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McHugh's Rights and Permissions Glossary

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All Rights Reserved

WHY COPYRIGHT IS IMPORTANT

Copyright is the bedrock of any publishing business. In order to succeed in the publishing business, you need to know the basics of copyright law.

A knowledge of copyright law, and its corollary subjects—fair use and public domain—will enable you to determine whether or not you need to request permission to reprint material you plan to use in your publication. Understanding the doctrine of fair use and determining whether or not material is in the public domain will provide guidance for using copyrighted material without risking infringement.

The flipside of licensing other's copyrighted material is permitting others to license your copyrighted content. Licensing is particularly important as you pursue a strategy of digitizing your publications as there are numerous vendors who are eager to provide this service for you. For that reason, you should have a grasp on basic copyright terminology.

Copyright also underpins any co-publishing arrangement entered into by your organization. In order to understand publishing licenses, you need to understand the basics of copyright. For anyone entering into such an arrangement, knowledge of copyright is indispensable.

Copyright, like any legal specialty, has its own special terminology one needs to understand in order to master basic rights literacy. That is the intent of this *McHugh Publication*, to provide you with a working vocabulary so you can understand rights licensing and be able to converse with your copyright attorney. This glossary defines 40 key rights and permissions terms.

Assignment of Copyright

A transfer of all the exclusive rights in a copyrighted work. An assignment of copyright is tantamount to a sale of copyright. *Copyright law requires that the transfer of copyright be in writing and that the writing be signed by the copyright owner making the assignment.*

Berne Convention

An International Copyright treaty for establishing the International Union for the Protection of Literary and Artistic Works. Provides for the principle of "National Treatment," which means every member country gives citizens of other member countries at least the same copyright protection that it affords its own nationals. Berne requires no formalities, such as notice and registration that were formerly required for basic copyright protection. The United States signed the Convention on March 1, 1989.

Co-Publishing

A special type of rights agreement between organizations (one need not be a publisher) in which the partners agree to share the costs of acquiring, developing, and marketing new publications. The responsibilities of the various publishing functions: author acquisition, manuscript development, production, marketing, and fulfillment are split among the publishing partners.

Collective Work

The Copyright Act defines a collective work as work "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Examples of collective works include magazines, journals, anthologies, and encyclopedias. Each contribution is covered by its own separate copyright, and the copyright in the collective work covers the selection, arrangement, and organization of the collective work as a whole.

Compilation

A compilation is copyrightable work that is formed by the bringing together or arranging of preexisting material (regardless of whether that material is protected by copyright) in an original—or nonobvious—way. Copyright protection is based on the original selection, coordination, or arrangement of the material, not the copyright status of the preexisting material itself. (From

McHugh's Rights and Permissions Glossary

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The Copyright Permission and Libel Handbook, Jassin and Schecter, 1998, John Wiley and Sons, p. 14)

Contributors Agreement

The agreement used by magazine and journal publishers to secure the right to publish an author's article. The agreement may be in the form of an assignment of copyright or a license. The contributors agreement should always contain the author's warranties that the material is original, doesn't infringe on someone's copyright, and if the author uses copyrighted material of others, the author will obtain permission to use that material from the copyright holder.

Copyright

Copyright is the creator's exclusive bundle of rights, at the moment of creation, to an original work fixed in a tangible medium of expression.

"bundle of rights" consists of the exclusive right to:

- a) Reproduce the work,
- b) Prepare derivative works based on the copyrighted work,
- c) Distribute copies of the work to the public,
- d) Perform the work publicly, and
- e) Display the copyrighted work publicly.

Copyright Clearance Center (CCC)

A nonprofit clearinghouse centralizing copyright authorization to use the copyrighted materials of the publishers registered with the CCC. Collects a fee from the permission requestor, keeps a percentage, and remits the remainder to the copyright holder.

