NAVIGATING COPYRIGHT INFRINGEMENT FOR NONPROFITS

Nonprofit organizations often market themselves and increase awareness of their programs and services in order to, for example, reach more community members or raise funds. As part of these outreach efforts, they frequently distribute promotional and informational materials, such as brochures and newsletters, and operate websites. Many organizations use materials, such as photographs, graphics, or other content, from third parties and the Internet to enhance the visual appeal and quality of their promotional materials. However, these materials are often protected by copyright laws, and using them without permission from the copyright owner can put the organization at risk of copyright infringement. There is a limited but widely known exception to copyright protection called the "fair use" doctrine. Some uses by nonprofit organizations may constitute "fair use," depending on the nature and purpose of the use. There are also certain materials that are in the "public domain," meaning they are not protected by copyright and are available for anyone to use for any purpose.

We have compiled this collection of frequently asked copyright and copyright infringement questions and answers and have divided them into the following categories:

We hope you will find this resource to be a useful preliminary guide for determining what materials may be copyrighted, and when and how they may be used.

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This guide is intended to serve as a general reference regarding federal trademark and copyright laws. This guide's coverage of these areas is not exhaustive and is necessarily incomplete. In addition, many of these areas may be subject to changes in statutory and case law as well as new interpretive positions of the U.S. Patent and Trademark Office and the U.S. Copyright Office. Although this guide may provide information concerning potential legal issues, it is not a substitute for legal advice from qualified counsel. This guide is not created or designed to address the unique facts or circumstances that may arise in any specific instance, and you should not and are not authorized to rely on it as a source of legal advice. It is understood that neither the provision of information to you through this guide, nor your reviewing that information, will establish any attorney-client relationship between you and Public Counsel, or any other person or entity, including but not limited to Public Counsel's counsel. Anyone seeking legal advice or assistance should contact an appropriate attorney in their relevant jurisdiction.

Public Counsel's **Community Development Project** builds strong foundations for healthy, vibrant and economically stable communities through its comprehensive legal and capacity building services for nonprofits that assist low-income neighborhoods in Los Angeles County. If your organization needs legal assistance, or to access the latest version of this document, visit *www.publiccounsel.org/practice_areas/community_development* or call (213) 385-2977, extension 200.

COPYRIGHT BASICS AND DEFINITIONS

1. What is a copyright?

A copyright protects an author's expression of an original work. Copyright is a form of intellectual property that gives the author of an original work the exclusive rights to own, use, and exploit that work for a certain period of time.

2. Who is the author of a copyrighted work?

The author of a copyrighted work is the person who created the work. When a photographer takes a picture, they are the author of the photograph for copyright purposes. When a writer writes a story, they are the author of that story. The author can be any type of creator who makes a work subject to copyright protection.

Unless the copyrighted work has been assigned to another individual or company, the work's author is presumed to be the copyright owner. However, there is an exception for "works made for hire." If a copyrighted work is made for hire, then the employer, not the employee, owns the copyright. For instance, if an individual is hired to create animation for a film, the film studio, not the animator, will own the copyright (unless there is an agreement to the contrary).

If two or more people together create a creative work, they are co-authors, and act as co-owners of the copyright unless there is an agreement to the contrary.

3. What types of things can be copyrighted?

Any work of original artistic expression that is fixed in a tangible medium can be protected by copyright. This means that in order to qualify for copyright protection, a work must be:

- **Original**. The author must *independently* create the work. Works that consist entirely of publicly available information or common property are not eligible for copyright protection (for example, standard calendars).
- **Artistic**. The work must be the result of at least some *creative* effort on the part of the author.
- **Fixed in a tangible medium of expression**. The work must exist in some *physical form* (e.g., on paper, on a hard drive, or on a cassette tape) for some period of time, no matter how brief.

Copyright protection can extend to a variety of works, encompassing literary, dramatic, musical, and artistic forms. Examples include poetry, movies, CD-ROMs, video games, videos, plays, paintings, sheet music, recorded music performances, novels, software code, sculptures, photographs, and architectural designs.

