
Rachel Brooke · Brianna L. Schofield, Ed.

THIRD-PARTY PERMISSIONS AND HOW TO CLEAR THEM

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AUTHORS
ALLIANCE

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TABLE OF CONTENTS


I.	Introduction to Copyright, Publication Contracts, and Permissions	2
	Introduction	2
	Copyright Basics	7
	Publication Contract Basics	9
	Third-Party Permission Basics	11
II.	Do You Need Permission?	14
	Is the Work Protected by Copyright?	18
	Expiration of Copyright	19
	Works Created After 1978	20
	Works Published 95+ Years Ago	21
	Other Works	22
	Works Authored by the Federal Government	23
	Uncopyrightable Subject Matter	24
	Facts	25
	Ideas	26
	Scènes à Faire	27
	Miscellaneous Items Not Protected By Copyright	27
	Abandonment / No Rights Reserved	28

Is the Work Available Under a Creative Commons or Other Public License?	29
Is Your Use of the Third-Party Materials “Fair Use”?	31
Does Your Publisher Allow You to Rely on Fair Use?	35
Your Publication Contract	35
Your Publisher’s Policies	37
Practical Tips	39
Understand Clear Cut Cases	39
Find the Simplest Way to Use the Work	39
Credit the Author	41
Consider Norms in Your Community	42
Where Else Can You Turn?	43
III. Who Holds the Rights?	44
Timeline and Preparation	46
When to Request Permission	46
Setting a Budget	48
What Rights Do You Need?	48
Finding a Rightsholder	50
Where to Start	51

Rights Held by a Creator	55
Text Permissions	55
Image Permissions	56
Rights Held by a Publisher	58
Rights Held by Multiple Parties	59
Joint Ownership	60
Exclusive Licenses	61
Translations	62
Image Permissions	63
Elusive Rightsholders	64
IV. How Do You Secure Permission?	68
Terms	71
Term or Duration	75
Print Run	77
Exclusivity	78
Fees	79
Calculating Fees	80
Negotiating Fees	80
Payment of Fees	83


Recordkeeping	84
V. When Best Efforts Fail	86
Orphan Works	88
No Agreement on Terms	91
What Now?	94
Modify Your Use	94
Abridge Your Use of the Materials	95
Use the Materials Selectively	96
Use Alternate Materials	97
VI. Conclusion	102
Endnotes	104
Index	108

CHAPTER 1:
INTRODUCTION
TO COPYRIGHT,
PUBLICATION
CONTRACTS, AND
PERMISSIONS



THIS GUIDE IS DESIGNED TO SERVE AS AN EDUCATIONAL resource for authors who have decided they would like to include third-party materials, or expressive work authored by another person or entity, in their own original work. *Authors Alliance* regularly hears from authors struggling with the third-party permissions process, and we have designed this guide to help authors navigate the issues involved. Some common situations in which an author may be required to seek third-party permissions are:

- When including photographs in a book or other work for aesthetic purposes;
- When using lyrics or lines of poetry as an epigraph in a novel or nonfiction book;


- 
- When incorporating a published essay into an anthology (and when there is no contributor agreement in place);
 - When your publisher requires permission for each copyrighted third-party work included in your work, regardless of whether such permission would legally be required.

This guide provides information about the permissions process, with a special focus on textual permissions and image permission and highlighting the different issues involved with these two types of permission where applicable. In general, this guide is for authors who have already signed publication contracts and are far enough along in the writing process to have already selected third-party materials they wish to include in their works. However, this guide may be useful even if you do not yet have a publication contract or manuscript, and in fact, it can be prudent to consider these issues early in the writing process. In some cases, permissions issues can affect writing decisions: if a section of your book or article relies on the inclusion of a certain photograph or textual excerpt, you may want to determine whether you will be able to obtain permis-

sion to use the work (or lawfully use the work without permission) before writing that section.

This guide provides general information about the process of obtaining permission to use third-party materials in original works of authorship, developed with U.S. law and practice in mind. It does not apply this information to any individual author's specific situation. This guide is not legal advice, and using this guide does not create an attorney-client relationship. Please consult an attorney with experience in publishing law if you are unsure how the information in this guide applies to your particular situation, or if you would like legal advice about your rights and obligations.

Finally, this guide does not address other legal issues related to incorporating third-party materials in your work. It is important for authors to be aware that clearing copyright concerns does not preclude other legal claims. When using third-party materials, authors should consider legal issues beyond copyright, such as contractual restrictions, privacy rights, trademark law, the right of publicity, defamation, and community norms, like rules against academic plagiarism.



In the remainder of this chapter, we lay the groundwork with some foundational information on copyright law, publication contracts, and permissions in order to help authors understand why permissions are required in the first place. In **Chapter 2**, we examine the most common situations in which authors do not need permission from a rightsholder to help you evaluate whether you need to request permission to use the materials you would like to include in your work. In **Chapter 3**, we explain how to identify and locate a rightsholder, and in **Chapter 4**, we explain how to go about the process of securing permission. We conclude in **Chapter 5** with a discussion of what steps or options authors might consider when their efforts to obtain permission are unsuccessful. Throughout this guide, we have interspersed practical tips gleaned from our research, experience, and interviews. Before you start, it is helpful to have both your publication contract and a copy of the third-party materials you would like to use in hand, as we refer to these documents throughout the guide.

COPYRIGHT BASICS

Copyright is the legal mechanism that gives rightsholders control over the use of an expressive work, like a book, photograph, painting, or film. Copyright protection applies broadly to creative expression, covering works like computer software programs, video games, and architectural works in addition to text and images.

Copyright protection exists from the very moment of a work is created and “fixed” in a tangible form: when a work of original authorship is produced that involves at least some creativity, copyright protection for the work is immediately secured, without any further action required. An author will automatically hold a copyright in a work simply by creating it. The exception to this rule is that copyrighted works can be produced as “works made for hire,” such as when an employee creates an original work of authorship during the scope of her employment or when a work is specially commissioned, in which case the employer or commissioning party owns the copyright.¹ Although not required to secure copyright protection under today’s copyright law, copyrights can and often are registered with the U.S. Copyright Office, and registration can provide benefits.²



Copyright protection does not last forever: rather it provides a “temporary monopoly” on controlling uses of a work, after which period it is no longer protected by copyright and becomes free for anyone to use. Copyright protection does last a very long time, however: under current copyright law, for a work created by an individual author, copyright protection lasts for 70 years after the creator’s death.

When we talk about copyright, we really mean a bundle of six separate rights with respect to a work.³ The six exclusive rights under copyright are:

1. the right to reproduce the work by making copies,
2. the right to prepare derivative works (like translations or adaptations) based on the work,
3. the right to distribute copies of the work,
4. the right to perform the work publicly,
5. the right to display the work publicly, and
6. for works that are sound recordings, the right to perform the work through audio transmission (readers should note that this right is unlikely to be relevant for authors of textual works).


