



"Practical Problem-Solving Advice for Publishers"

McHugh and Koehser's Rights and Permissions Glossary

By

John B. McHugh

And

David Koehser, Attorney-at-Law

**Copyright © 2017 John B. McHugh and David Koehser
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.

Knowledge of Copyright Law, including the rules relating to fair use, the duration of copyright and the 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 reduce your risk of infringement claims when using copyrighted material.

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 as used in the publishing business.

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 which one needs to understand in order to master basic rights literacy. That is the intent of this glossary, namely, 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 43 key rights and permissions terms.

Legal Disclaimer

This publication is designed to provide general educational information regarding subject matter covered. The information contained in this publication is not intended to serve as advice for a specific situation, and the appropriate steps to be taken in any situation will depend on the facts of that situation. If legal advice or such services are

required, contact a competent professional with these areas of expertise.

Agent

An agent is an individual or entity that represents a work for licensing for publication and other uses. An author may engage an agent to represent the author's works to publishers, with the goal of securing a publishing agreement. A publisher or an author may engage an agent to represent one or more works for foreign rights licenses, motion picture and television licenses, or other uses. An agent charges a commission as a percentage of the amount received by the author or publisher from each deal secured by the agent.

Assignment Of Copyright

Assignment of copyright is the transfer of an entire copyright, consisting of all the exclusive rights in a copyrighted work. An assignment of copyright is tantamount to a sale of copyright. Copyright Law requires that an assignment of copyright be in writing and be signed by the copyright owner making the assignment.

Berne Convention

The Berne Convention is an international copyright treaty for establishing the International Union for the Protection of Literary and Artistic Works. It 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

Co-publishing is a special type of publishing 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 between the publishing partners. Associations and societies routinely co-publish with commercial publishers.

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 applies to the original selection, coordination, or arrangement of the material, not the copyright status of the preexisting material itself. (From *The Copyright Permission and Libel Handbook*, Jassin and Schechter, 1998, John Wiley and Sons, p. 14)

Contributor's Agreement

The *contributor's agreement* is 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 contributor's agreement should always contain the author's warranties that the material is original and does not infringe on someone's copyright. If the author uses copyrighted material of others, the author should be required to identify that material and to obtain permission to use that material from the copyright holder.

Copyright

A *Copyright* is a bundle of exclusive rights in an original work which has been fixed in a tangible medium of expression. The copyright “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 work publicly.

Copyright protects the expression in a work, but it does not protect the facts, ideas, discoveries, principles or concepts explained or embodied in that work.

Copyright Clearance Center (CCC)

The Copyright Clearance Center is a nonprofit clearinghouse centralizing copyright authorization to use the copyrighted materials of the publishers registered with the CCC. The CCC collects a fee from the permission requestor, keeps a percentage, and remits the remainder to the copyright holder.

Copyright Infringement

Copyright infringement is the unauthorized exercise of one or more of the exclusive rights in a copyright. 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 coursepack is a compilation of material, from copyrighted sources, selected by a college instructor for use as a 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. The production and distribution of coursepacks, even if limited to a single classroom, will constitute copyright infringement unless the owner of the copyright in each work included in the coursepack has given permission.

Creative Commons

A Creative Commons (CC) license is a 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 is a *derivative 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.

Digital Millennium Copyright Act (DMCA)

DMCA, passed by Congress in 1998, is a 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. The DMCA also provides an exemption from liability for

infringement for internet service providers and others for infringing content posted on their websites or transmitted through services furnished by them, provided they did not post the infringing content themselves and provided they remove the content immediately upon receiving a notice of removal in the proper form from the copyright owner.

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

Embedded copyright is 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.

Fair Use

Fair use refers to situations in which the use of a copyrighted work will not constitute infringement. Fair use is a defense against a claim of copyright 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. purpose and character of use including whether or not such use is of a commercial nature or is for nonprofit or educational purpose and whether such use is “transformative,” which means that the work

is being used for a purpose that is different from its original 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 determinative of fair use. Rather, all four factors should be taken into account, although the weight given to each factor will depend on the facts of the particular situation. 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 transfer of rights in a copyrighted work from the creator or other copyright owner to another person. Grants of rights are made under an agreement by which the copyright owner 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 in the case of a license 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

Intellectual property is 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 closer to patent law than to copyright or Trademark Law, but it has become a practice

area for 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.]