4. What types of things cannot be copyrighted?

Copyright only protects fixed, original, and creative expression, not the ideas or facts upon which an expression is based. In general, copyright protection will not cover:

- **Ideas**. Copyright law does not protect ideas; it only protects the particular way an idea is expressed. (Note: Some states might offer protection for ideas, like California's legal recourse for "misappropriation of ideas.").
- **Facts and Theories**. Copyright law does not protect facts and theories. Individuals who formulate scientific theories or uncover previously unknown facts cannot prevent others from creating new works based on those theories or facts.
- **Short Phrases, Slogans, Symbols, Names and Titles**. These elements may not be covered by copyright, but they could potentially receive protection under trademark law.
- **U.S. Government Works**. Any work created by a United States Government employee or officer is in the public domain, as long as the work is created in that person's official capacity. This rule applies exclusively to works created by federal employees and not to works created by state or local government employees. State and local laws, as well as court decisions, are in the public domain.

5. How is a work copyrighted?

Any work that meets the standards for copyright protection (as described in FAQ 3) is automatically copyrighted at the time it is created. You do not need to register your work with the U.S. Copyright Office ("Copyright Office") to have a valid copyright, but you do need to register the copyright to sue for copyright infringement.

Since March 1989, copyright protection may be granted to a work without requiring either copyright registration or an affixed copyright notice (such as"© [year of first publication] [owner of the work]"). Copyright protection attaches at the creation of the work once it is fixed in physical expression. In sum, a work is copyrighted by default unless the author explicitly dedicates it to the public domain.

While not technically required, a copyright notice can help inform the public that the work is protected by copyright, identify the owner, and show the first year of publication.

6. What rights does a copyright owner have?

During the term of the copyright, the copyright owner has the following *exclusive* rights:

- **Reproduction Rights.** The right to make copies of a protected work.
- **Distribution Rights.** The right to sell, rent, lease, or otherwise distribute copies of the work to the public.
- **Adaptation Rights.** The right to create adaptations (called "derivative works") and develop new creations based on the protected work. Examples of derivative works include translations, musical arrangements, motion picture versions of literary material, or new editions of a preexisting work.
- **Performance Rights.** The right to perform a protected work, such as by staging a play or hosting a live concert. This right also extends to the public display of a work.
- **Transfer Rights.** The right to sell or assign any of the rights listed above to other people or companies.

The copyright owner can prevent anyone else from using, exploiting, or copying the work in any way that only they have the exclusive right to do. Anyone who uses a copyrighted work (for example, by copying it, displaying it, or distributing it) has infringed upon the copyright owner's exclusive rights in violation of the United States Copyright Act ("Copyright Act").

After the time period in which the copyright owner had exclusive rights to the work ends, the work is said to enter the public domain (see FAQs 9-12). This means that the copyright owner no longer has any exclusive rights to the work, and it is available to use by the public.

7. What is copyright infringement?

Generally, copyright infringement occurs when someone other than the copyright owner uses the work in a way that violates the copyright owner's exclusive rights. The exclusive rights that are most commonly infringed are reproduction and distribution rights. To use a copyrighted work without infringing, either the user must have permission from the copyright owner, or the use must fall within one of the limitations or exceptions to the copyright owner's exclusive rights, such as fair use (see FAQs 13-18).

8. How is a copyright different from a patent or trademark?

Copyright law covers the creative or artistic expression of an idea. It grants exclusive rights to the author of a work to control the use and accessibility of that work.

Patent law covers inventions. A patent for an invention is the grant of a property right to the inventor. The inventor has the right to exclude others from making, using, and selling his invention.

Trademark law covers distinctive terms, marks, brand names, logos, slogans, and other devices used with products or services as indicators of origin. In other words, trademark applies to markings that identify and distinguish products and services as being of a particular company or manufacturer.

Unlike copyright, which is solely protected by federal law, both federal and state trademark law protects trademarks. Although copyright and trademark laws are distinct, certain works can be covered by both copyright and trademark protections. For example, the contents of a movie are protected by copyright, but famous character names within the movie might be trademarked. Go to https://publiccounsel.org/publications/trademark-basics-for-nonprofits-2015-2/ for a collection of frequently asked trademark questions and answers. For more on the differences and similarities between copyright, patent, and trademark, see https://www.uspto.gov/trademarks/basics/trademark-patent-copyright.