Because copyright owners have these exclusive rights, and because incorporating a third-party work into

your own would implicate one or more of these rights, many uses of copyrighted material require permission from the copyright owner in order to avoid liability for copyright infringement.

These exclusive rights automatically belong to the author, who is typically the individual or individuals who created the work (unless the work is a work made for hire). This being said, as the original copyright holder, the author can hand over the exclusive rights to another party or parties, and there are a multitude of ways that the exclusive rights can be allocated and apportioned. Authors can and often do sign over some or all of their copyright rights to their publisher. Copyrights can also be inherited or transferred to another person or entity, like a museum or archive. To account for situations where the original copyright holder has handed over the rights to another party, we use the word “rightsholder” in this guide to refer to the party who holds permission rights and can grant you the permission you desire.

PUBLICATION CONTRACT BASICS

The relationship between author and publisher is governed by the publication contract.



For our purposes, publication contracts establish two important points about third-party permissions. First, the publication contract will directly allocate responsibility and costs for clearing third-party permissions, and these obligations are generally placed with the author. Second, the publication contract will contain what are known as warranty and indemnity clauses, which impact your potential liability for any copyright infringement claims that emerge as a result of your work. Warranty clauses are “warrants,” or promises, that your work does not infringe the copyrights of any third party, in addition to promises that the work is accurate and does not defame any person (issues beyond the scope of this guide). Indemnity clauses effectively “indemnify” your publisher, or agree to compensate it for certain kinds of harm. Indemnification clauses typically state that the author agrees to compensate her publisher in the event that harm to or liability for that publisher occurs related to a breach of your warranties. Because authors typically assume the responsibility for clearing permissions and have a contractual obligation to accept legal and financial responsibility for the failure to properly do so, authors


have good reason to make sure they are meticulous and precise when clearing permissions.

Special Case: Authors Who Have Not Signed a Publication Contract

If you have not yet signed a publication contract, you may want to consider negotiating with your publisher to try to get it to take a more active role in the permissions process, to help with permissions costs, or to include more author-friendly language in your warranty and indemnity clauses. For more information, including sample contractual language for more author-friendly terms for permissions, warranty, and indemnity clauses, check out our guide, [Understanding and Negotiating Book Publication Contracts](#).⁴

THIRD-PARTY PERMISSIONS BASICS


A third-party permission agreement—otherwise known as a “license”—is a contract between a rightsholder and an author who wishes to use some or all of the rightsholder’s work in their own original work. In this contract, the rightsholder agrees to permit the author to exercise one or more of their exclusive rights



under copyright. Licenses can be exclusive—meaning only the licensee can exercise the relevant right(s)—or non-exclusive—meaning that both the licensor and other parties may also be able to exercise those rights. In general, rightsholders will offer permissions licenses on non-exclusive bases, but there may be exceptions to this rule.

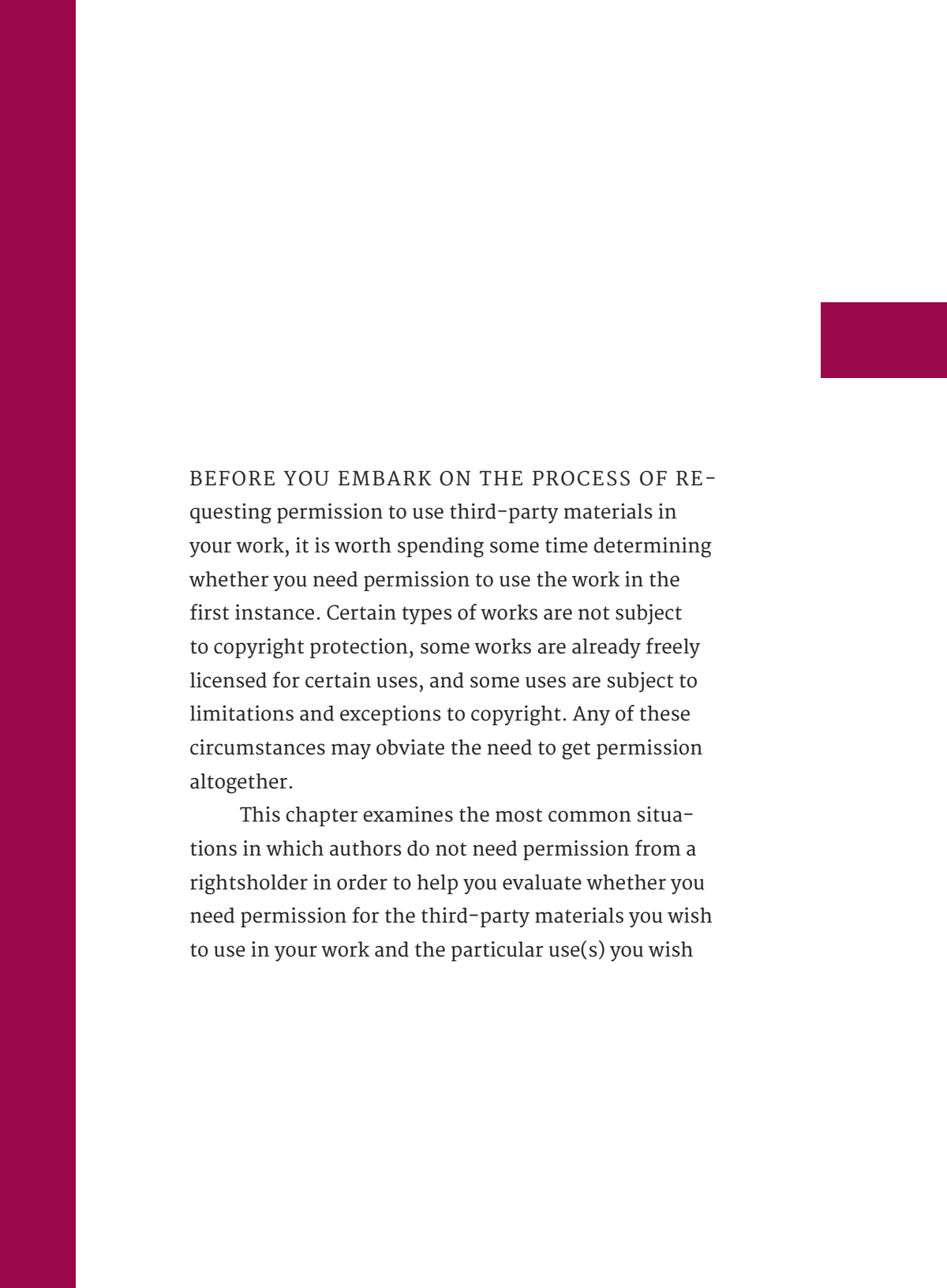
Because a copyright holder has the aforementioned six exclusive rights under copyright, using copyrighted third-party materials in your work without obtaining permission could constitute copyright infringement of one or more of the exclusive rights (such as the rights of reproduction and distribution), unless an exception or limitation to copyright such as fair use applies to permit the use. And because of the warranty and indemnity provisions in publication contracts, failing to clear permissions where required could expose you to legal liability and also result in massive costs in the event of a lawsuit; even unsuccessful copyright infringement claims can cost upwards of thousands of dollars to defend.