Copyright Infringement

The unauthorized exercise of one or more of the exclusive rights of a copyright owner. Under the copyright law, to prove infringement, you must prove that you

own a valid copyright. You also must prove that the infringer had access to the copyrighted material. Finally, you must show that the copy is substantially similar to the copyright-protected elements of your work. If a work is in the public domain, the copyright in that work has expired and thus it cannot be infringed. If the use of a copyrighted work qualifies as a fair use (see below), that use will not constitute infringement, even though the work is still within the term of copyright protection.

Coursepack

A compilation of material, from copyrighted sources, selected by a college instructor for use as an adopted textbook in the instructor's course. The physical production of the course pack and processing of permissions to use copyrighted material is usually performed by a custom publisher or the campus book store.

Creative Commons

A Creative Commons (CC) license is a "public domain" license that is somewhat similar to an open source license. Open source software is not in the public domain but it is made available, subject to its liberal license, and this license permits users to modify, distribute, or otherwise use the software, without getting permission. Someone owns the material but essentially they allow others to use it free of charge. Creative commons licenses generally require that attribution be provided, the use is noncommercial, and no derivative works be made from the licensed work.

Derivative Work

A work that is "derived" from or based on a pre-existing copyrighted work. Examples of derivative works include a condensation of a book, a movie based on a novel, a foreign language translation of a book, a stage play based on a book, or any other adaptation or transformation of a pre-existing copyrighted work. The right to prepare a derivative work is one of the exclusive rights held by the owner of a copyright.

McHugh's Rights and Permissions Glossary

R-23 ©2010 by John B. McHugh page 3 of 8

Digital Millennium Copyright Act (DMCA)

Law passed by Congress that makes changes in U.S. Copyright Act to address the digitally networked environment. DMCA makes it illegal to manufacture or provide devices or services that circumvent encryptions or other technological measures used to control access to copyrighted works, or to protect the rights of copyright owners in copyrighted works. DMCA reinforces the notion that copyright laws are still valid and enforceable in a digital environment.

Digital Rights Management (DRM)

DRM is software that protects content from unauthorized copying and downloading. Password access, encryption, digital watermarks, and lock-down technology are terms for different ways to limit access and use your site and contents.

Embedded Copyright

Copyrighted material, placed within the body of a work, that may not be apparent to the permission grantor (and copyright holder) of the work or may not be apparent upon a cursory examination of the work. "Embedded copyright" arises because authors typically use the work of others, getting permission, and incorporating the work in their books. For example, an author may use copyrighted poetry or song lyrics, and may have permission to use the copyrighted material only for that one work, in a single language and in a single country. This is also referred to as "third party content."

Fair Use

Fair use refers to situations in which the use of a copyrighted work will not constitute infringement. Fair use is generally limited to use for purposes of teaching, scholarship, research, commentary and news reporting. The four factors to be considered in determining whether a use is a fair use, as listed in Section 107 of the US Copyright Act, are:

a) The purpose and character of use including whether

or not such use is of a commercial nature or is for nonprofit or educational purpose;

- b) The nature of the copyrighted work;
- c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d) The effect of the use upon the potential market for or value of the copyrighted work.

(Note that no single factor is determinate of fair use. Rather, all four factors should be taken into account. Note also that fair use determinations are made on a case-by-case, facts and circumstances basis. There are no blanket rules for fair use, and the only way to definitively determine if a use is a fair use is to have a court rule on the specific situation.)

Grant of Rights

Grant of rights refers to the acquisition of rights in a copyrighted work from the creator. Grants of rights are made under an agreement by which the creator of the work conveys the rights in the work to another person, usually in exchange for a royalty or other financial payment. A grant of rights may be in the form of an assignment or a license, and the grant of rights may be exclusive or nonexclusive. A grant of rights must be signed if the acquiring party wishes to obtain exclusive rights. The grant of rights must define the nature and scope of rights conveyed.