THE PUBLIC DOMAIN

9. What does the term "in the public domain" mean?

Copyright protection does not last forever. There are many rules covering the expiration of a creative work, depending on whether the work was published or unpublished, the year the work was created or published, and the country of creation or first publication (see FAQ 10 for some of these rules).

When copyright law no longer protects a work, it enters the "public domain." The term "public domain" refers to creative materials, such as books, songs, movies, artwork, or other works that are not protected by copyright law (or trademark, patent, or other intellectual property law). The public, rather than an individual author, owns these works. No one can ever claim ownership of a work in the public domain or prevent others from using it. Anyone can use a public domain work without obtaining permission. Works in the public domain are free to use.

10. How does a work enter the public domain?

There are four common ways that works arrive in the public domain:

(i) **Expiration of copyright**. Any work published in the United States before 1927 is in the public domain. For works created after January 1, 1978, the copyright protection term lasts the author's life plus 70 years. For works made for hire, the copyright lasts for 95 years from the first publication or 120 years from creation, whichever is shorter. When a copyright expires, the formerly copyrighted work enters the public domain and may be freely used or exploited by anyone.

(ii) **Failure to renew copyright**. For works first published before 1964, the copyright owner was required to file a renewal with the Copyright Office during the 28th year after publication. Failure to renew meant the owner lost the copyright, and the work entered the public domain.

(iii) **Lack of required copyright notice**: For works published before March 1, 1989, a copyright notice was required to be affixed to the copyrighted work in order to obtain copyright protection. Works with defective or absent copyright notices could have fallen into the public domain. However, there exists various exceptions and ways to cure the defective notice that would prevent the work from losing copyright protection.

(iv) **Dedication**. The owner may deliberately place a work in the public domain (although this is relatively rare). Only the copyright owner can dedicate a work to the public.

11. How can I find out if a work is in the public domain?

The best way to determine if a work is in the public domain is to calculate it based on the work's first date of publication. If you know the work's first date of publication, you can calculate if it is already in the public domain or when it will enter the public domain. If you are unsure of when the work was created or first published, you can search the records of the Copyright Office to obtain more information about the work's copyright protection (see FAQ 19).

There are also several public domain resources online:

- www.publicdomainworks.net: This is an open registry of artistic works that are in the public domain. You can search by author or by the title of the work.
- http://www.publicdomainsherpa.com/calculator.html or http://www.publicdomainsherpa.com/calculator.html: These are a copyright term calculators, which can let you know how long a work's copyright protection will last or if a work is already in the public domain. Note that while these tools are helpful, there are many laws that may remove works from the public domain, so make sure to consult an expert or contact the Copyright Office to ensure accuracy.

- https://www.boisestate.edu/generalcounsel/copyright/copyrightbasics/law/: This is a helpful table on public domain timelines.

12. If a work is publicly accessible, like on a website, does that mean it is in the public domain?

NO! Just because a work is publicly accessible does not mean that it is publicly available for use by all. The term "public domain" refers specifically to copyright protection, or lack thereof, and does not refer to a work's accessibility. Any work available on the Internet can be copyright-protected in the same way a physical book in a library or a photograph in a magazine would be (see FAQs 27-29).

FAIR USE

13. What does the term "fair use" mean?

Fair use is a right to use copyrighted material under certain circumstances without the consent of the author or owner of the copyright. Fair use is a copyright principle based on the belief that the public is entitled to freely use portions of copyrighted materials for certain purposes, such as commentary and criticism, nonprofit educational purposes, or parody. This principle recognizes that society can often benefit from the unauthorized use of copyrighted materials when the use furthers scholarship and education or informs the public.

Fair use is a defense against a claim of copyright infringement. Fair use is infringement (i.e., unauthorized use of a copyrighted work), but it is a form of infringement that courts excuse due to its greater social benefit. If a copyright owner challenges the infringing use of their work in court, and the court determines that the use is fair use, then the infringer will not face any legal consequences.

