

# COPYRIGHT GUIDELINES

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Copyright is the foundation on which modern publishing is built. Responsible authors and publishers will respect the copyrights of others, just as they expect others to respect their copyrights. At the same time, both sides must honor the role of fair use, especially in scholarly publishing.

## I. What Is Copyright?

Copyright consists of a number of rights. The right to reproduce a work and the right to distribute copies of the work are two bedrock publishing rights. A third is the right to create “derivative works” based on the original. A derivative work is any work in which the original is recast, transformed, or adapted. Changes must be such that, by themselves, they could be protected by copyright. Minor revisions will not constitute a derivative work. But extensive revisions, such as those that would justify calling a work a “second” or “revised” edition, will qualify as a derivative work.

Merely reproducing text in digital form does not create a derivative work. However, a publisher may wish to make a CD-ROM or Web-based version of the work in which sound or motion picture clips are included for analytical or illustrative purposes. Such a product would qualify as a derivative work. An electronic version would also constitute a derivative work if it were enhanced with a substantial number of hyperlinks to other material.

The two other rights that make up a copyright are the right to display the work publicly and the right to perform it publicly. The Internet has made the display right important to publishers because posting material on the Web constitutes a public display. When the viewer downloads the displayed document to his or her computer, a distribution of a copy also takes place.

## II. What Is Protected by Copyright?

Copyright covers every kind of work that has been devised to convey thoughts or information. It protects, for example, written works, works of art (very broadly construed) in all media, musical works, sound recordings, and (with certain limitations) architectural works. It protects the author’s expression of the ideas and facts contained in the work, not the ideas and facts themselves. And the author’s expression must contain at least a minimal degree of originality, meaning not novelty but something that the author has not copied from something else. Originality has been defined as a “spark of creativity.” The standard of creativity—the required wattage of the spark—is quite low: white pages in a telephone book do not qualify but yellow pages may.

As the yellow pages example indicates, creativity can reside in an author’s “selection and arrangement” of facts. This is the basis on which many compilations of facts are protected. Maps and graphs can be covered by copyright for the same reason. Even a fairly simple map reflects the cartographer’s choice as to which geographic points to include and how to

represent and connect them. But as the white pages example indicates, some selections and arrangements are so basic, or so compelled by external considerations, that they will not be copyrightable. Thus, a simple graph charting gross domestic product of the United States over a twenty-year period may be below the threshold of copyright.

Courts have held that straightforward photographic reproductions of works of two-dimensional art lack originality and are not copyrightable. However, photographs of three-dimensional works are copyrightable as derivative works.

To be protected by copyright, a work must have been fixed in tangible form for more than a transitory period. No copyright notice, registration, or other formality is required to secure a copyright, although registration is often desirable for other reasons.

### **III. Who Owns Copyright?**

Copyright of a publication is owned upon creation by the author(s) of the work. If two or more individuals create a work, they are called “joint owners” and own the copyright jointly, although any of them can do anything with the work that he or she wishes, on a nonexclusive basis.

In the case of a work made for hire, the “author” is the hiring party. A work made for hire is any work that meets any one of the following conditions:

- It was created by an employee within the scope of his or her employment
- It was created by someone who is so closely directed in his/her creative endeavors by the hiring party that he/she is considered an “agent” of the hiring party
- It was one of several types of works specified in the Copyright Act, if the party commissioning the work and the party commissioned to create it agree in writing that the work will be treated as made for hire. So far as publishing is concerned, the following types of works are eligible for this treatment:
  - a collective work, such as an anthology, in which separately copyrightable elements are brought together. The work for hire in this situation is the selection and arrangement of materials.
  - a contribution to a collective work
  - a database or other compilation of data. As with collective works, it is the selection and arrangement the data that is relevant here.
  - a translation
  - a supplementary work, i.e., a work prepared as a secondary adjunct to a work by another author, for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work. Such things as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, bibliographies, appendixes, and indexes fall in this category.
  - a work prepared for use in systematic instructional activities
  - a test
  - answer material for a test
  - an atlas

The author may assign all or any part of the copyright to other persons. The author and the publisher may agree to register the copyright in the name of either the author or the publisher. That will not necessarily affect the grant of rights. Typically, the publisher of a work acquires the rights of reproduction and distribution of the text in all media, at least for as long as the work remains in print. The publisher needs exclusivity in these rights in order to make the necessary investment in publication and to be able to enforce the copyright against possible infringers. The publisher often also acquires rights to license the work for other media, such as audio (e.g., books on tape) and motion pictures, although generally not with authors who have agents who can handle these rights.