Taken together, these contractual and legal principles mean that clearing permissions, where required, is crucial for authors in order to avoid legal liability.




This is the reason we have compiled this guide: clearing permissions is often a necessary part of the publication process for many authors, but it can be daunting. However, this process does not have to be overly intimidating, and legal risks can often be managed with prudent preparation and due diligence. In the chapters that follow, we will explain the steps and considerations for determining whether you need permission, locating the rightsholder(s) for the work you wish to use, obtaining the permission, and contemplating possible alternative paths forward if your best efforts to obtain permission do not bear fruit.

CHAPTER 2: DO YOU NEED PERMISSION?



BEFORE YOU EMBARK ON THE PROCESS OF REQUESTING permission to use third-party materials in your work, it is worth spending some time determining whether you need permission to use the work in the first instance. Certain types of works are not subject to copyright protection, some works are already freely licensed for certain uses, and some uses are subject to limitations and exceptions to copyright. Any of these circumstances may obviate the need to get permission altogether.

This chapter examines the most common situations in which authors do not need permission from a rightsholder in order to help you evaluate whether you need permission for the third-party materials you wish to use in your work and the particular use(s) you wish



to make of them. Authors should note that advising an author on whether or not they need to obtain permission can constitute legal advice, which your publisher is unlikely to be able to provide based on the rules governing the practice of law. Moreover, while the responsibility of securing permission—and liability for failing to secure permission when required—is typically placed on the author through the publication contract, your publisher may have policies that require you to get permission for each third-party work you use and restrictions that affect your ability to rely on limitations to copyright.

Special Case: Alternative Contract Terms for Clearing Permissions

As discussed in **Chapter 1**, the publication contract allocates responsibility for clearing permissions, and this burden is typically placed with the author. But before you begin the permissions process, it is prudent to double-check that this is the case by examining the language in your contract that deals with permissions. If the publisher has assumed responsibility for clearing permissions, an author is relieved of this burden. If you are not sure whether

your publication contract places the burden of clearing permissions on you or the publisher, you can also ask your publisher for clarification.

In the coming pages, we introduce categories of works and circumstances in which authors may not need to seek permission to use a work without running afoul of copyright law. First, we discuss the categories of works that are not protected by copyright, explaining copyright expiration, uncopyrightable subject matter, and other limitations on copyright that can make permissions unnecessary. Then, we share information about public licenses, which typically do not require authors to apply for permission (though there may be other conditions on using the materials). Next, we discuss situations in which an exception or limitation on copyright—for our purposes, the doctrine of fair use—might apply, making a use permissible without obtaining formal permission. Finally, we flag the ways that publication contracts and publisher’s policies can restrict some authors from relying on fair use, instead requiring that authors secure permission. We will conclude by offering practical tips to keep in mind

as you evaluate whether permission is necessary for a particular use of a third-party work.


IS THE WORK PROTECTED BY COPYRIGHT?

One question to ask yourself when determining whether you need permission to use third-party material in your own work is whether the relevant third-party materials are protected by copyright at all. While copyright protection is very broad, some things are simply not protected. As we discussed in **Chapter 1**, the reason for needing permission to use third-party materials is copyright: because the copyright holder possesses the exclusive right to reproduce and distribute their work, other parties need permission in order to exercise these rights to avoid infringing on the copyright holder's rights. But if an author incorporates third-party work that is outside the realm of what copyright protects, there can be no infringement since there are no copyrights to infringe. This is why the absence of copyright protection means that there is no need to request permission to use the material in order to avoid liability for copyright infringement.

Works that are not entitled (or are no longer entitled) to copyright protection are a part of what is known as the “public domain.” The public domain refers to works in which copyright is not owned by any party; instead, these works are free for the general public to use as desired without the shackles of copyright. In this section, we go over some categories of works that are a part of the public domain. Note that these categories are not exhaustive, but are among the most common types of works outside of copyright protection. If a work is a part of the public domain, it is generally free for an author to use without obtaining permission.

Expiration of Copyright

As mentioned in **Chapter 1**, copyright protection only lasts for a set period of time. This is known as the term of copyright.⁵ Unfortunately, changes to copyright law over time have complicated efforts to easily determine whether a copyright term has expired, but a set of guiding principles remain to make the determination simpler in some cases.



Works Created After 1978: Under current U.S. law, for most works created by an individual author on or after January 1, 1978, copyright protection lasts for the lifetime of the author plus an additional 70 years. This means that if you seek to use a work that was created in 1978 or later, you can usually determine when its copyright protection will lapse by first determining whether the author is still living. If the author is deceased, copyright protection will lapse 70 years from the date of the author's death.

Special Case: Works Published Between 1978 and March 1989


While most works created by an individual author after 1978 fall into the “life plus 70” rule, for a period of time between January 1, 1978 and March 1, 1989 there were additional requirements in place for securing copyright protection for works published in this time period. If a copyright owner failed to meet these requirements, the work entered the public domain. For this reason, some works published between January 1, 1978 and March 1, 1989 are in the public domain.

Note works authored anonymously or pseudonymously and works created on a work made for hire basis are subject to a different rule: under copyright law, the copyright term in those works expires 95 years after the date of first publication, or 120 years after the date of first creation—whichever comes first.

Works Published 95+ Years Ago: The good news is that there is one hard and fast rule which may work to your advantage: all works originally protected by copyright which were first published in the United States 95 years ago or longer have automatically entered the public domain. This means that on January 1, 2021, works first published in 1925 entered the public domain, and in January 1, 2022, works first published in 1926 will enter the public domain (and so on). If an author seeks to use third-party material published in the United States 95 years ago or earlier in her own work, she can be confident that this work is in the public domain.

Special Case: Unpublished Works

The term of copyright for unpublished works from this time period are different. Works that were not published and not registered before the latest



Copyright Act went into effect on January 1, 1978 were swept into the life plus 70 regime, meaning that unpublished, unregistered works from the early 20th century (or before) may still be protected by copyright. As of 2021, unpublished works from authors who died before January 1, 1951 are in the public domain.


Other Works: Prior to 1978, copyright duration was measured not from the date of creation, but instead from the date of first publication (or, if the work was not published, the date of registration, if registered as an unpublished work). Additionally, rules about copyright registration, copyright notices, and copyright renewal changed over time. Because of these changes to copyright law during the 20th century, works that were created or published after 1925 (as of 2021) but not created on or after January 1, 1978 can have murky copyright statuses (as can some works published between January 1, 1978 and March 1, 1989, as discussed above). If you are interested in using a work from this time period, check out the University of California Berkeley's [**Is it in the Public Domain? Handbook**](#)⁶ for evaluating whether the work is in the public domain.

