Copyright Permissions Request Report

The goal of this report is to help faculty gain a broad understanding of copyright permission in the context of choosing their course materials and completing the Copyright Clearance Request Form. A bibliography of the resources used to prepare this report can be found on the last page.

What information will help you choose your materials and understand what triggers the need for copyright permission requests?

Ask yourself three questions:

1. Is the material protected under United States Copyright Law?
2. What is your intended use of the material?
3. How are you going to supply the material to your class?

Your answer to these three questions will determine if you have to request copyright permission. Most of the time the material you select will be copyright protected. Most of the time you will be using the material in the classroom for academic purposes, and most of the time you will want to reproduce the material for class handouts or a course pack in either print or digital formats. Under these circumstances you will need to request copyright permission for any material you use. However, there are ways to provide the material to your class that do not trigger the permission requirement as you will see later on.

1. Is the material protected under United States Copyright Law?

“The congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, sec. 8. (Lind, p.3)

Economic Basis for United States Copyright Protection.

“[The limited grant of copyright protection] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.  Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).” (Lind, p.3)

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Mazer v. Stein, 347 U.S. 201, 219 (1954).” (Lind, p.3-4)

(Other copyright experts argue the primary purpose of copyright law is not to compensate creators but to “Promote the Progress of Science and useful Arts.” (Heller, p.3))
Prerequisites for Federal Statutory Copyright Protection.

**Fixation:** “Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression...” 17 U.S.C. sec. 102(a). (Lind, p.4)

**Originality:** “The constitutional grant of power to Congress to create a system of copyright protection is limited to the protection of “authors”. Implicit in the word “authors” is the requirement that the expression be that of the author and not a copy of another’s expression. This is the basis for the originality requirement which is codified in 17 U.S.C. sec. 102(a).” (Lind, p.7)

**Expression:** “Copyright law protects the expression of ideas, not the ideas themselves.” (Lind, p.14)

**Copyrightable subject matter.**


“Letters, lectures, speeches, manuals, catalogues, and corporate documents, as well as other traditional prose material such as novels, articles, and scripts are protected by copyright.” (Lind, p. 24)

“Traditionally, the copyright protection of nonfiction literary work has been limited to its literal elements: words, sentences, and paragraphs. See, e.g., Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5ty Cir. 1981). But see Feist Publications, Inc. V. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991) (sufficiently original selection, coordination and arrangement of facts may be protected by copyright).” (Lind, p.25)


Pictorial, graphic, and sculptural works. 17 U.S.C. sec. 102(a)(5).


Derivative works.

“A derivative work, a work which is based upon one or more preexisting works which are recast, transformed or adapted, is protected by an independent copyright. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1078-79 (9th Cir. 2000) (derivative work must be based on a preexisting work that is copyrightable).” (Lind, p. 48)

“Examples of derivative works include: translations, musical arrangements, art reproductions, editorial revisions, abridgments, dramatizations and fictionalizations.” (Lind, p.48)

Compilations

“A compilation, a work formed by the collection and assembling of preexisting materials or data, may be protected by copyright. The copyright in the compilation protects the selection, coordination or arrangement of the preexisting materials. 17 U.S.C. secs. 101, 103; *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 357 (1991).” (Lind, p. 49)

“Categories of compilations include: collective works, factual compilations, and non-factual compilations. The copyright in the compilation only extends to the contributions of the compiling author. 17 U.S.C. sec. 103(b). *See Faulkner v. National Geographic Enterprises Inc.*, 409 F.3d 26, 34 (2d Cir. 2005).” (Lind, p.49)

**Some works are not protectable by copyright even though they may be original to the author.**

Government Works

“A work prepared by an officer or employee of the United States government as part of that person’s official duties can not be protected by copyright. 17 U.S.C. sec. 105. “(Lind, p.55)

“The 1976 Copyright Act does not provide a specific prohibition against copyright protection for works prepared under federal government contract or grant.” (Lind, p.55)

“The sec. 105 prohibition does not affect the copyrightability of works created by employees of state governments.” (Lind, p.55)

“If the work constitutes an ‘edict of government’, whether federal or state, it can not be protected by copyright.” (Lind, p. 55)
Public Domain

“The term “public domain” refers to creative materials that are not copyright protected...” “The public owns these works.” “Anyone can use a public domain work without obtaining permission, but no one can ever own it.” (Stim, p.228)

The following are some easy ways to determine if the material you want to use is in the public domain:

Works published in the U.S. before 1923 are considered in the public domain. (Stim, p.238)

Works published in the U.S. after 1922 but before 1964 were copyright protected for an initial term of 28 years, but if the copyright was not renewed during the 28th year, the work fell into the public domain. (Stim, p.238)

Works published in the U.S. after 1922 but before March 1, 1989 without a copyright notice are generally in the public domain. This is because, if a work was published without copyright notice under the authorization of the copyright owner and the law does not provide an exception for the omission, the work is in the public domain. (Stim, p.238)

For a more detailed look at public domain see: Cornell University’s Copyright Term and Public Domain in the United States @ http://copyright.cornell.edu/resources/publicdomain.cfm