14. How does one determine if use of a work is fair use?

Fair use is a legal defense to an infringement claim. It is up to the court to determine whether your use of copyrighted work is fair use. Courts consider the following four factors when determining whether a use is a fair use: The (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) effect of the use on the potential market for the copyrighted work. Each factor is outlined in turn below:

1. Purpose & Character of the Use

More likely to be Fair Use	***Less likely to be Fair Use***
Educational Purpose (e.g., using diagrams to explain a concept or using a painting to teach about an artistic technique). Note that using a video for entertainment in a class is likely not educational. *Nonprofit, Non-Commercial Purpose.*	*Commercial Purpose* *User Acting in Bad Faith.*

Illustrative Purpose (e.g., using a work for criticism, comments, news reporting, teaching, scholarship, and research). *Transformative Purpose*. This applies when adding something new to the work, with a further purpose or different character, so that the first work's expression, meaning, or message alters. While not necessary for a fair use defense, the more transformative a work, the less significant other factors become.	

2. Nature of the Copyrighted Work

More likely to be Fair Use	***Less likely to be Fair Use***
Factual Work. The dissemination of facts or information benefits the public, so there tends to be more leeway to copy from factual works than from fictional works.	*Creative Work* (e.g., plays, novels, songs, or visual art). *Unpublished Work.* In one case, a magazine published a soon-to-be-published memoir without permission. However, this factor is likely less important if the work was never intended to be published.

3. Amount & Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

More likely to be Fair Use	***Less likely to be Fair Use***
A Small Portion of the Work is Taken.	*A Large Portion of the Work is Taken.* *The Portion Taken is the "Heart of the Work".* If a portion (even a small portion) of the copyrighted work taken is important to the work as a whole, this factor will weigh against fair use. For example, when a magazine published 300-400 word excerpts from Gerald Ford's upcoming memoir, the Supreme Court held that this factor weighed against fair use because the excerpts included Ford's discussion of his pardon of Nixon and other central passages that the Court found to be the "heart" of the work. *Improper Nexus*. If more of the work is taken than what is needed to accomplish

	the purpose of fair use, then this factor will skew towards not being fair use. If the amount taken is necessary to accomplish the fair use purpose, this factor is neutralized.

4. <u>Effect of the Use On the Potential Market for the Copyrighted Work</u>

More likely to be Fair Use	***Less likely to be Fair Use***
The Use is the Sort that the Rightsholder is Unwilling to License or Market. *The Use is a Parody or Criticism of the Original Work.*	*The Use Decreases the Market for the Original Work.* If a use deprives the copyright owner of income or takes away a new or future market for the copyrighted work, courts will likely weigh this against fair use. This is true even if the use of the work is not directly competing with the owner's use of the copyrighted work.

Judges use the four factors above as guidelines when resolving fair use disputes. Courts are free to adapt these factors to particular situations on a case-by-case basis. A judge has a lot of freedom when making this determination, so the outcome of a copyright infringement case with a fair use defense can be difficult to predict.

15. Which uses are generally considered fair use?

The following types of uses are frequently found to be fair use:

- **News reporting, commentary, and criticism**. If you are commenting on or analyzing a copyrighted work, fair use principles allow you to reproduce some of the work to achieve your purpose. For example, it would be very difficult to write a book review and describe the writer's words and images if you could not quote some of the language in the book. Using the writer's exact words makes your critique of the book more effective. Allowing the use of copyrighted works for commentary and criticism is also grounded in the idea that a copyright owner should not be able to stifle comments or critiques about their work. The public benefits from an open debate and this debate is enhanced by including some copyrighted material.
- **Parody**. A parody is a work that ridicules another, usually well-known, work by imitating it in a (usually) comic way. Judges understand that parody demands some use of the work being parodied. Unlike other forms of fair use, extensive use of the original work is permitted in a parody in order to "conjure up" the original. The Supreme Court has recognized parody as fair use, even when done for profit. There is, however, a distinction between parody and satire. A parody uses a work in order to poke fun at or comment on the work itself, while a satire uses a work to poke fun at or comment on something else, such as societal norms or cultural themes. A successful parody needs to incorporate a large part of the original work in order for the consumer to understand what the source material for the parody is. This transformative use of a copyrighted work is a fair use for purposes of humorous commentary. On the other hand, a satire does not need to use a large portion of another work to make its broader point. Since the satirical point is not tied to the ridicule of a specific work, satire does not enjoy the same

latitude as parody when determining fair use. As a result, a satire is unlikely to be fair use because an author's satirical idea is capable of expression without the use of the other copyrighted work.