And for more information on expiration of copyright, check out Cornell University’s [Copyright Term and the Public Domain in the United States](#)⁷ chart.

For more information on investigating the copyright status of a work to determine whether it is in the public domain, including information on support services the Copyright Office provides, see the Copyright Office’s [Circular 22: How to Investigate the Copyright Status of a Work](#).⁸

Works Authored by the Federal Government

The next type of public domain works to be aware of is works authored by the U.S. federal government. Copyright law defines a work authored by the federal government as “a work prepared by an officer or employee” of the federal government “as part of that person’s official duties.”⁹ Works prepared by government contractors, for example, do not qualify, as contractors are not government employees. Note that this rule does not apply to works authored by state and local governments (though some state and local entities have similar policies¹⁰), nor does it apply to foreign governments. If an author would like to use material from a United States federal government publication



in her work, she may decide to do so without requesting formal permission once she has verified that it is a work authored by the federal government. Relatedly, under the so-called government edicts doctrine, judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy, and so are also part of the public domain.

Uncopyrightable Subject Matter


Another area of the public domain to be aware of as you evaluate whether you need to request permission to make your desired use of the third-party materials is so-called “uncopyrightable subject matter.” This refers to types of expression that are categorically not protected by copyright. For our purposes, the major categories of uncopyrightable subject matter are facts, ideas, and *scènes à faire*.

For each of these categories, you should be aware that while the underlying idea, fact, or *scène à faire* is itself not protected by copyright, the actual words used to express these are protected—as you will recall from **Chapter 1**, any original expression with a modicum of creativity qualifies for copyright protection. Unlike

copyright expiration and works that are not eligible for copyright protection (such as those authored by the federal government), uncopyrightable subject matter typically refers to parts of third-party materials that are outside of copyright protection. So while you are free to use a fact presented in another's work in your own, you may be exposing yourself to copyright liability if you copy the exact words used in that work to express the fact without permission.

Facts: It is axiomatic to copyright law that facts are not protected by copyright. This is because copyright protects original creative expression, whereas facts cannot be said to be created, but rather are discovered. There is also a widespread view that it is socially beneficial for facts to be treated as building blocks to be used by all to advance knowledge. Consequently, facts are categorically not protected by copyright. This is true even if the fact itself turns out to be untrue: when a work presents information as factual, that information becomes free for others to build on in the future.¹¹

As noted above, while using a fact from another's work in your own does not infringe their copyright, you typically cannot copy the expression, i.e., the actual



words used to convey those facts. But the general rule that you are not entitled to copy the expression used to convey the fact becomes a bit more complicated when the fact you wish to use can be expressed only in limited ways: if the author does not add any originality, but presents the facts in a bare bones way, the expression might not be protected either. If you come across the phrase, “J.D. Salinger was born in 1919,” and you wish to include this fact in your work, you do not have to strain language to avoid copying the expression; there are very limited ways to express this fact, meaning the phrase is not an original expression protected by copyright.


Ideas: Ideas, as well as related categories such as themes, concepts, processes, systems, principles, and discoveries, are also not protected by copyright. The rationale is similar to the rationale for no protection for facts: while the expression used to convey ideas can be copyrighted, the underlying idea cannot be. Copyright gives creators a temporary monopoly on the use of their works, and to restrict the use of an idea to only one creator would work against freedom of expression. Moreover, an idea is simply too general to be entitled

to copyright protection. By way of example, if you use the idea of a school for magic in your story of adolescent wizards, you have not infringed the copyright in *Harry Potter*, so long as you are not copying the original expression of the *Harry Potter* series.¹²

Scènes à Faire: Scènes à faire (from the French for “scenes to be made”) are characters, settings, events, or other elements of a work which are standard in the treatment of a given topic. The use of scènes à faire often emerges in the context of fiction writing and applies to elements like images of blood and crosses in vampire stories and cowboys in Western stories. Similarities in the use of scènes à faire cannot form the basis of an infringement claim. By way of example, if an author writes a story about a dinosaur zoo involving electrified fences, workers in uniform, and dinosaurs in captivity, she has not infringed the copyright in *Jurassic Park*,¹³ because these elements would logically be included in a story about dinosaur zoos.

Miscellaneous Items Not Protected by Copyright

There are also some miscellaneous categories of expression that are not protected by copyright for a



variety of reasons. These include names, titles, short phrases, blank forms, and typefaces. The specific rationales for excluding these from copyright protection vary, but overall reflect the view that a temporary monopoly on the use of these items is neither socially beneficial nor practical. For more information on these miscellaneous items outside of copyright protection, see the U.S. Copyright Office's [**Circular 33: Works Not Protected by Copyright**](#).¹⁴

Abandonment/No Rights Reserved


A final type of work not protected by copyright is works for which copyright protection is abandoned or no rights are reserved. In theory, a copyright owner can voluntarily abandon her copyright before it expires by engaging in an overt act reflecting the intent to relinquish her rights.¹⁵ Abandoned works then become part of the public domain, available for anyone to use without formally requesting permission. But authors should be aware that abandonment of copyrights lacks a clear, formal process recognized by the Copyright Office. Even if an author wishes to dedicate her work, which was formerly protected by copyright, to the public domain, it is unclear whether an abandonment

would be effective in the eyes of a court in the event that someone who uses the abandoned work in their own is sued for copyright infringement.

Similar to abandonment, Creative Commons offers a “No Rights Reserved” tool for copyright owners who wish to waive copyright interests in their works and thereby place them as completely as possible in the public domain. If a copyright holder makes a work available under a “No Rights Reserved” notice, the copyright holder is indicating their intent to make the work free for others to use without permission and without any restrictions on the onward use.

IS THE WORK AVAILABLE UNDER A CREATIVE COMMONS OR OTHER PUBLIC LICENSE?

Publicly licensed works are another category of works that you may be able to use without seeking additional permission. Some copyrighted works are available under public licenses that allow anyone to make specific uses of the works without the need to pay or seek additional permission from the rightsholder. Creative Commons (“CC”) licenses are the most well-known public licenses.¹⁶ Creative Commons is a



nonprofit organization that offers a simple, standard way to grant copyright permissions for creative works, and a suite of licensing options that allow authors to impose some commonly-sought limitations on would-be users. Instead of the traditional “all rights reserved” arrangement, whereby users of a copyrighted work typically have to seek permission from a rightsholder in order to use it, rightsholders can apply a CC license that affirmatively allows others to use and share their works without seeking such permission.


CC licenses are particularly common in the academic world, especially as research funders increasingly require their grantees to use CC licenses and as faculty adopt open access policies. But even non-academic works may be made available under CC licenses. For example, some museums distribute photographs of works in their collections under public licenses.

