Copyright and Permissions FAQ

Patricia Nelson, Esq.
pnelson@batt-tech.com

1. What is protected by copyright?

Copyright protects original works of authorship, such as books and textual content, music, motion pictures, plays, choreographic works, painting, sculpture, architectural works, and sound recordings. The categories of work protected are viewed broadly. For example, computer source code is considered a "literary work", and therefore protected under copyright law.

Copyright protection subsists as soon as a work of authorship is created in a fixed form (such as written on paper, stored on a computer, or recorded on tape or film). The law does not require the copyright owner to display any notice of copyright (although there are benefits to doing so). As long as a work is fixed, therefore, and contains copyrightable expression (it has to contain some originality – works that are merely alphabetical listings of facts like the telephone book, for example, are not protected by copyright), it is likely to be protected, even if a notice of such protection is not displayed. Note that if the work is not "fixed", it is not protected. (A speech, for example, which is not written down or recorded in some manner, is not protected by copyright.)

Copyright law grants the owner of a copyrighted work the exclusive right to:
- copy the work;
- prepare derivative works based on the copyrighted work;
- distribute copies of the work publicly; and
- perform or display the work publicly.

Note that "intent" to infringe is not a prerequisite for a finding of copyright infringement. You may be held liable for copying, even if you believed in good faith that a work was not protected by copyright.

2. How long does copyright endure?

Under the current copyright law, for works created on or after January 1, 1978, copyright lasts for the life of the author plus seventy years. For works made for hire and anonymous works, the duration is 95 years from publication, or 120 years from creation, which ever is shorter.

For works created and published prior to January 1, 1978, the law is somewhat more complicated. Prior to a change in copyright law, a work had a term of protection of 28 years, and could then be renewed for an additional period. Generally, assuming that the copyright was renewed, the copyright on works published prior to 1978, generally has a duration of 95 years, although there are exceptions.

3. **What is a "work made for hire"?**

A work made for hire is a work prepared by an employee as part of the employee's official duties, or a work specially ordered or commissioned for use as one or more of the following:

1. a contribution to a collective work
2. a part of a motion picture or other audiovisual work;
3. a translation;
4. a supplementary work
5. a compilation;
6. an instructional text;
7. a test;
8. answer material for a test;
9. an atlas.

If not prepared within the scope of employment, three prerequisites must be met:

First, the work must be specially ordered or commissioned.

Second, the work must be ordered or commissioned for use as one of the nine specifically enumerated categories mentioned above.

Third, the parties must expressly agree in a written instrument signed by both that the work shall be considered a work made for hire. As an extra precaution, the agreement should be signed prior to the commencement of the work.

If a work meets the work made for hire criteria, the organization or individual commissioning the work is considered the author, and has all the exclusive rights granted by copyright law.

4. **If I contact the owner of a copyrighted work for permission to use some material from the work, and the person does not respond can I assume I can use the material?**

No. The owner has no obligation to answer you. If the owner chooses not to respond, that does not mean that anyone can then just take the owner's property. It is important to remember that even though the content is "intellectual property", it is "property" nonetheless, much in the same way as a car is someone's property. If you ask someone to use their car, and they do not answer, that does not mean you can then just jump in and drive off.

5. **There is an issue of a magazine which contains an article written by a famous economist, which I'd like to reproduce on my website. Do I just ask the publisher for permission for this article?**

It depends on the rights the magazine has to the article. Magazines, newspapers, anthologies, and similar works are considered "compilations". A compilation is a work that is created by putting together a particular grouping of other works in a unique way such that it constitutes an original work of authorship. The creator of the compilation will hold the copyright in the compilation, but may not have rights to the individual works. Check to see if there is a copyright notice on the individual article. With anthologies, often the publisher will have a page

listing the various credit information for the chapters, which indicates that they were used by permission. You will likely need to obtain permission from the original source.

6. **How do I determine if the person granting me permission to use a copyrighted work is the person who has the rights to that work?**

If you are dealing with a trusted source, such as a major publisher, or reputable stock photo agency, you can generally feel safe. As back-up, the license agreement between you and the person or organization granting permission should contain a warranty that the source has the right to grant the particular license.

