



COPYRIGHT & FAIR USE BASICS FOR NONPROFITS

Like for-profit businesses, nonprofit organizations seek to market themselves and increase awareness of their goals and activities in the communities they serve. In doing this, nonprofit organizations often distribute promotional and informational materials, such as brochures and newsletters, and operate websites through which visitors can contact the organization or find out more information. Many organizations use materials, such as photographs, graphics, or other content, from third parties and found on the Internet to give their promotional materials and websites a professional and entertaining look and feel. Public Counsel is often asked for legal assistance regarding copyright issues and risk of infringement for using copyrighted (or possibly copyrighted) materials in websites or promotional literature.

An organization may want to use a photograph or quotes from an article or book, by including these in a newsletter or posting them on a website. These materials are often protected by copyright and using them without permission from the copyright owner can put the organization at risk for claims of copyright infringement. There is a limited, but widely-known, exception to copyright protection called the "fair use" doctrine. Some uses by nonprofit organizations (and others) may constitute "fair use," depending on the nature and purpose of the use. There are also certain materials that are in the "public domain," not protected by copyright, and that are available for anyone to use for any purpose.

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

- **FAQs 1-8** **Copyright Basics and Definitions**
- **FAQs 9-12** **The Public Domain**
- **FAQs 13-18** **Fair Use**
- **FAQs 19-24** **Using Copyrighted Works**
- **FAQs 25-27** **Copyright Considerations on the Internet**

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.



This publication should not be construed as legal advice. These frequently asked questions and answers are provided for informational purposes only and do not constitute legal advice. While this information can help you understand the basic rules relating to copyrights and fair use, it is very important that you obtain the advice of a qualified attorney before using copyrighted or possibly copyrighted materials.

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 the artistic expression of an author of an original “work.” Copyright is a form of intellectual property that gives the author of an original work exclusive rights to 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, she is the “author” of the photograph for copyright purposes. When a writer writes a story, he is the “author” of that story. The author can be any type of creator who makes a work that is subject to copyright protection.

Keep in mind that the author of the work is not always the copyright owner. The author of the work is the original owner of the copyright, but rights to copyrighted works can be (and often are) assigned or transferred to other individuals or to companies.

3. What types of things can be copyrighted?

Any work of independent and 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:

- “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 at least some period of time, no matter how brief.
- Original – it must be independently created by the author.
- Artistic/Creative – it must be the result of at least some creative effort on the part of the author.

A “work” can be literary, like a brochure or novel, or visual, like a photograph, sketch or painting. Copyright protects “works” such as 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 protects only fixed, original and creative expression, not the ideas or facts upon which the 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.
- *Facts and Theories*. Copyright law does not protect facts and theories. Anyone who creates a scientific theory or discovers a previously unknown fact cannot prevent others from creating new works or otherwise using that theory or fact.

- *Short Phrases, Names and Titles.* Although these may be protected under trademark law.
- *U.S. Government Works.* Any work created by a United States government employee or officer is in the public domain, provided that the work is created in that person's official capacity. Note that this rule applies only to works created by federal employees, and not to works created by state or local government employees. State and local laws and court decisions are in the public domain.

5. How is a work copyrighted? Does it need to be registered or marked?

Any work that fulfills the criteria for copyright protection (as described in FAQ 3) is copyrighted at the time it is created. No registration or notice is needed. Once it exists, it is protected by copyright.

A work may be protected by copyright without having copyright registration and without an affixed copyright notice. Copyright protection attaches at the creation of the work, once it is fixed in physical expression. Essentially, a work is copyrighted by default, unless the author has explicitly dedicated it to the public domain.

6. What does it mean for a work to be copyrighted? What rights does a copyright owner have?

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

- The right to make copies of a protected work (reproduction rights).
- The right to sell or otherwise distribute copies to the public (distribution rights).
- The right to create adaptations (called derivative works) and prepare new works based on the protected work.
- The right to perform a protected work (such as a play) or to display a work in public (performance / display 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 he or she has 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 and is a copyright infringer.

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 open to use by the public.

7. What is copyright infringement?

Generally speaking, copyright infringement occurs when someone other than the copyright holder uses the work in a way that violates the exclusive rights held by the copyright holder. The exclusive rights that are most commonly infringed are copying or reproducing and distributing a copyrighted work. In order to use a copyrighted work without infringing, the user must either have permission from the

copyright holder, or the use must fall within one of the limitations or exceptions to the copyright holder'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 the 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 that are used with or for products or services as indicators of origin (meaning they identify and distinguish these products and services as being of a particular company or manufacturer). Unlike copyright, trademarks are protected by both federal and state trademark law. Although copyright and trademark laws are distinct, some things can be covered by both copyright and trademark protections. For example, the contents of a movie are protected by copyright, but titles or famous character names might be trademarked. Go to www.publiccounsel.org/publications/trademarknp.pdf for a collection of frequently asked trademark questions and answers.