If a work is made available under a public license, the work can be used only in ways that comply with the terms of the license. It is important to pay attention to the specific terms of the license to determine what uses are permitted. All CC licenses require attribution, that is, they require those who reuse a work to give credit to the author for the creation of the original work. CC

licenses also allow authors to put other conditions on how others may use the work without further permission. For example, some CC licenses restrict commercial uses, some prohibit users from creating derivative works, and others require users to distribute new works based on the original material under the same license terms as the original work. If the work you wish to use is available under a CC license, you may wish to speak with your publisher about whether the terms on which your work will be distributed are consistent with the relevant license terms, and whether the publisher can accommodate the requirements of the particular license, such as providing attribution. If your publisher has plans to make uses of your work that are not consistent with the terms of the CC license, you may not be able to rely on the CC license to include the work in your own without obtaining further permission from the rightsholder.

IS YOUR USE OF THE THIRD-PARTY MATERIALS “FAIR USE”?

Another question to ask yourself before diving headfirst into the permissions process is whether your use might fall under a limitation or exception to copyright.



The major limitation to copyright protection, for our purposes, is fair use, a doctrine that allows the use of third-party works without permission in some circumstances.

Fair use allows creators to use copyrighted works in their own works for certain purposes such as teaching, criticism, commentary, news reporting, and research. While the question of whether fair use applies is a fact-sensitive determination, we lay out some guiding principles below that courts employ to evaluate whether a use may be a fair one. This information is by no means exhaustive—if fair use might apply to your desired use, you may wish to consult additional resources, such as our guide to [**Fair Use for Nonfiction Authors**](#).¹⁷

Fair use is a four-factor inquiry that considers:

1. the purpose and character of the use, including why the author is using the copyrighted work and whether the use “transforms” the original work into something different;
2. the nature of the copyrighted work, focusing on whether it is highly creative and entitled to more

- copyright protection, or more factually based and entitled to less or “thin” copyright protection;
3. the amount and substantiality of the portion used, or how much of the copyrighted work an author incorporated into their own, both in terms of quantity and quality;
 4. the effect of the use on the potential market for and value of the work that was used, focusing on whether the new work “usurps” the market for the work which was used.¹⁸

You should note that this inquiry is a “balancing test.” In other words, no single factor is determinative of the outcome in a court’s analysis, though factors 1 and 4 tend to be more prominent.

Some common situations in which fair use may apply in nonfiction writing are when an author uses a copyrighted work to criticize, discuss, or comment on the copyrighted material; uses copyrighted material to illustrate, support, or prove an argument or point; or uses copyrighted material for non-consumptive research. For many nonfiction authors, using third-party materials in their work often falls under the ambit

of fair use, because third-party materials are often used in nonfiction for commentary or critique.

In the realm of fiction writing, the clearest example of fair use is parody. This legal principle allows authors to imitate the style of another work in order to comment on it or criticize it, so long as the use falls within the contours of fair use (such as using no more of the original work than reasonably necessary). Parody requires an author to directly evoke the work it seeks to parody, but it is often viewed as a fair use because it is always transformative, transporting the underlying work into a new context for parodic or comic effect.

It is important for authors to be aware that contractual terms governing access to a work can restrict the availability of fair use. Some archives, museums, and commercial collections (including on websites) place contractual restrictions on the use of their works in their collections, even when use of the work would otherwise be permitted by fair use (and, in some cases, even when the work itself is in the public domain). As such, authors should pay careful attention to the conditions of access to source materials and may want to consider negotiating with the museum or archive

for better terms that do not restrict their research and writing goals.


Fair use is a huge topic for authors, and one that numerous organizations, including *Authors Alliance*, offer extensive resources on. While we present only an abridged explanation of fair use for authors of literary works here, check out *Authors Alliance*'s guide to **[Fair Use for Nonfiction Authors](#)**¹⁹ for much more information on fair use.

DOES YOUR PUBLISHER ALLOW YOU TO RELY ON FAIR USE?

If you think you may want to rely on fair use instead of obtaining formal permission, the next step is to determine whether your publisher allows you to rely on fair use when including third-party materials in your work.

Your Publication Contract

It is a good idea to start by consulting your publication contract to see if it discusses whether your publisher allows you to rely on fair use without getting additional permission. Publication contracts can contain clauses that forbid an author from relying on fair use when they



want to include third-party material in their work, even if fair use would otherwise apply to permit the use. For this reason, it is a good idea to check (or double-check) your publication contract to make sure that it does not contain language that forbids you from relying on fair use. If you still aren't sure about what your contract terms allow after reviewing your contract, you can also ask your editor or someone from your publisher's contracts department for help understanding what your publication contract does or does not allow.

Special Case: Authors Who Have Not Signed a Publication Contract

If you have not yet signed a publication contract and your publisher's proposed contract contains language forbidding you from relying on fair use, you may want to push back against this language. And even if this is not the case, it can be prudent to insert language into a publication contract explicitly permitting an author to rely on fair use where it applies. For sample contractual language that allows authors to use third-party materials in reliance on fair use, check out our guide to [**Understanding and Negotiating Book Publication Contracts**](#).²⁰

Your Publisher's Policies

Outside of the language of your publication contract, your publisher may have policies about its authors' reliance on fair use. Your publisher may have fair use guidelines for authors on its website, and you can always ask your editor or someone from the contracts department with your publisher whether and under what conditions you are permitted to rely on fair use.

If you initiate a conversation with your publisher about relying on fair use, you should be aware that your publisher may not be able to advise you on whether the use you seek to make is fair. As we discussed in the introduction to this chapter, advising on whether a use is fair might constitute legal advice, which your publisher may not be able to provide. Additionally, some publishers have policies encouraging authors to seek formal permission if there is any doubt as to whether permissions are required, so any advice you do receive about relying on fair use may be conservative. Your publisher may be able to provide limited feedback on legal issues in your work in the form of a “legal read”—a limited review of a work it will publish to scan for potential legal issues, including copyright infringe-

ment—but a publisher’s capacity and willingness to perform a legal read can vary.

Related to its policies about allowing you to rely on fair use in your work, your publisher may also have policies about what it considers to be fair use for the purpose of granting permission rights in the work it controls. Some publishers have a policy of treating the use short text excerpts, such as excerpts containing fewer than 200 words, as fair use. This means that if an author approaches your publisher requesting a permission that qualifies as fair use under its policy, it may allow the use as a fair use without requiring payment or granting formal permission. It does not mean that you can treat third-party material that qualifies as fair use under your publisher’s policy as fair use. The example of the “under 200 words” rule above is not a legal rule, but a policy that a particular rightsholder (in this case, your publisher) has adopted. The party that holds the rights to the work you wish to use may have a rule about what they consider to be fair use, but they also may not. Either way, it is important to know that if your use is justified under fair use, an arbitrary word count threshold set by a publisher cannot alter your rights.