Intellectual Property

The subject material of copyrights, trademarks, trade secrets and patents dealing with intangible property. Copyrights, trademarks, and patents are each governed by different federal laws. Trademarks and trade secrets are also governed by state laws. Generally, intellectual property lawyers either specialize in copyright / trademark law or in patent law. [NOTE OF EXPLANATION: Trade secret law is entirely at the state level. It generally is closer to patent law than to copyright or trademark law, but it has become a practice area for

McHugh's Rights and Permissions Glossary

R-23 ©2010 by John B. McHugh page 4 of 8

most business and employment lawyers, as it is easier to understand and describe than copyrights, trademarks and patents, and it is not the subject of an extensive statutory scheme, as is the case with the other three.

Trademarks are covered by both federal and state law. Copyright law is exclusively federal, although issues such as the scope and validity of contracts containing licenses or assignments of copyrights are governed by state law. Likewise for patents.]

Kinko Case

A court case, with Basic Books as the plaintiff, in which the court ruled against Kinko's defense that the making of multiple copies of various copyrighted materials for classroom use was a fair use. This was the first major copy shop case in which unlimited reproduction, even for "educational use," was ruled not fair use and, therefore, infringement.

Libel

Libel (also often referred to as defamation) is a false statement of fact made about an identifiable person in print or through broadcast that tends to bring the subject into public hatred, ridicule, or contempt, or to injure the subject's reputation or standing in the community or in his or her business and occupation.

License

An agreement whereby the copyright owner or holder of a work permits another party to use a portion of the work, or the entire work, for a limited specific purpose for a specific time in return for a fee or a royalty.

Examples of licenses include an agreement from a US publisher to an Italian publisher granting the Italian publisher the right to prepare and publish an Italian language translation edition of a book, and an agreement from an author to a movie production company granting the production company the right to create and exhibit a motion picture based on the author's novel. A permission to reprint copyrighted material is a license.

Note also that licenses are contracts and are usually for limited time period. A license is subject to being revoked if the licensee fails to make a royalty payment or otherwise violates a term of the contract.

Linking

Linking is the connecting of a Uniform Resource Locator (URL) to another document on the same server or on a different server. In another context, it could refer to a pointer embedded within the text of one document that refers to specific text in another document or in the same document.

Nonexclusive

A license is nonexclusive if the party granting the license (the "licensor") can also grant the same license to others. A license is exclusive if the rights granted under the license can be exercised only by the licensee. If a license is exclusive, the licensor cannot grant the same license to others, and cannot exercise the rights granted under the license. Note the licensing of exclusive rights may preclude other licensing opportunities.

Nontransferable

If a license is nontransferable, the licensee cannot, without the permission of the licensor, transfer the license to a third party. Note that a nontransferable license can still effectively be transferred if the licensee is merged into another entity, unless the license agreement specifically prohibits a transfer of the license by merger or consolidation.

Open Access

Open access is a term used in scientific and scholarly journal publishing to signify the availability and unrestricted use of peer-reviewed, full-text journal articles in a digital form free of charge to users. The financial model for an open access journal is not subscription-based but rather supported by author paid publication fees. The authors hold the copyright rather than the

McHugh's Rights and Permissions Glossary

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publisher. For research funded by Federal Government, the Federal Research Public Access Act (Cornyn-Lieberman Act 2006) requires “that federal agencies with extramural research expenditures of over \$100 million make publicly available via the Internet an electronic version of published articles whose research has been funded by that agency. The manuscript will be maintained and preserved in a digital archive. Through this process, taxpayer funded research will be publicly available via the Internet.” (Frequently Asked Questions, [PDF] [linkThe Federal Research Public Access Act of 2006 \(Cornyn-Lieberman ...\)](#))