#### **IV. How Long Does Copyright Last? What Is in the Public Domain?**

The duration of copyright, that is, how long copyright lasts, differs depending on whether a work has one or more individual authors, or is a work made for hire. A derivative work has a copyright separate from that of the work on which it is based; the separate copyright covers only the new matter and does not affect in any way the copyright of the preexisting matter.

When a work is no longer covered by copyright it is in the “public domain,” and anyone may make use of it without obtaining permission from the authors. Works of the U.S. Government are in the public domain from the date of their creation.<sup>1</sup>

In the United States, copyright is protected for the terms discussed below.<sup>2</sup> The information given here is distilled into a table, but readers are advised to review both the text and the table.

##### **Works created after December 31, 1977**

- Works by individual authors: life of the author plus 70 years
- Works by two or more individuals (called “joint works”): life of the last author to die, plus 70 years
- Works made for hire: 95 years from first publication, or 120 years from creation, whichever expires first
- Works published anonymously or under pseudonym: 95 years from first publication, or 120 years from creation, whichever expires first, except that this can be converted to life-plus-70 (if the author(s) is/are individuals) by filing in the U.S. Copyright Office. See 17 U.S.C. §302(c).
- **Special note:** If a work was in existence but unpublished as of January 1, 1978, and was subsequently published *prior to 2003*, copyright will in no event expire before December 31, 2047.

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<sup>1</sup> This applies to works created by U.S. government employees as part of their official duties. It does not apply, in general, to works created by private parties under government grant or contract.

<sup>2</sup> Special rules concerning sound recordings and architectural works (buildings, not blueprints) are not discussed here.

- The above rules are subject to a caveat concerning copyright notice, for works published before March 1, 1989. See fourth bullet under the heading “**Works no longer under copyright and therefore in the public domain**” below.

### **Works first published<sup>3</sup> after December 31, 1963, and before January 1, 1978**

- 95 years from first publication. If the work was first published in the United States, protection was contingent on use of proper copyright notice. If the work was first published outside the United States, lack of notice generally does not matter; for certain limited exceptions see the final bullet under the heading “**Works no longer under copyright and in the public domain**” below.

### **Works first published<sup>4</sup> on or before December 31, 1963**

- If first published in the U.S., 28 years from first publication, assuming proper copyright notice was used, plus an additional 67 years if copyright was renewed in the U.S. Copyright Office in the twenty-eighth year of the first term.
- If first published outside the United States, generally 95 years from first publication. For limited exceptions, see the final bullet under the heading “**Works no longer under copyright and therefore in the public domain**” below.

### **Works no longer under copyright and therefore in the public domain**

- Any work first published before 1923, regardless of where published.
- Any work first published in the United States prior to 1964, if copyright in it was not renewed in the United States Copyright Office. (Bear in mind: the nationality of the author does not matter if the work was first published in the U.S.) Some renewal data are available online at [www.copyright.gov](http://www.copyright.gov), but as of June 2005, absence of renewal data on this site could not be assumed to mean that renewal had not been effected. Manual searches of Copyright Office records may be arranged with the Copyright Office or with independent search firms.
- Any work first published in the United States, if it was published before 1978 without proper copyright notice. The rules concerning proper copyright notice are somewhat complex and are not dealt with here. In general, though, if a pre-1978 U.S. literary work does not have a notice in the form “© [or “Copyright” or “Copr.”] 19XX [name],” in a conspicuous place at the front or the end, it is in the public domain owing to failure to use notice.
- Any work first published in the United States, if it was published without copyright notice between January 1, 1978, and February 28, 1989, **but note that** certain steps could be taken to “cure” the omission of notice for works of that vintage, so to be

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<sup>3</sup> If copyright in a work was registered in the U.S. Copyright Office before publication, then the copyright term began on the date of registration rather than the publication date.

