assume your request has been approved. You cannot reprint the material until you receive a written permission from the copyright owner or the owner's designated agent.

The copyright owner may give permission upon the condition of several requirements, which must be fulfilled before the consent becomes valid. Here are two common contingencies sometimes required by copyright owners:

1. Even if the author has authorized a publisher or other representative to grant permission on behalf of the author, the author may still need to approve of any grant of permission before that permission is valid. .
2. The copyright owner may request a fee before the permission is valid.

Or, the copyright owner may refuse permission to use their copyrighted material. You cannot use the copyrighted material if you do not have the copyright owner's consent. And if you do, you will run the risk of committing copyright infringement. Even though you have sent many requests to a copyright owner and still received no reply, you still run the risk of a claim of infringement, as merely requesting permission or notifying the copyright owner of your intent to use his or her material unless the owner objects will not shield you from an infringement action.

Organization and Record Keeping

Organization and record keeping are important as a permission requester. Therefore, it's imperative to maintain a permissions master list or log. At a minimum, the permissions requester log should contain the following information:

Permissions and Requester Log

- The chapter number of the manuscript
- Manuscript page

- Author and title of book requested
- Copyright owner and address
- Fee
- Special credit line
- Date of agreement
- Comments and restrictions

Managing permission requests effectively requires a combination of research skills and organizational skills.

Eight Other Suggestions

To help you successfully manage permissions, here are eight suggestions:

1. Send your permission request to the publisher only, unless you are also certain that a particular publisher requires permission from the author also.
2. Identify the specific material you wish to use. If you wish to alter, abridge, add heads or make any other changes to the material, send a copy of the material showing the proposed changes with your request.
3. When you receive a reply to your request, read it all the way through. It may specify further action such as obtaining an author's permission or, there may be a time limitation on the permission, which should be noted. There may also be limitations as to languages, formats, territory, editions or number of copies.
4. Most permission forms are sent to the requester in duplicate. Sign both and return to the copyright owner for counter signature. The publisher will then return one signed copy to you, which is your valid permission to reprint. Permission is a license and a license is a contract. A contract must be signed by both parties to be valid.
5. If you have a large number of permissions, for example as is common for an anthology, arrange your permissions file in the order the material appears in the book. It may also help to put the number of the selection in the upper right-hand corner of the sheet of paper on that selection for an anthology.
6. Your permissions job is complete when every necessary permission request has been cleared through the copyright owner and when you have complied with each stipulation required by the publisher. The permission is not valid until all stipulations are met.
7. If the copyright owner has stipulated the form and/or the placement of acknowledgment to be used for the copyright material, that particular line must be used exactly as given and stipulated in the permission form. For this reason, credit lines will not have a consistent style throughout your manuscript. Your manuscript must include this exact

credit line as requested by the copyright holder. Failure to comply with the specific credit line requirement or with any other stipulation will invalidate your permission.

8. Send all of the permissions along with the permissions master list/log to the publisher.

Permissions Fees and Gift Copies

Most copyright owners charge a permission fee to reprint their material. Many, but not all publishers pay permissions fees at the time the book is published. Then, these fees are charged against the author's royalty account.

However, the author is actually responsible for the payment of these fees. It's always a sound business practice for the author and publisher to agree in writing on the amount of permissions fees budgeted for the project. If there is a subsequent variance, the author should discuss the variance with the publisher. *In some instances, payment of the permission fee will be required before publication.* This must be done in order to validate permission. Most copyright owners will ask for a complimentary copy of the book.

Information Needed by the Copyright Owner

The biggest headache, for those managing rights departments, is incomplete information from the requester. Therefore, complete and accurate information will enhance the permissions requesting process. Include this information in your permissions request.

1. The names of the authors, including possible pseudonym names or editor or translator;
2. The title, edition and volume number of the book or periodical;
3. The copyright date;
4. The name of the probable copyright owners, which may be a publisher or an author;
5. For a work originally published as part of a periodical collection: the title of that publication and any other information such as the volume, and issue date number to help identify it;
6. The numbers of exact pages, figures and illustrations, and the rights requested, and the publication use of the requested material.
7. The exact URL, as it appears when viewing the document, when requesting material appearing on the Internet.

Book Launches and Permissions

A book launch is that meeting that occurs at a publishing company, when the editorial development is completed and the production phase can be started for a book. Some book publishers call this junction in the life of a book the transmittal meeting or release to production.

The book's content and coverage is fixed and the author's job is to work with the production department. No more substantial author changes are permitted at this point. The company is now ready to spend both marketing and production dollars on this title.

Publishers need a system to launch a book into production. The purpose of a launch is to systematically summarize all relevant editorial, production and marketing information to all who will be involved with the book. The launch gets all of the publishing team on the same page. The acquisitions editor should run the book launch.

