

Obtaining Copyright Permission to Use Digital and Online Content

Obtaining permission to use digital content, whether online or in a physical container such as a DVD, should generally be approached in the same manner as analogue or traditional content. In any digital project, whether simply including a photograph or article on a website, developing an entire blog or multimedia electronic magazine, or creating a digital archives or virtual library, permission-wise you need to consider the following:

Are you using a work that is protected by copyright?

Digital and non-digital works are equally protected by copyright. Follow the rule that content on the internet is protected by copyright unless there is information associated with the content that states otherwise. Similarly, content such as a movie on a DVD is protected by copyright.

Is the duration of copyright still running or is the work in the public domain?

In the U.S., copyright protection lasts 70 years after the author's death. In some countries such as Canada, duration is life-plus-50. Once copyright has expired, you are free to use the work without permission (see below about moral rights which are perpetual in some countries.) When using work in an online forum such as a website, blog or social networking space, get permission for life-plus-seventy to cover yourself in all countries.

Is the work an adaptation or translation of a public domain work?

Adaptations and translations may be copyright-protected works even if they are based on public domain works. Generally, digitizing a work will not in itself result in a new copyright-protected work. However, if it is more than a mere digitization and there are modifications to the work, there may be a new copyright-protected work. In this situation, you may need to obtain permission from the owner of both the original/underlying work, and the new digital work.

Are there underlying works for which permission is needed?

Digital works are by their very nature comprised of many layers of rights and different kinds of copyright-protected works. Websites, electronic publications, video games, digital libraries, and educational software, often consist of various types of works from literary (including computer software/code) to artistic to musical to audiovisual. Each of these works must be cleared when creating a multimedia work or when reproducing a part of that work. Different works may have different copyright durations, and different ownership and authorship. You need to get permission for each of the underlying works as well as the "final" work you are reproducing.

Are you using a substantial portion of a work?

Generally, very small uses of works such as quotes do not require permission. There is no actual defined amount that would not require permission as it depends on the facts in each particular circumstance. It is more difficult to use a “small” portion of a photograph or painting.

Are you using the work in a copyright sense?

Reproducing, publishing, performing in public, or adapting a work are copyright uses. Also, including content on a DVD or blog or digital archive or library are copyright uses.

Is there an exception in the law that exempts you from obtaining permission?

Exceptions are generally limited and vary from country-to-country. Check your country’s copyright statute to see what exceptions exist that may apply to your exact use of content. If you are comfortable applying fair use or fair dealing to your particular fact situation, you may also make that analysis, keeping in mind that fair use and dealing is a defense to infringement and not an exception and its use requires a judgment call. Exceptions and fair use and dealing often involve a look at your organization’s overall approach towards copyright risks and how it manages and allows any risks.

Are you using the work in a country where an author has moral rights?

If so, are you modifying the work in a manner that may be prejudicial to the honor or reputation of the author, and does the author’s name appear in association with the work? In the U.S., moral rights only attach to authors of works of fine art. However, in many countries, authors of all copyright-protected works have moral rights. Even mere digitization of a work may arguably result in a modification of that work and may harm the reputation of an author. Thus, moral rights may have an even greater role in the digital world. If possible, obtain a waiver of moral rights if you are using the work on a worldwide basis. Not all countries allow for a waiver of moral rights.

Do you already have permission to use the work?

Check your database of permissions to see whether you have already obtained permission to use the work in question in the manner in which you wish to use it. You may have direct permission to use the work from its owner, through a copyright collective agreement or through a digital license with a database or content aggregator. If the work was created by a fellow employee, your employer/organization may be the owner of the work and therefore you do not need to seek permission to use it. Also, you may have implied permission to use the work by virtue of the nature of the work and its availability; this is a copyright risk analysis you need to make. Further, the work in question may be covered by a Creative Commons (CC) license; again, check to determine what uses are permitted by this CC license.

Negotiating with Digital Rights Owners

Some unique considerations may arise when negotiating the permissions you need for using content in a digital format. These include the following:

If you are obtaining permission to use content in a digital format, also consider obtaining some traditional rights. For example, you may want to promote some of the content through print publications and may require certain print rights.

Your permission to use the content on a website, for example, may not include the right to digitally archive that same content on a DVD or on the internet. Consider all digital rights you may need at your initial negotiations with the rights holder. It is always better to obtain more rights than what you need (if you can afford to do so), than to have to later negotiate further rights for use or re-use of the same works.

The value of digital content is still not established and is a matter of negotiation. Sometimes rights holders see their work as having more value in the future in a digital format and may ask for much more than you are willing to pay for that content. Determine your budget before negotiating rights and place your own value on those works before negotiating with the rights holder.

The internet often means that the content may be reproduced in unlimited quantities. Is the rights holder in agreement with this?

Digital content may be reproduced in a variety of quality. Negotiate with the rights holder the quality of the reproduction to avoid a future complaint by the rights holder and a possible allegation of moral rights infringement.

If you are adapting the content at all or digitizing traditional content, ensure that the rights holder agrees with what you are doing with that content and is fully aware of your use of that content.

Consider how you will pay the rights holder. If the rights holder is a book author, for example, he is used to being paid a royalty for the use of his work. However, in the digital world, it often makes more sense to pay a fixed fee, especially if a work is one of 1000's going into a DVD or a social networking site. This is negotiable.

Many rights holders are concerned about unauthorized uses of their works once their works are available in a digital format. What precautions are you taking to protect content, for example, copyright notices, encryption, password protected sites, and policing authorized uses?

Conclusions

Whether you are clearing copyright in traditional or digital content, a checklist or written permissions policy (as a stand-alone document or as part of a copyright or intellectual property policy), may help ensure that your organization has a thorough and consistent approach to clearing digital permissions.

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