<sup>4</sup> See fn. 3 above.

prudent one should either assume such a work is still under copyright or consult a copyright specialist.

- Any work first published outside the United States before March 1, 1989, if the formalities required under U.S. law – notice (or cure), registration, renewal – were not complied with at the applicable times, **but only if one of the following additional factors also applies:** (i) the work was published in the United States within 30 days after initial publication abroad; (ii) the work’s copyright in its country of origin has expired, (iii) at the time the work was created, all of its authors were U.S. citizens, or (iv) at the time the work was created, none of its authors was a citizen of a country with which the U.S. now has copyright treaty relations.<sup>5</sup> If none of these factors applies, the work is in essence exempted from the rigors of the old (and now expired) U.S. formalities.

The following table summarizes the terms of copyright protection. Note that (1) proper copyright notice is assumed to have been used if and when applicable; and (2) a “non-U.S. work” is one first published outside the United States, of which at least one author was not a U.S. citizen or company.

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<sup>5</sup>The complexities of non-U.S. copyright, the complex rules for determining the country of origin—“source country” in the jargon of 17 U.S.C. §104A—of a foreign work, and the identification of those few countries that do not enjoy relevant treaty relations with the United States are not covered here.

<b>Date of Creation/ Publication</b>	<b>U.S. or Non- U.S. Work</b>	<b>Type of Authorship</b>	<b>Term of Protection</b>
Created after 1977	Either	Single author – individual	Life plus 70 years
“	“	Two or more individual authors	Life of last to die plus 70 years
“	“	Work made for hire	95 years from first publication, or 120 years from creation, whichever expires first
“	“	Pseudonymous	95 years from first publication, or 120 years from creation, whichever expires first, unless identity filed with Copyright Office, in which case life plus 70 if applicable
“	“	Anonymous	95 years from first publication, or 120 years from creation, whichever expires first, unless identity filed with Copyright Office, in which case life plus 70 if applicable
Created before 1978 but not published until after 1977 and before 2003	“	Same as any of above	Same as corresponding term above, or until 12/31/47, whichever is later
Published or registered between 1/1/64 and 12/31/77	“	Same as any of above	95 years from first publication
Published or registered between 1/1/1923 and 12/31/1963	U.S.	Same as any of above	95 years from first publication or registration, if copyright was renewed in 28 <sup>th</sup> year, otherwise now in public domain
Published between 1/1/1923 and 12/31/1963	Non-U.S.	Same as any of above	95 years from first publication
Published before 1923	Either	Same as any of above	Public domain

## V. When Is Permission Needed to Reproduce Copyrighted Material?

An author or publisher should seek permission for any re-use of copyrighted material that is not within the bounds of “fair use.” (See **What Is Fair Use?** below.) In general, publishing contracts place the responsibility for getting such permission on the author.

Certain uses always require permission. These include (but are not limited to):

- Inclusion of any substantial portion of a work in an anthology or a selection of readings for a course (a “coursepack”).
- Incorporation of copyrighted text in a work, where the text is not the subject of the work’s commentary or analysis. For example, if the author of *Rural Values in 20<sup>th</sup> Century Vermont* wanted to include Robert Frost’s poem “Mending Wall” in a “box” on page 159, that would require permission. The poem serves the same function as a pictorial illustration.
- Use of a photograph, drawing, map, chart, etc., as an illustration in a work rather than as the subject of the work’s commentary or analysis. For example, inclusion of a photographic portrait of Jackson Pollock in a biography of Pollack would require permission from the photographer or whoever had acquired copyright from the photographer.
- Use of a photograph or other illustration on the dust jacket or in promotion pieces for the work. Permission for this use needs to be explicit and separate from permission to use the illustration in the body of the work.

An author who has assigned or exclusively licensed his or her own copyright to a publisher will need permission to use his or her own material in any of these ways. Normally, the publisher will permit such re-use at no charge.

**Note:** What is being licensed here is re-use of copyrighted expression, not of the ideas or data concerned. Thus, an author does not need permission to create a new map or chart that presents the same information in different guise, or to write a new book using data that formed the basis for an earlier journal article. The author should be careful, however, not to violate any noncompete clause that may be included in a previous book contract. The author should always, as a matter of professionalism, cite his or her previous work.