Joint Work

A joint work is a work prepared by two or more authors, each with the intent that his or her contribution will be merged with the contributions of the other co-authors to form a single copyrighted work. Unless the contributors to a joint work agree otherwise, each contributor will hold an equal interest in the copyright in the joint work and will be entitled to share equally in any proceeds generated from the use of the work. The co-author of a joint work can use or grant licenses for the use of that joint work without the consent of the other joint authors, subject to an obligation to account to the other joint authors for each author's share of the net proceeds realized from that use or license.

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

A *license* is an agreement whereby the owner of the copyright in a work permits another party to exercise one or more of the rights comprised in that copyright, or the entire copyright, for a stated specific purpose for a specific time in return for a fee, a royalty or some other consideration. Examples of licenses include a publishing agreement between an author and a publisher, 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. The person who owns the copyright in the work being licensed is referred to as the "Licensor" and the person who receives the license is referred to as the "Licensee." Licenses are usually for a limited time period, which will be defined in the license agreement, and, which, depending on the terms of the license agreement, may be 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 that 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 of the licensee with another party.

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 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 a copyrighted work — books, music, records, films, etc — which is still in its 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.” (See *Public Knowledge* <http://publicknowledge.org/>.)

From time to time the US Copyright Office and Congress have considered 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, but no such legislation has been enacted to date.

According to the U.S. Copyright Office (November 2013). “The Copyright Office is reviewing the problem of orphan works under U.S. copyright law in continuation of its previous work on the subject and to advise Congress on possible next steps for the United States. The Office has long shared the concern with many in the copyright community that the uncertainty surrounding the ownership status of orphan works does not serve the objectives of the copyright system. For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace. The issue is not contained to the United States. Indeed, a number of foreign governments have recently adopted or proposed solutions.”

Owner of Copyright

The general rule is that the person who creates a work and fixes that work in a tangible medium of expression will be the owner of the copyright in the work, beginning at the time the work is fixed in a tangible medium. If more than one person participates in the creation of the work and each party intends for his or her contribution to be merged with the contribution of the other author or authors to form a single work, then the work will be a joint work, and the authors will be co-owners of the copyright in the work. Work made for hire is an exception to the general rule. If a work is a work made for hire, then the employer of the person who created the work (if the work was created by an employee as part of his or her employment duties) or the party who commissioned the work (if the work was prepared by an independent contractor) will be the owner of the copyright in the work.

Patent

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

Permission

A *permission* is 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.

Privacy (Right of)

The right of privacy refers to the right of an individual to control the use of personal information relating to that individual and “to be let alone.” The right of privacy is governed by state law, and while the right varies from state to state, it generally recognizes four causes of action, as follows:

- (1) Intrusion into seclusion, meaning the acquisition of information by entering into or observing areas normally deemed to be private.
- (2) Disclosure of true but embarrassing private facts which are offensive and of no legitimate concern to the public.
- (3) False light privacy, meaning the publication of facts which, while literally true, are presented in a context which creates a false and offensive impression.
- (4) Misappropriation of a person’s name, likeness or other personally identifying characteristics for commercial purposes, such as in advertising or product endorsements.

Proprietor

A *proprietor* is the company or agent that owns, controls or manages a copyright and that has the right to enter into a licensing agreement on behalf of the author/copyright owner.

Public Domain Work

A *public domain work* is 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 which are in the public domain by reason of not being eligible for copyright protection 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.

Publicity (Right of)

The right of publicity refers to the right of a celebrity or other well-known individual to control the use of his or her name, image or other identifying characteristics for commercial purposes. For example, a clothing manufacturer cannot use the image of an NBA player or a famous rock musician on a t-shirt without first getting permission from that player or musician. The right of publicity is related to trademark law, in that as with a trademark, a famous individual has the right to prevent the use of his or her name, image or other identifying characteristics for products or services in a manner that would be likely to confuse consumers into believing that the individual had endorsed or licensed those products or services.

