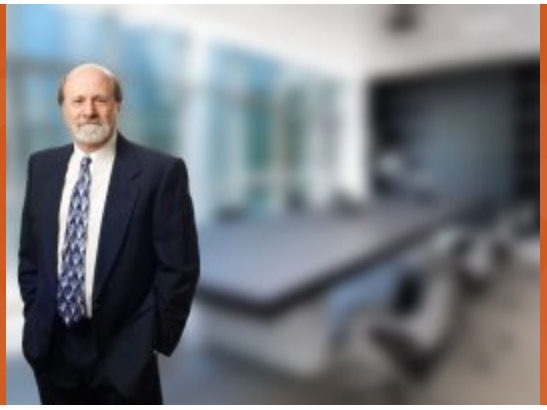
Basics of Copyrights and Copyright Clearance

By:Howard G. Zaharoff
February 20, 2002



I. Copyright Basics

Source: Constitution and Federal Law (Title 17, U.S. Code)

Good Company
a Morse blog

Subject Matter

Original "works of authorship" fixed in tangible form, including

- Literary
- Pictorial
- Musical
- Sound Recordings
- Audiovisual
- Other: Dramatic, choreographic, architectural, computer programs

Scope of Rights

- Reproduction — To make copies.
- Adaptation — To create translations, dramatizations, or other derivative works.
- Distribution — To make the ("first sale") of each copy or phonorecord.
- Public performance — To recite, play, act out, or otherwise perform a work.

  - For an audiovisual work, to "perform" is to show images in any sequence or to make accompanying sounds audible.

- Public display — To show a copy directly or using a device.

  - For an audiovisual work, to "display" is to show images nonsequentially.

  - A performance or display is "public" if done at a place open to the public, at a gathering outside a normal circle of family and friends, or if transmitted to such a place or gathering directly or using a device or process.

Also two newer, lesser rights:

- Digital audio transmission — To perform a sound recording publicly by means of a transmission in non-analog form.

- Attribution and integrity — To claim authorship and prevent mutilation or destruction of a work of visual art, i.e., paintings, prints, sculptures, and exhibition photos existing in single copy or in limited edition of up to 200 copies signed and consecutively numbered by the author.

Limitations on Rights

- Original creation of similar work — No "copying," no infringement.
- Use of ideas, facts, or principles — Copyright protects "expression," not ideas.
- "Fair use" of copyrighted expression.
- Specific use rights granted to libraries, archives, and nonprofit educational institutions under §§108-110 and 112 of Copyright Act.

Duration

- Life of author plus 70 years (previously life plus 50 years; this extension is being challenged on Constitutional grounds).
- For works make for hire and pseudonymous and anonymous works: 95 years from publication or 120 years from creation.
- For rules describing when works enter the public domain, see www.unc.edu/~unclng/public-d.htm.

Ownership

- Author or artist (actual creator) owns copyright unless:

    - There is a written transfer of ownership, or
    - The work is either of the following types of work made for hire:
        - Work created by employee within scope of employment, or
        - Work is specially ordered or commissioned for use as:
            - Contribution to collective work
            - Part of audiovisual work
            - Translation
            - Supplementary work
            - Compilation
            - Instructional text
            - Test
            - Test answers
            - Atlas

    and the work is designated in a *signed writing* as for-hire.

Practice Pointer:

Non-employees own copyrights in their creations *unless* there's a signed work-for-hire or assignment of rights agreement.

- A "joint work" is a work prepared by two or more authors with the intention to merge their contributions into a unitary whole.
    - Joint authors jointly own the copyright (ownership transferable).
    - Unless they agree otherwise, each may grant nonexclusive licenses but must share profits with the other joint author(s).

Formalities

- Notice: Use proper notice on published copies, e.g.,*Copyright © 2002 Howard Zaharoff*
- Registration:
    - Voluntary, but required for lawsuit.
    - Registration before infringement provides better remedies (namely, statutory damages and attorneys fees).
    - Minimal cost — Currently $30.
    - Simple procedure — Proper application form, filing fee, and deposit of "best edition" (two copies of published work, one copy if unpublished).