## VI. How Is Permission Obtained and from Whom?

What the publishing profession generally refers to as “permission” is, in essence, a license granting the author and his or her publisher certain nonexclusive rights in the material concerned. Typically, publishers require their authors to seek permission for material they have used in their works. Many publishing houses have their own template letters that authors may use for such requests, as well as their own templates for responding to the requests of others. If the work to be used is a derivative work, permission is needed for both the derivative and the underlying work.

To whom does one send the permission request? The place to start is with the publisher of the material to be used. The publisher will in most instances either control the rights concerned or be able to indicate who likely controls those rights.

Many twentieth-century publishing houses no longer exist or have been merged with other publishing companies. Many twentieth-century authors and illustrators have moved or passed away, leaving no forwarding address or no easily ascertainable heirs. These things make it difficult for an author of a new work to track down the copyright owners of older material he or she wishes to use. The new author should make and document reasonable efforts to find the rightsholders. If such efforts fail, it may be reasonable to use the material in question, but the author should consult with his or her publisher about how to proceed.<sup>6</sup>

Museums often assert rights in works in their possession, sometimes on the basis of mere assumption. Rather than challenge these assertions, authors generally accede to a museum's fee and credit requirements in order to obtain access to the work to photograph it, or to obtain access to the museum's own transparencies. Authors are increasingly encouraged when publishing two-dimensional artworks in the public domain to copy images from books rather than submit to unenforceable reproduction claims made by museums or other owners of those works.

## **VII. What Is Fair Use?**

Fair use refers to the use of copyrighted material that an author can make without seeking permission from the copyright holder. (By definition, this doctrine does not apply to material not under copyright, which anyone can use without permission. See section D (above) for discussion of the public domain.) Fair use has been the subject of many learned treatises and articles and hundreds of complex legal decisions. No one can define it absolutely because it is always dependent on the facts and circumstances surrounding the particular use.

The U.S. Copyright Act, at §107, specifically identifies fair uses such as “criticism,” “comment,” and “scholarship,” but such uses are not the only ones that can be fair, and they are not fair per se. In determining whether any use is fair, four factors must be considered:

1. The purpose and character of the use
2. The nature of the work to be used
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work

As Supreme Court Justice Joseph Story said in an early case, to determine if a use is fair, one must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” Story's formulation was recited with approval

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<sup>6</sup> The United States Copyright Office is investigating the problem of such so-called orphan works and may recommend a change to the statute to alleviate this problem.

in a more recent Supreme Court opinion, an opinion which also stressed that these factors should not be used as a mechanical scoring system, but as a gestalt.<sup>7</sup>

The University of Chicago Press seeks to simplify the process of seeking and granting permissions by setting forth guidelines for what it considers to be fair use of text material from the books and journals it publishes. These guidelines, which are appended, apply only to use of the Press's publications, but it is hoped that other publishers will adopt similar guidelines.

What about unpublished materials – when can copying them be fair use?

The Copyright Act says “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” This was added to the Fair Use section of the Act in response to a disturbing trend in an influential copyright court toward tightly constricting unauthorized use of unpublished materials.

What this added clause means is that the four fair use factors are still the determining factors, and that an unpublished work is subject to the same analysis as a published work. However, the fact that a work is unpublished may, of course, alter the analysis under one or more of those factors. For example, in a famous case that preceded the statutory amendment, the Supreme Court held that *The Nation* was liable for publishing excerpts from President Gerald Ford's memoirs before their publication, under contract, in *Time Magazine*. In that case a mere 300 words were taken, but the Supreme Court found that those 300 words were the most politically charged and that their premature release led directly to a loss of revenue when *Time Magazine* backed out of its contract to publish its own excerpts from the memoirs. The reproduction of those 300 words, had it occurred in a news story written after the book was published, might well have passed muster as fair use. But their premature use, given the author's reasonable desire to keep the work under wraps until publication so as to have the greatest market impact, weighed heavily against fair use. In effect, the scope of copying allowed for unpublished works is going to be narrower than for published works. Anyone quoting unpublished letters or the like needs to err on the side of caution when assessing how much quotation is really critical to the scholarly enterprise in question.

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<sup>7</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)