- **Scholarship and Research**. Courts generally find that copyrighted works used to educate and inform the public are fair use.

For a list of examples of what has been found to be fair use and what has not, see https://fairuse.stanford.edu/overview/fair-use/cases/.

16. What nonprofit educational purposes can qualify as fair use?

"Educational purposes" have been described as:

- Non-commercial instruction or curriculum-based teaching by educators to students at nonprofit educational institutions;
- Planned non-commercial study or investigation directed toward making a contribution to a field of knowledge; or
- Presentation of research findings at non-commercial peer conferences, workshops, or seminars.

In addition to the above, courts have generally found that nonprofit educational institutions, such as elementary schools, high schools, colleges, and universities, are engaging in educational uses of copyrighted works when using the works as part of a curriculum. Furthermore, courts often consider libraries, museums, hospitals, and other nonprofit institutions to be educational institutions when they engage in nonprofit instructional, research, or scholarly activities for educational purposes. In these cases, and for the limited purposes of the seminars or training sessions, nonprofit organizations can be considered "educators" and the attendees "students".

Despite the inclusiveness of "educational purpose," fair use analysis remains a case-by-case inquiry. The "educational purpose" of a use is still just one factor out of the four factors to be balanced when determining fair use. However, a use for nonprofit and non-commercial purposes is more likely to be considered fair use than a for-profit commercial use.

Keep in mind that when evaluating the purpose of a use, courts will look at the *nature* of the use as part of its fair use analysis. The nature of the use refers to whether the copyrighted material taken has been used to help create something new or has just been appropriated verbatim or as an exact copy into another work. Using a copyrighted work to add something new, with a further purpose or different character, is considered a transformative use and is more likely to be fair use. While it is not necessary for a work to be transformative in order for there to be a finding of fair use, the more transformative the new work, the less significant the other factors that weigh against a finding of fair use become. When taking portions of a copyrighted work, ask yourself the following questions to determine if it is a transformative use:

- Has the material I took from the original work been transformed by adding a new expression or meaning?
- Was value added to the original by creating new information, new aesthetics, new insights, and understandings?

- Did I use the work for my own personal, commercial gain or to profit financially, or was there a broader benefit to the public?

17. What if I think I am engaging in a fair use and the copyright owner disagrees?

If the copyright owner disagrees with your fair use interpretation, the dispute will have to be resolved by courts or arbitration. If it is not a fair use, then you are infringing upon the rights of the copyright owner and may be liable for damages. In this situation, you may be able to argue you are an "innocent infringer," meaning you had good reason to believe that your use was fair. Innocent infringers will be ordered to immediately cease all infringing activity and sometimes must pay money damages to the owner.

However, be wary. The innocent infringer has a heavy burden of proving innocent intent (that it was reasonable for the infringer to believe that their conduct was legal). The burden becomes heavier when the innocent infringer knew the work was copyrighted.

18. What are common misunderstandings about fair use?

Numerous misunderstandings and rumors about fair use can lead nonprofits into legal difficulties. A few of these misconceptions are debunked below:

- **Any use that seems "fair" is fair use.** WRONG. Not every use that is commonly considered "fair" in the plain sense of the word is considered fair use under the law.
- **It is copyrighted, so it cannot be fair use.** WRONG. Fair use applies only to copyrighted works. Fair use is a defense against allegations of copyright infringement. If a work is not copyrighted, it is in the public domain and can be used for any purpose, so the fair use defense is irrelevant.
- **Using a copyrighted work for non-commercial use is always fair use.** WRONG. This is an important – but not determinative – factor in the fair use analysis. A judge may take into account whether the alleged infringer made money from the use or if there is a commercial motive. However, a judge must look at all of the other factors, and these may sufficiently weigh against a non-commercial, nonprofit, or educational use.
- **If you are making money, it is not fair use.** NOT NECESSARILY. While using a copyrighted work for profit makes it harder to qualify as fair use, this is not determinative. Again, a judge may take into account a profit motive and actual financial benefit derived from the use but must also weigh all of the other factors before determining if the use is a fair one.
- **If you quote under 300 words of a copyrighted work, it is fair use.** WRONG. There is no set minimum or maximum amount of a work that can be copied or used to be considered fair use or infringement.
- **If you are copying an entire work, it is not fair use.** NOT NECESSARILY. Copying an entire work goes against the third factor, the amount of the work used in relation to the whole, since the whole of the work has been taken and used. However, this factor alone is not determinative in the fair use analysis. Making copies of an entire work has been found to be fair use, such as making photocopies for classroom use.
- **Strict adherence to the fair use principles and factors protects you from being sued.** WRONG. Remember that fair use is a defense against copyright infringement. It does not stop anyone

from suing you, even if you believe your use was fair. The copyright owner may legitimately disagree with your determination that the use was fair and may file an infringement suit to have the matter decided by a court.