II. Copyright Clearing and Packaging for Courseware and Supplementary Material

Rights of Use

If using copyrighted work, need basis for use:

- Public domain — Copyright expired, dedicated to public (can be shaky basis) or not copyright protected ,e.g., works of U.S. government.
- Permission — See "Permissions/Rights Clearance" below. In general, permission must be in writing, unambiguous, of sufficient scope, and from the proper rights holder.
- Fair use, de minimis use, or special educational exceptions (Copyright Act §108 et sec.)
- Compulsory licensing — Mainly musical works, including webcasting.
- Consider non-copyright rights, including:
    - Trademark/Trade Dress – Beware of using third party names and works commercially without permission.
    - Defamation – The law penalizes the publishing of false and defamatory statements about individuals.
    - Publicity – Individuals, and occasionally businesses and institutions, can prevent exploitation of their name and likeness for trade or advertising.
    - Privacy – Individuals have rights against unauthorized and undesired publicity; special issues with medical and financial data.

- Moral Rights ("droit moral") – Many foreign countries, and under certain jurisdictions and circumstances in the U.S., individuals may have rights of attribution and paternity, integrity, and withdrawal over their creations.

Practice Pointer:

In general, get signed release from all individuals who appear in or in connection with courseware and multimedia works.

Permissions/Rights Clearance

- General Considerations
  - Different works and rights may require different means for clearing.
  - In general, one must consider every right involved in creating a new work and be sure to have proper clearance for each of these rights.
  - Determining owner of right can be challenging.
    - Many rights derive from private contracts.
    - WGA members may have certain reserved rights in studio materials based on guild agreements.
    - Can search Copyright Office records for transfers and assignments.
    - Distinguish "tangible" media (e.g., for CD-ROMs use) from "transmission" media (Internet use): basically reproduction v. performance/display.
    - Permissions should be clear, complete and in writing
- Specific Works
  - Books – Book publishers control most rights in published text; but authors may retain relevant rights.
  - Periodicals – Periodical publishers may hold all rights (common in academic publishing but not elsewhere), one-time rights, or more likely something in-between: contact publisher and author; Copyright Clearance Center controls reproduction rights for most publications and electronic rights for many.
  - Photos/Images – In most (but not all!) cases freelance photographers retain copyrights; generally they do not have releases from subjects; consider stock photo agencies (generally requires flat fee).
  - Music – May involve several parties in interest, including music publisher (controls composition), record company (controls particular sound recording of composition), and possibly performers and performers' unions (AFM and AFTRA); for online projects requiring performance rights, contact ASCAP, BMI, and/or SESAC; if "sync" license required, try Harry Fox Agency (NY); for use of particular sound recording try RIAA.
  - Motion Pictures/Audiovisual Works – Often hard to clear because many separate works (book, visuals, music, sound) and potential rights holders (studios, distributors, actors, music publishers, etc.); permissions may be required of and payments due actors, actors unions, screenwriters, publishers, composers et al;

check Motion Picture Licensing Corporation; consider using stock footage from stock houses.

 Databases – In U.S. may be copyrights issues and contracts; in EU must deal with special database protection.

See "Getting Permission" (www3.utsystem.edu/ogc/IntellectualProperty/ PERMISSN.HTM).

Packaging and Managing Rights

Full use and exploitation of a new work requires a systematic and organized approach to recording, offering, licensing and tracking rights.

- Centralize responsibility (comparable to a technology licensing office).
- For every multimedia/courseware creation, develop a comprehensive checklist of each copyright interest and other right
- Identify owner(s) of each right, e.g., university, individual student or professor, or third party.
- Identify basis for rights of use, whether ownership, public domain, fair use, or permission.
- Identify scope, duration, and applicable restrictions.
- Keep separate files for each grant or license from third parties.
- Create "Rights Books" for each work that organize the above information (that is, compile available rights and applicable limitations in single reference).

If you would like to discuss the basics of copyrights and copyright clearance issues, please feel free to contact a member of our team.