Orphan Work

An orphan work is one for which one cannot in good faith find the copyright owner. Note that an orphan work is not in the public domain. Orphan works “are copyrighted works — books, music, records, films, etc — which are still in their term of copyright, but for which the copyright owner cannot be located. Works can become ‘orphaned’ for a number of reasons: the owner did not register the work, the owner sold rights in the work and did not register the transfer, the owner died and his heirs cannot be found, the owner is a corporation that is no longer in existence ... the list goes on. Very often, orphan works become obscure no matter how valuable the material contained in them may be. The use of an orphan work without the permission of the copyright owner constitutes copyright infringement, and thus no creator is willing to use an orphan work for fear that he/she will have to pay a huge amount of money in damages if the owner emerges.” (Source Public Knowledge) The US Copyright Office and Congress are working on legislation that would allow the use of orphan works under certain conditions, and that would exempt a user from damages in excess of a normal fair market permissions fee should the copyright owner subsequently emerge.

Patent

A protection by law of the intellectual property in an idea expressed in an invention, whether a process or a machine.

Permission

A license obtained by the user from the copyright holder to reprint copyrighted material, usually but not always for a fee. In book and periodical publishing, the author is almost always responsible for obtaining permission to use copyrighted material in his manuscript.

Proprietor

The company or agent having the legal right to enter into a licensing agreement on behalf of the author/copyright owner.

Public Domain Work

A work for which the term of copyright has expired or a work which, by law, is not eligible for copyright protection. A work that is in the public domain will forever remain in the public domain, and it cannot be brought into copyright or back into copyright by being incorporated into a new copyrighted work. Examples of works in the public domain by law are most materials published by the U.S. Government and its officials, as part of their duties. Determining whether the copyright in a work has expired and the work has fallen into the public domain can be complicated, and usually requires a careful review of the facts relating to the publication of the work and the applicable statutes. You do not need permission to use a work that is in the public domain.

Release

A release is a contract in which someone foregoes the right to sue for the claims recited in the release. For example, you may obtain a release to protect against claims involving defamation or infringement of a person's right of publicity or privacy. Use a release when obtaining a written interview or photographs of an individual.

McHugh's Rights and Permissions Glossary

R-23 ©2010 by John B. McHugh page 6 of 8

Rights

The body of ownership interest protected by copyright law in the originator of copyrighted material, which may be held, sold, or licensed to others, as when a creator sells or licenses publishing rights to the publisher.

Serial Rights

First serial is the publication of portions of a book by a magazine or newspaper prior to the book's publication. Second serial is the publication of portions of a book by a magazine or newspaper after the book's publication.

Term

The specified length of time a license or contract is valid. The date after which the license is expired.

Territory

Countries where a licensee is permitted to print or distribute the work under the terms of the license.

Thin Copyright

Nonfiction works and other works for which copyright protection is limited. Dates, names of historic events, place names, lists of ingredients and other factual information is not protected by copyright, and thus the copyright in works that consist primarily of factual information is said to be "thin." For these types of works, only the author's selection and organization of the material in the work and the author's particular expression of that material will be protected by copyright. The facts themselves are not protectable, and can be freely used by anyone.

Trademark

A word, symbol, image, design or other element that performs the function of identifying to consumers the source or origin of the goods or services for which the mark is used. For example, APPLE is a trademark for computers and KLEENEX is a trademark for facial tissues.

Universal Copyright Convention

An international copyright treaty. Applies to all works published in the United States after September 16, 1955. Same as Berne Convention except Berne doesn't require copyright notice in order for a copyright to exist. The Berne Convention takes priority if a country has signed both agreements.

Work for Hire (also called Work Made for Hire)

A work in which the copyright is owned by someone other than the person who created the work. A work for hire may be prepared by an employee (in which case the copyright will be owned by the employee's employer) or by an independent contractor working under a written work for hire agreement (in which case the copyright will be owned by the person who commissioned the independent contractor). Section 101 of the US Copyright Act of 1976 defines a work for hire as:

- “1. a work prepared by an employee within the scope of her or his employment; or
2. a work specially ordered or commissioned for use as:
 - a) a contribution to a collective work;
 - b) a part of a motion picture or other audio visual work;
 - c) a translation;
 - d) a supplemental work;
 - e) a compilation;
 - f) an instructional text;
 - g) a test;
 - h) answer material for a test; or
 - i) an atlas.”