Bottom Line

Remember that due to the wide discretion given to courts in this area, there are no absolute rules as to what use will be protected by the fair use doctrine. The best course of action is to consider the factors that judges will look at (described above in FAQ 14) on a case-by-case basis and, if you are concerned, contact an attorney for advice.

To help you keep track of your analysis, try making a list or using a worksheet. A "fair use worksheet" can be found at this link: https://crk-umn.libguides.com/copyright/fairuse.

USING A COPYRIGHTED WORK

19. How can I find out if a work is copyright-protected?

The work itself may give you all of the information you need. Look to see if the work has a notice of copyright. If it does, this means the work is protected by copyright (unless the notice indicates that the work is extremely old – then see FAQ 9-12). To use the work, you should consider seeking permission from the copyright owner (see FAQ 21 for more about permission).

A copyright notice should contain:

- The word "copyright", the © symbol (this is a copyright notice symbol), or the abbreviation "Copr.";
- The year of first publication; and
- The name of either the author or the owner of all the copyright rights in the published work.

The copyright notices for phonorecords (such as CDs or cassettes) embodying sound recordings are different from other works. A copyright notice appearing on a phonorecord should contain:

- The ℗ symbol;
- The year of first publication of the sound recording; and
- The name of the copyright owner of the sound recording.

A copyright notice indicates that the work is likely copyright-protected and provides valuable information that will be helpful in tracking down the copyright owner to get permission for your However, works created after March 1, 1989 do not need a copyright notice to be protected by copyright. Any work created after this date is, by default, copyrighted. For a recent work created after March 1, 1989, to be in the public domain, the author must specifically opt out of copyright. If the work you would like to use lacks any identifying information or a copyright notice, you can do further research to determine who the copyright owner or author may be and whether the work is still under copyright protection. Information about ownership of copyright and whether the copyright is still in effect can be

found in copyright registrations and other related documents. This information can be found in the records of the Copyright Office.

To assist you in this search, check the work you want to use for the following information:

- Whether there is a copyright notice
- Title of the work
- Name(s) of author(s)
- The name of the copyright owner
- Year of publication or registration
- Title, volume, or issue (if it is a serialized publication)
- Underlying works or works contained within the works (like a film based on a novel)
- Identifying numbers

Once you have the above information ready, you can examine the records at the Copyright Office. To conduct your own search of copyright records electronically, visit www.copyright.gov and select "Search Copyright Records". There you can enter the relevant information in the search fields. You can also request that the Copyright Office conduct the copyright search for you for a fee (you can request a cost estimate from the Copyright Office). You can initiate the search request by clicking on "Request a Search of Copyright Records" at the sidebar on the left of the webpage.

You may want to contact the Copyright Office's Public Information Office to get more information about pricing, copyright searches, and other copyright basics.

U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000
(202) 707-3000 or 1 (877) 476-0778
Hours: 8:30AM-5:00PM EST, M-F

You should know that the records of the Copyright Office are not always complete or conclusive because filing a copyright registration and copyright assignments and transfers is not required. It is possible that there will not be a current record in the Copyright Office for the work. However, even if you do not find the records of ownership you are looking for, your research will demonstrate that you acted in good faith if you are later sued for unauthorized use and could help to minimize any damages for which you may be liable.

For more information about investigating the copyright status of a work, read Circular 22, "How to Investigate the Copyright Status of a Work," available at www.copyright.gov/circs/circ22.pdf.