PRACTICAL TIPS

Understand Clear Cut Cases

While this chapter has explored the intricacies and grey areas of the public domain, public licenses, and fair use, there are a few takeaway guiding principles that can make the decision of whether you need permission easier in some cases. Clear cases of copyright expiration—that is, works that were first published in the United States more than 95 years ago—and works that are authored by the federal government fall squarely in the public domain, making additional considerations like fair use less important. Similarly, paradigmatic cases of fair use, like using a short textual excerpt for commentary or criticism, largely obviate the need to investigate copyright status for a work. Understanding the “easy cases” may save authors time and energy that could better be spent pursuing their writing goals.

Find the Simplest Way to Use the Work

As authors navigate whether they need to request permission to use a work, it is also prudent to keep practicalities in mind. Sometimes, it may make more sense to formally obtain permission to use a work



even if fair use and/or the public domain may apply. For example, if you wish to use a portion of a blog post written by a close friend in your new book, and you think the use might be fair use, but are not sure, it may be easier to obtain formal permission from your friend than determining whether the use would be fair. This same principle applies when there is a possibility that both fair use and the public domain may apply to permit the use. For example, if you wish to use a short excerpt from a work that you think may be in the public domain, but you are unable to verify this without expending significant resources (such as paying the Copyright Office to conduct a search for you, discussed further in **Chapter 4**), it may be easier to determine that fair use applies to permit the use than go down the rabbit hole of determining copyright status for the work. If you think there are multiple avenues to using the third-party materials in your work, it is worth spending some time considering which path will be simplest or cheapest, depending on your goals and priorities for your work.

Credit the Author

Even if you rely on fair use or the public domain, it is prudent to credit the author or creator of the work you are using, if possible. Depending on the nature of your work and your publisher's policies, this can take several forms, from a prominent copyright credit line to an in-line acknowledgement of the authorship of the work you have used. Although the right to attribution is not explicitly protected under U.S. copyright law, some state and federal laws, as well as custom and practice, work together to provide some avenues for authors to protect and enforce their interest in being credited as the author of a work.²¹ Moreover, academic and community norms around plagiarism and attribution make crediting the creator a crucial consideration. While failure to credit the author of a public domain work or work used in reliance on fair use does not constitute copyright infringement, it may constitute plagiarism, or give the appearance of plagiarism. This can have serious consequences for your reputation and perceived integrity as well as your relationship with your publisher, including their willingness to work with you in the future. As a practical matter, crediting the

creator can help keep tempers cool, even if not required under copyright law.

Special Case: Public Licenses

As discussed in this chapter, if you plan to rely on a public license, such as a Creative Commons license, to include the third-party materials in your work, the license terms likely require that you attribute the original creator.

Consider Norms in Your Community

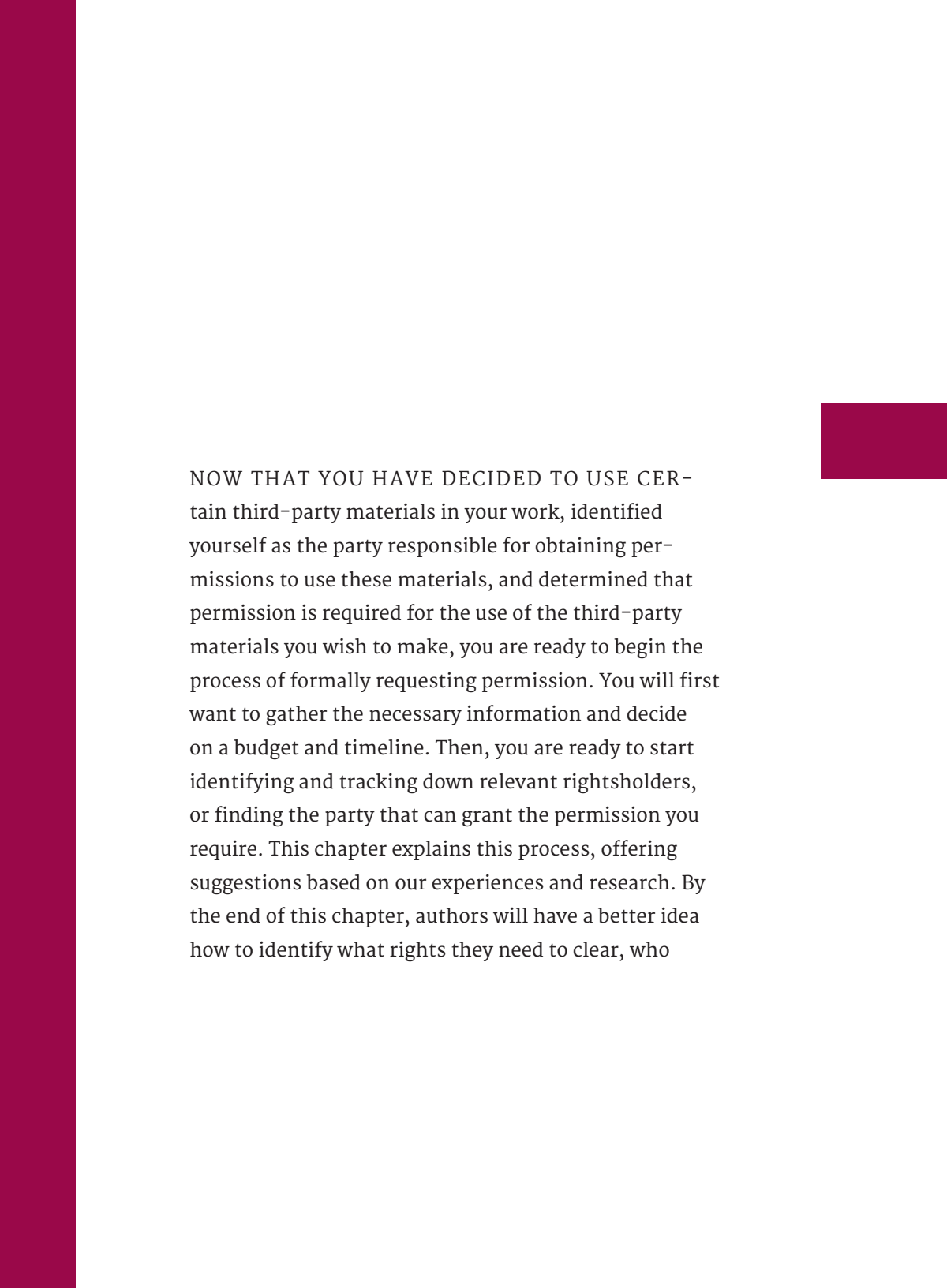
When deciding whether or not to request permission for the use of particular third-party materials, it is also prudent to consider norms in your community about permissions. For example, art historians tend to be more conservative with the decision, and scholars of art history may be encouraged or required to seek permission to use a work that is not in the public domain by their publishers or community norms. On the other hand, within the natural sciences, there is more of a culture of allowing for sharing and reuse of third-party materials, so authors of scientific texts may have an easier time using publicly licensed works or relying on fair use as a practical matter.