THE PUBLIC DOMAIN

9. What does the term “in the public domain” mean?

The term “public domain” refers to creative materials, such as books, songs, movies, artwork or other works that could be copyrighted, but that are not currently protected by copyright (or trademark, patent, or other intellectual property law). The public owns these works, not an individual author or artist. 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*: As a rule, any work published in the United States before 1923 is in the public domain. When a term of 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. (There were, however, 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.
- There are several copyright term calculators online, which can let you know how long a work's copyright protection will last or if a work is already in the public domain. Try www.publicdomainsherpa.com/calculator.html.

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.

FAIR USE

13. What is “fair use”?

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., an 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 someone's infringing use of a work in court, and the court determines that the use is “fair use,” then the infringer will not face any legal consequences.

14. Who decides whether or not something is “fair use”? How will they decide?

Fair use is a legal defense to an infringement claim. Therefore it will be up to the court to determine whether or not your use of a copyrighted work is fair use. Courts will consider the following four factors when determining whether or not a use is a “fair use”:

- *The purpose and character of the use.* The court will take into account the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. The court will also ask whether the copyrighted material taken has been used to help create something new or has been appropriated verbatim into another work. Using a copyrighted work to add something new to the work, with a further purpose or different character, so that the first work’s expression, meaning or message has been altered, is called a transformative use. While transformative use is not necessary in order for there to be a finding of fair use, the more transformative the new work, the less significant the other factors become.
- *The nature of the copyrighted work.* Some copyrighted works are closer to the “core” of copyright protection than others. Fictional and creative works, such as plays, novels or visual art, are closer to the core of protected expression than primarily factual works. Fair use is more difficult to establish when these “core” creative or fictional works are copied. Because the dissemination of facts or information benefits the public, you have more leeway to copy from factual works than you do from fictional works.
- *The amount and substantiality of the portion used in relation to the copyrighted work as a whole.* Generally, the larger the portion of the copyrighted material that is taken and used, the lower the likelihood that the use will constitute a fair use. However, even if you take a small portion of a work, your copying will not be a fair use if the portion taken is the “heart of the work.” If the small portion of the copyrighted material that is copied is an essential part of that work, the court will not only look at the amount of the work that is taken, but also consider that portion’s quality and importance to the work as a whole.
- *The effect of the use upon the potential market for the copyrighted work.* Fair use is more difficult to establish if your use deprives the copyright owner of income or takes away from a new or future market for the copyrighted work. This is true even if your use of the work is not directly competing with his own use of his work; your use may be different but still diminish interest in the copyright owner’s original use of the work.
- In general, ask yourself: Could my use of this copyrighted work potentially affect the sales of this work? If so, it’s likely not a fair use.

Judges use the four factors above in resolving fair use disputes, but these factors are only guidelines. Courts are free to adapt them 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. Are there certain uses that are generally considered fair use?

Transformative uses (as described in FAQ 14) are more likely to be found to be fair use. In addition, the following types of uses are frequently found to be fair use:

- *Commentary and criticism.* If you are commenting upon or critiquing a copyrighted work, fair use principles allow you to reproduce some of the work to achieve your purposes. 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 purposes of commentary and criticism is also grounded in the idea that a copyright owner should not be able to stifle comment or critiques about his work. The public benefits from an open debate, and this debate (including reviews and other comments) is enhanced by including some of the copyrighted material.
- *Parody and satire.* A parody is a work that ridicules another, usually well-known work, by imitating it in a (usually) comic way. Judges understand that, by its nature, parody demands some taking from the original work being parodied. Unlike other forms of fair use, a fairly 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 a 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 use a large part of the work it is making fun of or commenting on in order for the consumer to understand what the source material for the parody is; this is a fair use of a copyrighted work that is transformative and for purposes of humorous commentary. A satire does not need to use a large portion of another work to make its broader point; the satirical point is not tied to ridicule of a specific work, so it does not get the same fair use exceptions because satirical author’s idea is capable of expression without the use of the other copyrighted work.

16. What if I think it’s 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’s not a fair use, then you are infringing upon the rights of the copyright owner and may be liable for damages. However, if you have good reason to believe that your use was fair, but your use is being challenged by the copyright owner, you may be considered an “innocent infringer.” Innocent infringers often don’t have to pay any damages to the copyright owner, but do have to cease the infringing activity and sometimes must pay the owner for the reasonable commercial value of that use.

17. Common misunderstandings about fair use.

There is often confusion over whether a use is “fair” or not. Judges use the guidelines provided in the copyright law, but have considerable discretion in determining if an accused copyright infringer will be liable to the copyright owner. There is no bright-line rule that definitively classifies a use as “fair use.” But there are a number of common misunderstandings and rumors about fair use that can be traps for the unwary. In general, remember that there is no hard and fast rule to the “fair use” defense. The best course of action is to consider the factors that judges will look at (described above in FAQ 14) in relation to your proposed use of the work.