20. When can I use a copyrighted work without the copyright owner's permission?

You should begin by assuming that every work is protected by copyright unless you can establish it is not. If you can conclusively establish that a work is in the public domain (see FAQs 9-12), then it is available for your use without permission. However, you cannot rely on the presence or absence of a

copyright notice to determine if a work is in the public domain or protected by copyright. Remember that a copyright notice is not required for works published after March 1, 1989, and even for works published before March 1, 1989, the lack of a copyright notice may not always render the copyright invalid.

You should also keep in mind that fair use, while a defense to copyright infringement that allows for the use of a copyrighted work without permission from the owner, can only be determined definitively in court. If you make use of a copyrighted work without permission from the owner for a purpose you believe to fit within the fair use guidelines, you may still be subject to allegations of copyright infringement if the copyright owner does not agree with your fair use assessment.

21. What is copyright permission and how do I obtain it?

Obtaining copyright permission is the process of getting consent from a copyright owner to use the owner's copyrighted material. This is sometimes called "licensing" because permission grants you a license to use the work. You should plan ahead to obtain permissions because the process of locating, contacting, and negotiating with the copyright owner can take several months. You should plan on seeking permission before your project is fully completed because permission from the owner may be more difficult to get once your project is completed and your interest in obtaining permission is further heightened.

Each copyright owner controls a bundle of rights related to the work (such as the right to reproduce, distribute, modify, or make derivative works of the work – see FAQ 6). Because so many rights are associated with copyrighted works, you need to specify the rights you need. This may be as simple as describing your intended use (for example, "I would like to reproduce a photograph from your magazine"). Note that the rights may be broken up, and the copyright owner may have licensed certain rights to third parties.

If you think your use may qualify as fair use (for example, reproducing the photograph for nonprofit educational purposes), specify the nature of the use. Fair use means that permission is not required, but getting permission, if possible, is always the safest protection against infringement lawsuits.

There are libraries who license out copyrighted content to users. These libraries often present various subscription plans granting users licenses to access and use different portions of the library. Some libraries provide complimentary licenses for a specific portion of content. You can explore these libraries to see if there is a licensing option that will provide all the content you may need. One example of such a library is gettyimages.com.

22. Do I ask the author or the copyright owner for copyright permission?

Ask the copyright owner. However, the author may also be the copyright owner.

The author is the first owner of the copyright to the work. The author is either the creator of the work or the person that employs someone to create the work. Many authors do not retain copyright ownership and sell or transfer it to someone else. In selling or transferring the copyright to someone else, the author often receives a lump sum payment or periodic payments of royalties. The person or business that the author transferred or sold their rights to becomes the owner of the copyright. In this way, the

author and the copyright owner can be two different people. You will have to contact the current copyright owner to get valid permission to use the work. Even if you do not know the name of the current copyright owner, knowing the name of the author will help you find the current owner in the Copyright Office records.

23. Does obtaining copyright permission cost money?

Seeking permission sometimes entails more than just the consent of the copyright owner; some copyright owners would like to be compensated for your use of their work. Some types of permission almost always require payment, such as using a photo owned by a stock photo agency. Some copyright owners will make alternate payment arrangements, such as waiving any payment unless the work becomes profitable.

24. Does a copyright permission agreement need to be in writing?

It is a good idea to get your permission agreement in writing. This way, the agreement you and the copyright owner have decided upon will be available to consult in the event there is any dispute as to the terms. Relying on an oral or implied agreement for permission is not prudent. However, oral permission may be legally enforceable if it qualifies as a contract under general contract law principles. This will only become an issue if you or the copyright owner come to a disagreement as to the terms of the permission, and this dispute must be resolved by a court.

25. Can I get in trouble if I use a protected work without permission? Will I?

You can get in trouble if you use a protected work without permission. If your use of the work does not qualify as a fair use of that work, you may be liable for copyright infringement. The time and money required to track down a copyright owner for permission may be worth eliminating the risk of facing a copyright infringement suit and bearing the litigation costs to defend your use.

But will I get in trouble if I don't get permission? The risk of a lawsuit also depends on the particular use you have made of the protected work, the likelihood that the use will be spotted, and whether the other side is likely to assert their copyrights by sending out a cease and desist letter or sue for damages from your infringement. The more popular or highly visible your work is, the more likely the copyright owner will take notice and potentially bring suit. It is becoming easier for owners to find uses of their copyright with technological advances.