Where Else Can You Turn?

The key issues touched on in this chapter—the public domain, public licenses, and fair use—are the subject of a multitude of books, guides, FAQs, and other informative materials for authors. *Authors Alliance* links to many of these materials on our [Copyright Fundamentals](#)²² and [Fair Use Resources](#)²³ pages, which include links to our own resources and to external resources.

As we have discussed, your publisher probably cannot give you legal advice. But in some circumstances, you may decide you need help from a third-party professional. The Volunteer Lawyers for the Arts may have a chapter in your state and may be able to help with referrals. You can also ask your publisher for suggestions for an attorney who may be able to help you with these determinations. A literary attorney may be able to help you decide whether to rely on fair use (as an attorney you hire can give you legal advice) and may provide more comprehensive “legal reads” of books or articles to point out other legal issues you may have missed, supplementing any legal reads your publisher may perform on your work.

CHAPTER 3: WHO HOLDS THE RIGHTS?



NOW THAT YOU HAVE DECIDED TO USE CERTAIN third-party materials in your work, identified yourself as the party responsible for obtaining permissions to use these materials, and determined that permission is required for the use of the third-party materials you wish to make, you are ready to begin the process of formally requesting permission. You will first want to gather the necessary information and decide on a budget and timeline. Then, you are ready to start identifying and tracking down relevant rightsholders, or finding the party that can grant the permission you require. This chapter explains this process, offering suggestions based on our experiences and research. By the end of this chapter, authors will have a better idea how to identify what rights they need to clear, who

holds those rights, and how to find appropriate contact information for the rightsholder(s).

TIMELINE AND PREPARATION

When to Request Permission

An author should begin the process of identifying a rightsholder as soon as possible once she has signed a publication contract and decided to include particular third-party materials in her work. This is because the process of tracking down a rightsholder, coming to an agreement, and formalizing that agreement in a permissions license can take some time, with much of the timing being outside of an author's control. In the event that you are unable to reach a mutually acceptable agreement for your use of the work (whether the rightsholder refuses or—more likely—charges a fee outside of your budget for permissions), you may need to budget time to find alternate material to include in your work or adapt your work to exclude the relevant third-party material. We discuss these options further in **Chapter 5**. This being said, it is prudent to wait to begin actually securing permissions, as outlined in **Chapter 4**, until your publisher has approved the

use of the third-party materials. If you complete the permissions clearance process for a work that ends up not being included in your own as a result of the editing process, you may end up obtaining licenses and paying fees for permissions you do not actually need.

A publisher may have strict guidelines about your timeline for clearing permissions, or it may have more flexibility. You might consider asking your editor or looking at the publisher's permissions page on its website to find out. It is important to be aware of the latest date on which you need to deliver the permissions materials to your publisher based on their own planning and production schedule. Delays in a publisher's production schedule could mean your book or article is published later than you had hoped. In fact, depending on the terms of your contract, failing to deliver your permissions by the deadline for submitting your manuscript and other materials could result in a cancellation of your publication contract. It is prudent to examine your publication contract to see what language it includes around termination or cancellation, and you may want to check out our guide to [**Understanding and Negotiating Book Publication**](#)

Contracts²⁴ for more on the particulars of publication contracts.

Setting a Budget

After establishing a permissions timeline, the next step is to set a budget. This is because an author may have a multitude of permissions to clear, and fees can add up quickly. Your permissions budget is up to you, but your publisher may have some guidance on typical permissions budgets for projects like yours if you are not sure where to start. Once you have arrived at a number you feel comfortable with, consider how much you will be able to pay per permission request, and keep this number in mind as you move forward.

What Rights Do You Need?

Before you begin the process of tracking down a rightsholder, you should also identify which of the rights under copyright you need to obtain permission to exercise. As we will discuss later on in the chapter, there are situations in which different parties hold different rights in a work, and if you need both of those rights, you will have to clear permissions for the two rights separately. Therefore, ensuring that you under-

stand what rights you must clear in the work is an important first step.

In the simplest terms, the rights that you need will correspond to the uses your publisher will make of your work. For example, if your publisher plans to make copies of and distribute your work (as it almost certainly does), you will need permission to exercise reproduction and distribution rights—as we discussed in **Chapter 1**, these are two of the six exclusive rights granted to authors under copyright. And if your publisher plans to issue or license foreign language editions of the work and the third-party work is a text that will be translated, you will need to obtain permission to exercise the right to create foreign language translations, as translating a work could constitute the creation of a derivative work.

One way to determine what uses your publisher plans to make of your work is to consult your publication contract. The terms of the contract will lay out the rights in your own work that you are granting to the publisher. Because they make up a part of your manuscript, the third-party materials you include in your work will in most cases need to be licensed to cover the same rights. There are some exceptions to this

general rule. For example, if the third-party work you are including in your work is an image without text, you will not need to secure derivative rights to prepare a translation of the work even if your publisher plans to issue your work in multiple languages, because the image itself will not be translated.


FINDING A RIGHTSHOLDER

One aspect of the permissions clearance process that many authors find intimidating is the process of tracking down a rightsholder. Indeed, the lack of clear guidance from publishers on how to find a rightsholder and the absence of a complete and centralized database for copyright ownership can make this challenging. The good news is that there are multiple avenues you can pursue for identifying and contacting the proper rightsholder, and plenty of people you can ask for guidance along the way. Additionally, while the U.S. Copyright Office records of copyright ownership are not comprehensive, they can be instructive, and the Copyright Office can even perform a search for you for a fee. We discuss these options further at the end of this section.

Where to Start

Your first step should be to examine the copy of the third-party work you would like to use to see if it offers clues that identify its publisher and creator. For many types of works, this is fairly straightforward: for a book, for example, the identity of the author and publisher are typically readily apparent (likely on the book's spine and/or copyright page). If a work is unpublished, the copyright will by default be held by the creator, unless the work is a work made for hire, rights in the work were transferred to another party, or the work has entered the public domain. For example, copyright in an unpublished personal photograph is by default held by the person who took the photograph, and copyright in a personal letter by default remains with the letter writer (even after a letter recipient has physical possession of the letter). Unfortunately, unpublished works are more likely than published works to pose problems in terms of identifying, locating, and contacting the proper rightsholder. This situation is addressed later in the chapter.

For published works, the copyright page or credit section in a publication can be very instructive, as it may identify who owns the copyright for the work.



This may be the publisher, the author, or another party such as the author's estate or trust. There may also be multiple copyright lines (in the event that the work contains several separate copyrighted works), different copyright holders for renewals or translations, and a multitude of other complicated-seeming arrangements. On the other hand, there may be no printed copyright line for a text or image, in which case the work's publisher is the best first point of contact. It is important to be aware that the party identified in the copyright line is not necessarily the party that will be able to grant an author permission to use the relevant third-party materials: because an author's rights under copyright can be split up in a multitude of ways, it may be that she holds the copyright, but not the permission rights another author needs. It is also possible that copyright arrangements for a work have changed since the particular copyright line you are examining was printed.