7. **If there is a picture on a copyrighted site, but the picture itself is from a public source, can I take the picture from the copyrighted source or do I have to go back to the original source?**

The answer to this question depends on the circumstances, and requires a case-by case analysis. If the picture or work itself is in the public domain, and there has been nothing further added to it that is protectible by copyright (such as additional illustrations, or a new English-language translation of a work that was written centuries ago in another language), then yes, in general you may take it from the copyrighted source. The copyrighted source may be a book, a website, or a report by a research organization containing data provided by the U.S. Government. For example, if you went to Amazon.com's website (which is protected by copyright), and they had posted the complete text of Moby Dick in its original form (i.e., no added illustrations, annotations, etc.; just exactly as Melville wrote it), you could print it out and distribute copies. If, however, the text was html-coded in a special way, and you copied the entire text and embedded code (which is likely to be protected by copyright) added by Amazon.com, and placed it on your website, then you could be liable for infringing the copyright-protected aspects of the work.

8. **If I am going to use quotations, pictures, covers, etc. from published copyrighted material, what amount can I use under fair use without obtaining copyright permission?**

There is no set rule as to how much copyrighted material one can use under the doctrine of "fair use". Fair use is a limitation on the exclusive rights of the copyright owner. Technically, fair use is a defense against a claim of copyright infringement. It is not a right or privilege held by the general public to use copyrighted material without seeking permission from the copyright holder. The fair use concept was originally developed by the courts to help balance the rights of the copyright owner, with the public interest of the free spread of knowledge and information. In determining whether or not use of a copyrighted work is fair, courts consider various factors, including:

1. The purpose and character of the use, including whether the use is for commercial or for non-profit, educational purposes;

2. The nature of the copyrighted work. (Is it a highly creative work, or a factual work?)

3. The amount and substantiality of the portion of the work used in relation to the work as a whole.

4. The effect of the use upon the potential market for, or value of, the copyrighted work.

Whether or not a use of a copyrighted work is "fair" really depends on the circumstances. For example, even if the amount borrowed from a copyrighted work is relatively small, if this borrowed portion is to become a prominent feature in the new work, the use may not be fair. Similarly, if the amount borrowed is relatively small, but constitutes the most important feature of the copyrighted work, the use is probably not fair. Because "fair use" is so uncertain, it should be used sparingly, and each case must be analyzed based on the specific circumstances. Also, even if it is used, the original work should be attributed as to the source.

9. **I have photographs of people from many years ago. Can I assume that I no longer need releases? Can I use more recent photographs of people/children without releases if I have rights to the photographs?**

Not necessarily, to both questions. You may still need releases for the photos of people from many years ago because the subjects may still have a "right of privacy" (which legal scholars have defined as the "right to be let alone"), or a "right of publicity" (which, if an individual's name or likeness has commercial value, protects the individual's exclusive right to control the exploitation of that name or likeness for commercial purposes). The right of privacy consists of four categories:

1. public disclosure of private and embarrassing facts (the publication of material that although true, is offensive and of no legitimate concern to the public);

2. false light (the publication of material that creates a false and offensive impression about the individual, even if the material is technically true);

3. intrusion into seclusion (offensively entering or observing areas, or acquiring secret or private things by furtive means or actual trespass, usually for news gathering purposes); and

4. misappropriation of one's name or likeness for commercial advantage (the use of an individual's name or likeness without consent for advertising or commercial purposes).

If the photographs constitute a matter which is of legitimate public interest, or if they were taken in a public space (publicizing something that occurs in public view, such as on a street, at a sporting event, or in an airport will not generally give rise to liability for invasion of privacy) you may not need releases for news use. If use of the photographs is primarily for commercial purposes, such as for advertising, a release is recommended, or statutorily mandated. The right of privacy does not survive the death of the individual (although the right of publicity does). If any of the subjects of the photographs have died, and their name and likeness have no commercial value (e.g, Elvis Presley or Marilyn Monroe), you may not need to obtain a release.