The book launch is when the permissions file should be complete, that is, all of the necessary permissions licenses and releases have been obtained. The requirement that the permissions file be complete at the launch of a book is standard book publishing practice. Here's why.

The lack of critical permissions for material integral to a book can cause three things, all bad. First, outstanding permissions can cause delay in the production schedule. Secondly, the copyright owner of the pending permissions may be denied or the permission granted at an exorbitant fee. This would require the deletion of and/or work-around the manuscript thereby adding extra time to the schedule and/or cost. Thirdly, the book might be published without the necessary permissions and, thereby, risking exposure to copyright infringement.

Twelve Other Tips When Obtaining Permission

1. Always seek permission when in doubt.
2. You must seek permission if the work is not in public domain or if your use of the work will not qualify as a fair use.
3. Request early. It will take longer than you think to obtain permission.
4. Permissions cost money. Expect to double your budget for permission fees.
5. Document all your efforts in obtaining permissions.
6. Be wary of additional third-party copyrighted embedded in the material. For example, a photo of a mural will require permission from the photographer and from the owner of the copyright in the mural.
7. Ask, "Are there additional conditions for getting the copyright holder's permission?"
8. Direct your request to the publisher's copyright/permissions department, not the author.
9. Ask, "Are there additional intellectual property issues involved, i.e., trademark, privacy, publicity, trade secrets?" For example, the photographer will own the copyright in a photo of a person, and you will need to get permission from the photographer or the photographer's designated agent in order to include the photo in a book. However, depending on how the person is depicted in the photo and the context in which the photo is to be used, you may also need to get permission from the person depicted in the photo, in order to avoid any claims of infringement of that person's right of privacy.
10. Request permission whether or not the works are in print. Unpublished works are still subject to copyright protection.

11. Remember out-of-print does not necessarily mean in the public domain.
12. Remember also that a work is not in public domain or freely available for use just because it appears on the internet.

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John B. “Jack” McHugh is a 40-year veteran of the publishing business. Jack has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary’s Press. Jack is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality and for a two-year period, he served as the Interim Publisher at the Project Management Institute. He is a member of the ASAE Advisory Board for Publishing, Communications, and Media Issues and Practices.

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Glossary of Right and Permissions Terms

Those terms were selected *McHugh and Koehser’s Rights and Permissions Glossary*, which can be found in its entirety at <https://tinyurl.com/y6jw2doh> .

Assignment Of Copyright

Assignment of copyright is the transfer of the entire copyright, consisting of all the exclusive rights in a copyrighted work. An assignment of copyright is tantamount to a sale of copyright.

Copyright Law requires that the transfer of copyright be in writing and that the transfer be signed by the copyright owner making the assignment.

Co-Publishing

Co-publishing is a special type of publishing agreement between organizations (one need not be a publisher) in which the partners agree to share the costs of acquiring, developing, and marketing new publications. The responsibilities of the various publishing functions: author acquisition, manuscript development, production, marketing, and fulfillment are split among the publishing partners. Associations and societies routinely co-publish with commercial publishers.

Collective Work

The Copyright Act defines a *collective work* as work “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” Examples of collective works include magazines, journals, anthologies, and encyclopedias. Each contribution is covered by its own separate copyright, and the copyright in the collective work covers the selection, arrangement, and organization of the collective work as a whole.

Compilation

A *compilation* is copyrightable work that is formed by the bringing together or arranging of preexisting material (regardless of whether that material is protected by copyright) in an original—or nonobvious— way. Copyright protection is based on the original selection, coordination, or arrangement of the material, not the copyright status of the preexisting material itself. (From *The Copyright Permission and Libel Handbook*, Jassin and Schecter, 1998, John Wiley and Sons, p. 14)

Contributors Agreement

The *contributors agreement* is used by magazine and journal publishers to secure the right to publish an author’s article. The agreement may be in the form of an assignment of copyright or a license. The contributors agreement should always contain the author’s warranties that the material is original, doesn’t infringe on someone’s copyright, and if the author uses copyrighted material of others, the author will obtain permission to use that material from the copyright holder.

Copyright

Copyright is the creator’s exclusive bundle of rights in a work. Copyright arises when an original work is fixed in a tangible medium of expression. The copyright “bundle of rights” consists of the exclusive right to:

- a. Reproduce the work,
- b. Prepare derivative works based on the copyrighted work,
- c. Distribute copies of the work to the public,
- d. Perform the work publicly, and
- e. Display the work publicly.

Copyright Clearance Center (CCC)

The Copyright Clearance Center is a nonprofit clearinghouse centralizing copyright authorization to use the copyrighted materials of the publishers registered with the CCC. The CCC collects a fee from the permission requestor, keeps a percentage, and remits the remainder to the copyright holder.