Public Domain Trouble Spots

Compilations of public domain works. “Collections of public domain works may be copyright protected.” (Stim, p.228) You are free to copy and use the individual works, but using the collection as a whole may require copyright permission. (Stim, p. 228) “Example, Bartlett’s quotations. Anyone may copy a few quotes, but no one may copy the selection and arrangement of all the quotes.” (Stim, p.241)

Multilayered public domain works. “Example, a movie musical containing songs by Cole Porter is in public domain for failure to renew copyright, however, the Cole Porter songs were renewed in time.” “Therefore, you must obtain permission from the copyright owner of the Cole Porter songs in order to copy the public domain film.” (Stim, p.238)

Modified public domain works. Example, “anyone is free to copy the image of the Mona Lisa... [however]... the Mona Lisa modified with a hat and mustached is protected under the modifying artist’s copyright.” (Stim, p.240)
A Relevant Example

A relevant example of the “modified public domain works” trouble spot would be the situation where you want to use cases published by commercial publishers, such as West or Lexis, or reprint cases from a casebook. Although law cases are in the public domain as government edicts, you still must obtain permission if you want to use cases from these sources. Because of the formatting and added material that the publishers provide, such as annotations and summaries, these cases are now “modified public domain works”. (However, West’s pagination system alone is not protected. (Matthew Bender & Co. v. West Publishing Co., 158 F.3d 693 (2d Cir. 1998)(West sued Matthew Bender for incorporating West’s page number system into a cd-rom product.)) (http://fairuse.stanford.edu). To avoid this trouble spot, you can obtain cases from official government sources. For this summer’s course packs, LexisNexis has granted permission to professors to use cases from the LexisNexis database if printed without the editorial enhancements created by Lexis. This summer West has also granted permission to professors’ requests to reprint a limited of number of cases for course packs.

Direct Infringement

“Any person or entity actively involved in the infringing activity is a possible defendant in an infringement action. This would include employers, employees, printers, retailers and television or motion picture producers.” (Lind, p.162)

“Copyright infringement is a strict liability tort, therefore, a defendant need not have intended the infringement to be held liable. See Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla 1993)(computer bulletin board operator was found liable for the infringement of copyrighted photographs which were uploaded and downloaded on his bulletin board without his knowledge).” (Lind, p.163)

Fair Use Defense

“Fair Use is a judicially created doctrine.” (Lind, p.195). “As an affirmative defense, the defendant has the burden of proving the use was fair. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).” (Lind, p. 196)

“Fair Use Doctrine is codified at 17 U.S.C. sec. 107. (Lind, p.197). Section 107 codifies the factors developed under the prior case law. Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983); DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982).” (Lind, p.197)

The Fair Use Factors

“The purpose and character of the defendant’s use. 17 U.S.C. sec. 107(1).” (Lind, p.198)

“The nature of the plaintiff’s copyrighted work. 17 U.S.C. sec. 107(2).” (Lind, p.208)

“The amount and substantiality of the portion used. 17 U.S.C. sec. 107(3).” (Lind, p. 211)
“The effect of the defendant’s use upon the potential market for or value of the plaintiff’s copyrighted work. 17 U.S.C. sec. 107(4).” (Lind, p. 215)

“Some courts have added a fifth factor... that of the public interest.” (Lind, p.219)

(For more discussion of the Fair Use Factors see “Reproduction of Copyrighted Works by Educators and Librarians”( Circular 21) by the United States Copyright Office @
http://www.copyright.gov/circs/circ21.pdf)

**Not-For-Profit Educational Institutions and Applications of the Fair Use Doctrine**

When does photocopying materials for classroom use in not-for-profit educational institutions meet the requirements for the Fair Use exception? (Touro qualifies as a not-for-profit educational institution ©.)

A detailed agreement on guidelines for classroom copying in not-for-profit educational institutions was entered into by publishers and the academic community at the time of the passage of the 1976 Copyright Act. (Lind, p.228), (Stim, p. 218). These guidelines were intended to provide “greater certainty and protection” for teachers. (Stim, p. 218) None of these guidelines was intended to cover the creation of course packs. (Stim, p. 218) “These guidelines are similar to a treaty that has been adopted by copyright owners and academics.” (Stim, p. 218) “This agreement was not intended to have the force of law. See Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983); Addison-Wesley Publishing Co., Inc. v. New York University, 1983 Copyright L. Dec. (CCH) paragraph 25,544 (S.D.N.y. 1983).” (Lind, p.228)

Under this agreement:

A teacher may make a single copy of a chapter of a book, an article from a periodical or newspaper, a short story, short essay, or short poem, a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper for use in scholarly research or teaching. (Lind, p.228)(Stim, p.219).

“Multiple copies of a work may be made for classroom use provided that:

The copying meets the tests of brevity and spontaneity.