Even if you have a license to reproduce the photographs you may still need releases from the individuals portrayed in the photographs. If your license from the photographer or photo

agency states that the licensor warrants that it obtained releases to use the photographs in any manner and media (and to sub-license these rights), and indemnifies you against any claims of violation of the subject's right to privacy, then you may not need to pursue the matter further. If, however, there is no such language, and the use of the photographs does not serve a legitimate public interest, publicize something that occurred in a public place, and the subject is alive, then releases are likely needed.

10. **Corporations and other entities sent me pictures for use in a particular project. Can I use them again for a new project?**

Your ability to use pictures sent by corporations and state agencies depends on the original understanding between you and the copyright owners when the pictures were provided. Do you have a written license specifying the scope of use? If not, was there an understanding that you could use the pictures in any way, and for as long as, you wanted? If, when you initially requested the pictures, you gave the copyright owners the impression that you would only use the pictures for one particular purpose, then you should contact the copyright owners again. If, however, they provided them to you with the understanding that you were free to use them in any manner you chose, including allowing use by third parties, then there is not a great risk in using them again.

11. **Are all works from governmental agencies available for use without obtaining permission?**

Not necessarily. Works created by the U. S. Government are in the public domain. Works from state agencies are not, and you will need to obtain a license from these state agencies for any material protected by copyright. Also, sometimes the U.S. Government licenses works from others, and the licensor may retain proprietary rights.

12. **What kind of document do I have to get from a copyright owner for permission to use their copyrighted work?**

It is advisable to get some form of written license or release. It does not have to be long or elaborate, but should specify the rights granted, and contain some warranties by the licensor that it has the rights to the work.

13. **If I have obtained rights to use a video clip on my website, can I create still images from the video?**

The answer to this question depends on the scope of the grant of rights licensed to you by the copyright owner of the video. If you have the right to create a derivative work, this is likely to be acceptable. (A derivative work is a work that transforms, or recasts the original work in some way. A motion picture based on a novel, a colorized version of a black and white motion picture, and an animated version of a comic strip are examples of derivative works. Still images created from a video also constitute derivative works.) If you do not have specific permission from the copyright owner to create derivative works, then you should obtain permission before creating the still images from the videos.

14. **If I have an agreement with a content provider to provide its content for distribution on my website, am I liable if its content infringes someone else's copyright?**

You may be liable as a "vicarious" infringer. Even if not engaging directly in infringing activities, a person or organization may be liable for copyright infringement if it has the right and ability to supervise the activities, combined with a direct financial interest in those activities. Your license agreement with the content provider should provide language clearly stating that it is solely responsible for the content, and should also have language indemnifying you.

15. **Is a photograph/image of non-copyrighted material copyrighted? For example, given that the Mona Lisa is in the public domain, can I use any image of the Mona Lisa that I find on the web?**

Although one recent case suggested that a photograph of a public domain work cannot be protected by copyright, the law is still unclear on this point. To be safe, it is best to obtain the image from a reputable stock photo agency.

16. **If I have been given rights to use a copyrighted work, can I assume that I can make changes or edit the work any way I wish?**

This depends on the scope of the grant of rights. Some licenses will allow you to edit, modify, or create derivative works; others will strictly prohibit any modifications. If changes may be required, you should make sure your license allows you to do so.

17. **What licenses do I need to use music in my work?**

Depending on the use sought, a whole host of licenses could be required, and they could be held by a number of different parties. If you're just reproducing lyrics in a text form, permission may be required from the music publisher (a good source for tracking them down, is the ASCAP and BMI websites).

If you're producing a multi-media product, and are synchronizing the music to moving images a synchronization license is required. A license will also be needed from the holder of the copyright in the composition.

If there is going to be any public performance of the music a license is required from ASCAP or BMI, the two major music performing rights societies.

If the original recording for the music is used a license will be needed from the copyright owner of the sound recording, which is usually the record company.

If you are using the original recording, payments may be required to the original musicians and some unions as well.