- **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's copyrighted, so it can't be fair use.** WRONG. Fair use applies *only* to copyrighted works, describing conditions under which copyrighted material may be used without permission. Fair use is a defense to 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.** 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 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're selling for profit or deriving income from your use, it's not a fair use.** NOT NECESSARILY. While a commercial use of 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, that is a fair use.** WRONG. There is no set minimum or maximum amount of a work that can be copied or used to be considered a fair use or an infringement.
- **If you're copying an entire work, it's 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. But this is not determinative of the fair use analysis. Making copies of an entire work have 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 restrain anyone from suing you, even if you believe your use was fair. The copyright holder 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. However, the fact that you honestly believed your use to be fair may lead the court to limit the amount of damages, if any, you owe to the copyright holder.

18. What are “nonprofit educational purposes” that may qualify as fair use?

Courts have generally found that nonprofit educational institutions, such as elementary schools and 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 to be “educators” and the attendees to be students.

“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 into a field of knowledge; or
- Presentation of research findings at non-commercial peer conferences, workshops or seminars.

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

Also, keep in mind that court will look to not only the purpose of the use, but also the *nature* of the use as part of the fair use analysis (specifically when looking at the first fair use factor). 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, so that the first work’s meaning or message has been altered, is considered a transformative use.

However, it is not necessary for a work to be transformative in order for there to be a finding of fair use. But, 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 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?

Bottom Line

Remember that there are no absolute rules as to what use will be protected by the fair use doctrine, until that issue is decided by a judge or jury. Each use must be evaluated on a case-by-case basis.

To help you determine if your use could be considered fair use, make sure you analyze the copyrighted work and your intended use according to each factor. 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: www.lib.umn.edu/copyright/FU-checklist.pdf.

USING A COPYRIGHTED WORK

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

STEP ONE: Examine the work itself for information regarding copyright.

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. To use the work,

you should consider seeking permission from the copyright owner (see FAQ 21 for more about permission).

19A. What is a copyright notice?

A copyright notice should contain:

- The word “copyright”
- The © symbol (this is a copyright notice symbol)
- The date of publication
- The name of either the author or the owner of all the copyright rights in the published work.

This information indicates that the work is copyright-protected. It also provides valuable information that will be helpful in tracking down the copyright owner to get permission for your use of the copyrighted work.

19B. What if a work does not contain a copyright notice or the © symbol?

A work missing a copyright notice does not mean the work is in the public domain. Assume the work is protected by copyright unless you can establish it is not. Remember that 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. The next step (see below) is to perform a copyright search to determine ownership of the work and if it is copyright-protected.

STEP TWO: Perform a copyright search.

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, such as assignments of copyright and renewals of copyright. This information can be found in the records of the United States Copyright Office.

First find the information that will assist you in locating the correct copyright documents. Check the work you want to use for the following information:

- 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 this information ready, you can examine the records at the Copyright Office. 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 may not be a current record in the Copyright Office for your work. However, even if you don't 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 an unauthorized use, and help to minimize any damages you may be liable for.

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.

19C. How do I perform a search of the Copyright Office's records?

The United States Copyright Office maintains a website with a wealth of information about performing searches and other copyright-related issues.

Visit www.copyright.gov. You can conduct your own search of copyright records by clicking on "Search Copyright Records," and entering the relevant information in the search fields.

You can also request that the Copyright Office conduct the copyright search for you, for a fee of \$165 per hour or fraction thereof (with a two hour minimum). 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 can also contact the Reference & Bibliography Section of the Copyright Office at copysearch@loc.gov or (202) 707-6850.

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

20. When can I use a copyrighted work without the author's or copyright holder'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 a fair use, while a defense to copyright infringement that allows for 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, remember that you may still be subject to allegations of copyright infringement if the copyright owner does not agree that it is a fair use.

21. What is the permissions process and what does it entail?

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 anywhere from one to three 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.

22. What can I do to get permission from the author or copyright owner?

STEP ONE: Identify the current copyright owner.

22A. Is there a difference between the author and a copyright holder?

There can be. 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 his 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.

STEP TWO: Identify what rights you are seeking.

Each copyright owner controls a bundle of rights related to the work (such as the right to reproduce, distribute, and modify, or make derivative works, of the work). 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: “I would like to reproduce a photograph from your magazine.” If you think your use may qualify as a 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.

STEP THREE: Negotiate whether payment is required.

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.

STEP FOUR: Get it 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, an 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.

23. 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 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, whether you are a “worthy” target for litigation, and whether the other side is likely to 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.

In general, if you have the time and the resources, it is better to take a conservative approach. 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.

24. 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 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.

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, go through the same fair use factors you would if you had found the work in a more traditional medium, such as quotes from a book in print or photographs from a book.

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

Is it 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 necessary, because it was 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.

25A. What if my website is not for profit?

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 right to use the work, as 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.

25B. What if the website I'm copying from originally copied a copyright-protected image?

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.

26. 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.

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 a fair use or copyright infringement).

27. What 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. However, 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 of the copyright owner.