The test of brevity for prose allows for the reproduction of a complete work of fewer than 2,500 words or an excerpt of the work of not more than 1,000 words or 10% of the work, whichever is less.” (Lind, p. 228)(Stim, p. 219)

“The test of spontaneity allows for the reproduction of the work when the decision to use the work is so close in time to the moment of its use that it would be unreasonable to expect a timely reply to a request for permission to use it.” (Lind, p.228)(Stim, p. 219)
“Meets the cumulative effect test defined in the agreement.

The copying of the material is for only one course in the school in which the copies are made.” (Lind, p. 228)(Stim, p. 219)

“Not more than one complete work or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.” (Lind, p. 228)(Stim, p. 219)

“No more than nine instances of multiple copying is permitted for one course during one class term.” (Lind, p.228-229)(Stim, p. 219)

“Each copy includes a notice of copyright.” (Lind, p.229)(Stim, p. 219)

2. What is your intended use of the material?

That one should be easy to answer! Academic use in the classroom. So.....

Does your material meet the Fair Use tests? Probably not © unless (according to the guidelines for classroom copying detailed above) you are reading this in the middle of the semester and you have just spontaneously decided to copy and distribute a brief excerpt of less than 1,000 words or an entire work of less than 2,500 words and you are going to use it in class today or tomorrow which won’t allow a timely reply to a request for permission.

***If your use does not meet the Fair Use test and it is copyright protected material, you must request permission...unless you provide the protected material in some way that does not trigger the copyright protection!***

3. How are you going to supply the material to your class?

The method that you choose to supply the material to your students will determine if you must request copyright permission. Reproduction and distribution are the main triggers of copyright protection and supplying the material to your students in any method that requires reproduction and then distribution of the material will require you to obtain copyright permission. The following chart should help you determine which methods do not trigger copyright protection and thus require no permission requests.

***For further help, please see the FAQ’s cheat sheet attached it to this report***
<table>
<thead>
<tr>
<th>Methods that <strong>do not require</strong> reproduction and distribution of copyrighted material:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplying the URL or link. For material on the Internet, the student clicks on URL and goes into the material directly. For items that exist in a Touro Law Center licensed resource, the student clicks on supplied link and goes into the material on the licensed resource using the schools IP address or their login id.</td>
<td>No permission needed.</td>
</tr>
<tr>
<td>Supplying the Citation. Student enters citation into the licensed database and downloads item for individual use. Examples of these databases are Westlaw, Lexis, and HeinOnline, ProQuest and JSTOR.</td>
<td>No permission needed.</td>
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<th>Methods that <strong>require</strong> reproduction and distribution of copyrighted material:</th>
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<td>Supplying scanned copies in an e-coursepack.</td>
<td>Must request and obtain permission, usually for a fee.</td>
</tr>
<tr>
<td>Supplying scanned copies on a Course Management System (TWEN, WEBCOURSES).</td>
<td>Must request and obtain permission, usually for a fee.</td>
</tr>
<tr>
<td>Supplying scanned copies on a cd-rom/dvd.</td>
<td>Must request and obtain permission, usually for a fee.</td>
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<tr>
<td>Supplying scanned copies on a USB flash drive.</td>
<td>Must request and obtain permission, usually for a fee.</td>
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<tr>
<td>Supplying scanned copies in the library’s e-reserves.</td>
<td>Must request and obtain permission, usually for a fee.</td>
</tr>
<tr>
<td>Supplying photocopies for a print coursepack.</td>
<td>Must request and obtain permission, usually for a fee.</td>
</tr>
<tr>
<td>Supplying photocopies for classroom handouts.</td>
<td>Must request and obtain permission, usually for a fee.</td>
</tr>
<tr>
<td>Supplying photocopies for the library’s print reserves.</td>
<td>Must request and obtain permission, usually for a fee.</td>
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Conclusion 😊

This report hopefully has given you a broad understanding of copyright protected materials and what uses will trigger the copyright protection requiring you to fill out a copyright permission request form and submit it to Faculty Services or me (Lisa). If you have any questions I would love to hear from you. Remember I am not an expert. I just read some stuff and wrote this report. But I can do my best to explain something that is confusing in the report or work with you to find the information you need. For example, use of audio/visual materials including streaming video and multimedia, dvds, TV clips, music, etc. was beyond the scope of this report, but if you need more information on these or other copyright protected material you can contact me, Lisa Parisi, at ext. 7155.

Resources used in preparing this report:

Books


Online pdfs


Websites

Cornell University Copyright Information Center @ http://www.copyright.cornell.edu/ and Copyright Term and Public Domain in the United States @ http://copyright.cornell.edu/resources/publicdomain.cfm

Copyright Frequently Asked Questions: Central Michigan University @ http://www.cmich.edu/chsbs/Copyright_Home/Copyright?assistance/FAQs.htm

Harvard Kennedy School Course Materials Office website @ http://www.hks.harvard.edu/cmo/facindex.htm

Stanford Copyright and Fair Use – Welcome to the Public Domain @ http://fairuse.stanford.edu and http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/8-a.html (This website uses NOLO materials including a lot of information from the NOLO book, Getting Permission, written by Richard Stim, listed above.)