In general, it is better to take a conservative approach because, even if the use is fair use, you may still be subject to a lawsuit which leaves the issue open for the court to decide. Unless you are certain that the material is in the public domain or that your use is legally excusable (although a fair use determination is never certain), it is advisable to seek permission. If you are not sure, you may want to seek the advice of an attorney knowledgeable in copyright law and your specific circumstances.

26. What do I do if someone accuses me of copyright infringement or sends me a cease and desist letter?

A cease and desist letter, in the context of copyright, is typically sent by a copyright owner threatening a civil lawsuit if the recipient of the letter, the alleged infringer, continues the undesired activity (in this case, copyright infringement). The letter has no legal effect but may be a precursor to a potential lawsuit. The best initial response may simply be to stop using the offending work in the manner that is allegedly infringing. This means removing a photograph or quote from a website, ceasing circulation of pamphlets, books, or other printed materials that may contain portions of copyrighted works, or discontinuing the use of the infringing work in the manner the copyright owner has requested. You may also want to seek the advice of an attorney knowledgeable in copyright law and your specific circumstances to assist with your response to the letter.

COPYRIGHT CONSIDERATIONS ON THE INTERNET

The same fair use considerations apply to works found on the Internet. If you intend to use a copyrighted work that you have found online, analyze the same fair use factors you would if you had found the work in a more traditional medium, such as quotes or photographs from a book.

27. Can I legally copy a photograph from the Internet for use on my own website?

Not with certainty. It is very easy to download material on the Internet onto your own computer, for private use, or to post on a website. Because the information is stored somewhere on an Internet server, it is fixed in a tangible medium and potentially qualifies for copyright protection. Whether it is protected by copyright depends on other facts that may not be known to you – when it was first published, whether it has been renewed (if published before 1978), and whether the copyright owner intended to dedicate the work to the public domain. If you want to download the material for use in your own work, be cautious. It is best to track down the author of the material (or at least put in a good-faith effort to do so) and ask for permission to use the work (see FAQs 19-26).

If the Internet is the medium by which you comment, critique or educate others for non-commercial purposes, the same fair use considerations apply. Remember that you can claim a fair use defense to infringement claims if you use the work for the purposes of commentary, scholarship, or other nonprofit reasons. The other considerations still apply, however; the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole, and whether your use inhibits the potential market for the copyright owner, regardless of your non-commercial motives (see FAQs 13-18).

28. What should I do if the website I am copying content from initially copied a copyright-protected work?

Copyright infringement is an individual charge. Taking a copyrighted image from a likely infringer does not absolve you of any liability for infringement just because your source of the material did not obtain the image legally. Before using an image you think may be copyrighted (whether or not the website you

see it on has permission to post it), review carefully the same copyright issues and fair use considerations you would if you thought that image was original to the website owner.

29. Can a disclaimer on my website help me with claims of copyright infringement?

A disclaimer is a statement that claims to sever any association between your work and the work that you have borrowed. A disclaimer by itself will not negate a claim of infringement for your use. If the fair use factors weigh against your use, a disclaimer will not help. However, the use of a disclaimer may have a positive influence on how the court perceives your use as attempting to conform to the principles of fair use and to comply with copyright law. A disclaimer may also assist you in any potential trademark infringement claims (if that is at issue).

Disclaimers can also serve another purpose with respect to third parties. It may be effective in defending a claim against contributory infringement if visitors to your website were to take what you had used of the copyrighted work, despite a prominently placed disclaimer, and use it themselves in an infringing manner. The disclaimer puts the next user on notice that their use of the work has to be consistent with copyright law (regardless of whether your initial use of the copyrighted work is considered fair use or copyright infringement).

30. Am I protected from infringement claims if I acknowledge the source material?

Providing an acknowledgment that an existing copyrighted work (all or part of it) was incorporated or used in some way does not make it a permissible use of that work. For example, you might think you can use a photograph from a magazine as long as you include the name of the photographer in your use of the photo. This will not absolve you of any potential liability for copyright infringement. Acknowledgement of the source material may be a consideration in determining if it was a fair use, but it will not protect you from any initial claims of infringement. When in doubt as to the right to use or acknowledge a copyrighted work, the best course of action is to try to seek permission from the copyright owner.