World Intellectual Property Organization (WIPO)

An intergovernmental organization serving an international community of States, based in Geneva that develops treaties to ensure protection for members' intellectual property worldwide. WIPO also provides legal servic-

McHugh's Rights and Permissions Glossary

R-23 ©2010 by John B. McHugh page 7 of 8

es to a global market of private users in contracts, patents, trademarks, and copyright.

REVIEWER ACKNOWLEDGEMENT: DAVID KOEHSER

Thanks to Attorney David Koehser who reviewed this work for legal accuracy. David Koehser is a Minneapolis-based lawyer who practices in the areas of copyright and trademark law. Dave's website contains articles on the topics of: Publishing Law, Merchandise Licensing, Copyrights and Trademarks, and Theater and Performing Arts. Request a copy of Dave's informative quarterly e newsletter, Publishing and Merchandise Licensing Law Update. Link to Dave's Web site www.dklex.com.

FREE MCHUGH PUBLICATIONS

Available at my Web site are 80 free papers on all aspects of publishing management, www.johnbmchugh.com. Below are listed some of my papers on copyright.

R-2, *Fourteen Tips for Those Seeking Permission to Use Copyrighted Material*, 2009, 2 pages.

R-6, *Rights and Permissions: McHugh's Recommended Books and Web Sites*, 2009, 3, pages

R-12, *Assessing the Permissions Needs of a Manuscript: Decreasing Your Exposure to Liability*, 2009, 8 pages

R-19, *Sixteen Tips When You Grant Permission*, 2009, 5 pages

R-20, *Copyright Basics*, 2007, 7 pages

R-21, *Your Website and Copyright*, 2009, 5 pages

R-22, *Electronic Rights: How to Assess Their Value*, 2009, 3 pages

MCHUGH RIGHTS AND PERMISSIONS SERVICES

John B. McHugh is an experienced publishing executive and consultant with special expertise in managing rights and permissions. His advice and insights cover all areas of intellectual property management for both print and electronic products.

Tap into McHugh's extensive information industry expertise to help you:

- Grow revenues by fully exploiting the income potential of your electronic rights. McHugh will help you effectively organize your rights management to take advantage of the exploding innovation in digital distribution.
- Educate yourself and your staff about the often confusing and ambiguous subject of copyright practice with McHugh's executive coaching and on-site workshops.
- Get a detailed analysis of the strengths and weaknesses of every area of your rights management with McHugh's Rights and Permissions Audit. He will make recommendations to optimize staffing, streamline management processes, and increase rights, revenues and profitability. Most importantly, McHugh will alert you to serious legal exposure and when you should contract a copyright attorney.

ABOUT JOHN B. MCHUGH

John B. "Jack" McHugh, a 30-year veteran of the publishing business, is a successful publishing consultant. He is the author of the *McHugh Publishing Management Series*—80 practical publications on all aspects of publications management, which are available free at www.johnbmchugh.com.

In the book publishing business, McHugh has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary's Press. McHugh is also an experienced association-publishing executive. For seven years, he was

McHugh's Rights and Permissions Glossary

R-23 ©2010 by John B. McHugh page 8 of 8

Publisher and Director of Programs at the American Society for Quality, a 100,000-member professional association based in Milwaukee, WI. For a two-year period, McHugh served as the Interim Publisher at the Project Management Institute, a Newtown Square, PA. based, 240,000 -member professional association.

Jack McHugh's specialties include book publishing, executive recruiting, journal publishing, rights and permissions, organizational design, and startups. McHugh has advised a variety of association publishers including: Alliance for Children and Families, ASCD, ASTM, AWHONN, Boy Scouts of America, International Employee Benefit Foundation, NSTA, Police Executive Research Foundation, SAE, SMACNA and SNAME.

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