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.

Serial Rights

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

Term

The *term* is the specified length of time a license or contract is valid. After the expiration of the term, the rights licensed will revert to the grantor and the licensee will no longer be able to exercise those rights.

Territory

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

Thin Copyright

Thin copyright refers to 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 are 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 facts contained in the work and the author's particular expression of those facts will be protected by copyright. The facts themselves are not protectable, and can be freely used by anyone.

Trademark

A *trademark* is a word, symbol, image, design or other element that is used with goods or services and that serves to identify 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. A trademark used for services is sometimes referred to as a service mark,

although the term "trademark" is used for both trademarks and service marks.

Trademark rights arise upon the actual use of the mark in connection with goods or services, provided that the trademark is not a generic term for those goods or services or merely descriptive of a feature or characteristic of those goods or services and provided that the trademark is not the same as or similar to any other trademark already in use so as to create a likelihood of confusion among consumers.

Federal registration is not required to obtain rights in a trademark, but there are certain benefits to obtaining a federal registration, including the right to use the ® symbol with the trademark. The symbols TM (for trademark) and SM (for service mark) can be used by anyone who believes that his or her mark is a valid trademark or service mark, although the use of either symbol does not convey any legal right to the mark. The ® symbol can be used only if a federal registration has been issued for the mark, and even then the ® symbol can be used only when the mark is used for the goods or services covered by that registration. Use of the ® symbol without having obtained a federal registration constitutes fraud and may be grounds for denial of registration.

Universal Copyright Convention

The Universal Copyright Convention is an international copyright treaty which applies to all works published in the United States after September 16, 1955. The Berne Convention takes priority if a country has signed both agreements.

Work For Hire (also called work made for hire)

A work for hire is 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), provided that in the case of an independent contractor the work must also fall into one of nine categories of use specified in the Copyright Act. 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)

WIPO is 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 services to a global market of private users in contracts, patents, trademarks, and copyright.

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 digital products.

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

- Grow revenues by fully exploiting the income potential of your digital 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 confusing and ambiguous subject of copyright with McHugh's executive coaching and question and answer service.
- 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 contact a copyright attorney.*

Also of Interest from McHugh on Rights and Permissions — Free at <https://bit.ly/2tE3Pjf>

- R-28, *Rights and Permissions: McHugh's Recommended Books and Web Sites*, 2014, 3 pages
- SM-2, *Six Suggestions on Intellectual Property and Social Media: A McHugh Select*, 2014. 3 pages

McHugh Expert Interviews — Free at <https://bit.ly/2Jxq9Fd>

- I-14, *Copyright Aspects of Social Media: An Interview with Attorney David Koehser*, 2010
- I-15, *Ebooks and Copyright: an Interview with Attorney David Koehser*, 2010

About David Koehser, Attorney-at-Law

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*. Dave has a B.A. from the University of Iowa

and a J.D. *cum laude* from the University of Minnesota Law School. You can find his website at www.dklex.com.

ABOUT JOHN B. MCHUGH

John B. “Jack” McHugh is a 40-year veteran of the publishing business. Jack has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary’s Press. Jack is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality and for a two-year period, he served as the Interim Publisher at the Project Management Institute. He is a member of the ASAE Advisory Board for Publishing, Communications, and Media Issues and Practices.

Jack’s specialties include association/nonprofit publishing, book publishing, executive recruiting, journal publishing, rights and permissions, new ventures, organizational design, and social media strategy and policy.

McHugh and Liz Novak, of IAPD, are co-authoring a series of papers on **Networking Techniques**. Jack Mc Hugh is also the manager of the LinkedIn™ group, **Association** and **Nonprofit Publishing**
<https://bit.ly/2SAgdfl>

Contact Jack McHugh, 414-351-3056

Email jack@johnbmchugh.com,

Website <http://www.johnbmchugh.com>.

LinkedIn Page <https://bit.ly/2JL0r06>

R-23, Final. 12/24/13 DK, BK, JM, JAF . 4/1/15 rev 36
 terms, 4/26/17; 5/26/17 JAF