Derivative Work

A work that is “derived” from or based on a pre-existing copyrighted work is a *derivative work*. Examples of derivative works include a condensation of a book, a movie based on a novel, a foreign language translation of a book, a stage play based on a book, or any other adaptation or transformation of a pre-existing copyrighted work. The right to prepare a derivative work is one of the exclusive rights held by the owner of a copyright.

Fair Use

Fair use refers to situations in which the use of a copyrighted work will not constitute infringement. Fair use is a defense against a claim of copyright infringement. Fair use is generally limited to use for purposes of teaching, scholarship, research, commentary and news reporting. The four factors to be considered in determining whether a use is a fair use, as listed in Section 107 of the US Copyright Act, are:

- a. purpose and character of use, including whether or not such use is of a commercial nature or is for nonprofit or educational purpose;
 - b. The nature of the copyrighted work;
 - c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - d. The effect of the use upon the potential market for or value of the copyrighted work.
- (Note that no single factor is determinate of fair use. Rather, all four factors should be taken into account. Note also that fair use determinations are made on a case-by-case, facts and circumstances basis. There are no blanket rules for fair use, and the only way to definitively determine if a use is a fair use is to have a court rule on the specific situation.)

Grant of Rights

Grant of rights refers to the acquisition of rights in a copyrighted work from the creator. Grants of rights are made under an agreement by which the owner of the copyright in a work conveys the rights in the work to another person, usually in exchange for a royalty or other financial payment. A grant of rights may be in the form of an assignment or a license, and a license may be exclusive or nonexclusive. An assignment or an exclusive license can be made only by a written instrument signed by the owner of the copyright. A nonexclusive license can be granted orally, but it is recommended that nonexclusive licenses be in writing as well, as absent a written instrument the parties to a nonexclusive license can argue over the scope of that license and can also argue over whether any such license was even granted.

Intellectual Property

Intellectual property is the subject material of copyrights, trademarks, trade secrets and patents dealing with intangible property. Copyrights, trademarks, and patents are each governed by different federal laws. Trademarks and trade secrets are also governed by state laws. Generally, intellectual property lawyers either specialize in copyright / Trademark Law or in patent law.

License

A *license* is an agreement whereby the owner of the copyright in a work permits another party to exercise one or more of the rights comprised in that copyright, or the entire copyright, for a stated specific purpose for a specific time in return for a fee or a royalty. Examples of licenses include an agreement from a US publisher to an Italian publisher granting the Italian publisher the right to prepare and publish an Italian language translation edition of a book, and an agreement from an author to a movie production company granting the production company the right to create and exhibit a motion picture based on the author's novel. A permission to reprint copyrighted material is a license. Note also that licenses are contracts and are usually for a limited time period. A license is subject to being revoked if the licensee fails to make a royalty payment or otherwise violates a term of the contract.

Permission

Permission is a license obtained by the user from the copyright holder to reprint copyrighted material, usually but not always for a fee. In book and periodical publishing, the author is almost always responsible for obtaining permission to use copyrighted material in his manuscript.

Public Domain Work

A *public domain work* is work for which the term of copyright has expired or a work which, by law, is not eligible for copyright protection. A work that is in the public domain will forever remain in the public domain, and it cannot be brought into copyright or back into copyright by being incorporated into a new copyrighted work. Examples of works which are in the public domain by reason of not being eligible for copyright protection are most materials published by the U.S. Government and its officials, as part of their duties. Determining whether the copyright in a work has expired and the work has fallen into the public domain can be complicated, and usually requires a careful review of the facts relating to the publication of the work and the applicable statutes. You do not need copyright permission to use a work that is in the public domain.

Release

A *release* is a contract in which someone foregoes the right to sue for the claims recited in the release. For example, you may obtain a release to protect against claims involving defamation or infringement of a person's right of publicity or privacy. Use a release when obtaining a written interview or photographs of an individual.

Rights

Rights refers to the body of ownership interest protected by Copyright Law in the originator of copyrighted material, which may be held, sold, or licensed to others, as when a creator sells or licenses publishing rights to the publisher.

Work For Hire (also called work made for hire)

A work for hire is a work in which the copyright is owned by someone other than the person who created the work. A work for hire may be prepared by an employee (in which case the copyright will be owned by the employee's employer) or by an independent contractor working

under a written work for hire agreement (in which case the copyright will be owned by the person who commissioned the independent contractor), provided that in the case of an independent contractor the work must also fall into one of nine categories of use specified in the Copyright Act. Section 101 of the US Copyright Act of 1976 defines a work for hire as:

1. a work prepared by an employee within the scope of her or his employment; or
2. a work specially ordered or commissioned for use as:
 - a. a contribution to a collective work;
 - b. a part of a motion picture or other audio visual work;
 - c. a translation;
 - d. a supplemental work;
 - e. a compilation;
 - f. an instructional text;
 - g. a test;
 - h. answer material for a test; or
 - i. an atlas.”

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