Luckily, industry customs provide a starting place for contacting a rightsholder, once you have identified the creator and publisher. For books, scholarly journals, and consumer magazines, permissions rights are typically held by the publisher. For textual works

published in trade or commercial (non-scholarly) journals, permissions rights are typically held by the work's author. For unpublished works, permissions rights are generally controlled by the author. Permissions rights in photographs may be held by the photographer, or, if the photograph was published, by the publication in which the photograph was published. For works of art, both the artist and the museum or gallery which displays the work may hold some rights. The artist will generally retain the copyright in her works of art, but contractual arrangements may pass copyright ownership to a museum to accompany a donation or sale. In either case, the museum or gallery may be able to answer questions about whom to approach for permission.

Unfortunately, the above generalities are just that. Permissions arrangements as to who controls the various rights under copyright can vary substantially from work to work and publisher to publisher, and there is no set rule for allocating permission rights.

Special Case: Works You Authored


Although it may seem counterintuitive, authors sometimes need to seek permission to use their own previously published work in a new work if they transferred rights to an earlier work to a publisher. If you review your publication contract for an earlier work and find that you no longer have the relevant rights to your earlier work, you may need to reach out to your publisher as the current rightsholder for permission to use that material in your new work. For previously published works in which the author has retained the right to grant permissions (or has reserved the right to use her previously published work in her own future works in her publication contract), it is important to make this clear in the new work to avoid the appearance of self-plagiarism and ensure the author is fulfilling her obligations under her publication contract—it is common for warranties clauses to include a provision that the author warrants that the manuscript is an original work.

Rights Held by a Creator

When rights are controlled by a work's creator, they will be the party responsible for granting you permission.

If you are able to identify a work's creator and locate contact information for the creator, you can simply make your request to the creator.

Text Permissions: If you seek to use textual materials in your work, either the author of those materials or her representative (such as a literary agent, attorney, or other party who licenses these rights on an author's behalf) will be the party responsible for granting you permission. If the author of the materials has a literary agent, the agent will most likely be the party that actually grants you the permission, and will do so on the author's behalf. You can find an agent by searching the Internet for "[author name] literary agent." You can also search for an author's own website, which will often have a contact form, email address, or contact information for an agent, if that author is formally represented.




If the author holds the rights but does not have representation, they will most likely be the party who can grant you permission. An author's professional or personal website may contain her contact information, and in the case of academic authors, university biography pages and staff directories will often include contact information. A publisher of that author's work may also have contact information for the author, or may be able to pass along an email. Finally, there are a variety of registries and societies for different types of authors which you might consider consulting if you are still not able to find an author's contact information. **WATCH File**²⁵ is a database of copyright holders in North America and the United Kingdom, and **The Author's Registry**²⁶ is another resource for locating hard-to-find authors.

Image Permissions: When rights in photographs, images, or multimedia works are held by the photographer or artist, you can start by looking for a copyright or credit line to determine the artist's name (if available). If you have found the artist's name, but are not able to find their contact information with a simple Internet search, you can try contacting a rightsholder organization such

as the **Artists Rights Society**²⁷ for fine art and the **Graphic Artists Guild**²⁸ for graphic art. While artists are less likely to be represented by agents than authors, some artists do have agents who manage their rights. If this is the case, the artist themselves may be able to refer you to their representative.

Special Case: Deceased Creators

As we mentioned in **Chapter 1**, one important feature of copyright is that it can be transferred from the creator to another party, such as a publisher. This same principle applies to make copyrights in both text and images transferrable upon a creator's death. And because copyright protection lasts 70 years after the creator's death under current copyright law, copyrights are often left to a creator's descendants after her death, either in a will or under principles governing inheritance when a person dies without a will. However, the creator can choose to dispose of her copyrights in another way, such as leaving them to a non-family member or even an entity, like a university or foundation. In many cases, contact information for an estate can be found with a simple Internet search. The Copyright Office also



houses records of transfers of ownership of copyrights, though as with all Copyright Office records, these are not necessarily comprehensive. If you are unable to identify or locate contact information for an estate through these methods and the work is published, the publisher of the creator's work may be able to point you in the right direction.

Rights Held by a Publisher

When rights are controlled by a work's publisher, the publisher will most likely have employees whose duties include granting permission requests. This means that requesting permission from a publisher is often a more straightforward process than tracking down the original creator of a work. You can find the proper contact for permissions by looking on the publisher's website. Publishers generally have contact information for the permissions staff member or dedicated portals where you can submit requests on their websites. Permissions portals are more likely to exist for trade publishers and large academic publishers, while small publishers may direct you to a permissions email address or the staff member responsible for granting permissions. If you are unable to determine who the proper contact for

permissions is at the publisher, someone who works in the publisher's contracts department may be a good starting point.

One thing to keep in mind here is that publishers, like other private companies, have merged, changed hands, and shuttered altogether over time, especially over the past two decades. You may have to consult the Internet to find out what publisher controls the rights to a work published by an entity that is now defunct or of a different nature. Wikipedia can be a useful tool here. If you discover during the course of this research that the publisher of the third-party work has shuttered altogether with no successor that continues to publish its backlist (the catalogue of older titles published by that publisher which remain in print), consult the last section of this chapter on elusive rightsholders.

Rights Held by Multiple Parties

As we have alluded to, it is possible that the permissions you want or need to clear will require you to obtain permission agreements from multiple parties. This happens when the rights you need are not held by a single party, but split among multiple rightsholder-




ers. It can occur for a variety of reasons, as there are multiple mechanisms for splitting up and apportioning the six exclusive rights under copyright. An author can share ownership of these rights with co-authors or give them away to someone else, such as their publisher or another party.

The process of finding a rightsholder will be the same when you encounter a so-called split copyright; the only difference will be that you must go through these steps multiple times to identify the multiple rightsholders, and may need to clear the rights you need separately in multiple permission agreements. However, a rightsholder will typically notify you if the rights you request are controlled by multiple parties, and in many cases will be able to refer you to the proper contact(s) for the rights you require. The split copyright issue comes up in a few specific situations which we will go over below.

Joint Ownership: You may recall from **Chapter 1** that copyright protection attaches automatically to any original work of authorship, giving its creator a temporary monopoly on certain rights in that work. But it is common in many fields for creators to create

a work jointly such that the authors are co-authors, sharing in the exclusive rights that copyright automatically provides. When a copyright is jointly owned, all of the owners can generally exercise the exclusive rights granted by copyright independently, but must act together to *exclusively* license the rights to another party. This means that when you seek permission to use a work that is jointly owned on a non-exclusive basis, any of the joint owners can grant you this permission. On the other hand, if you require an exclusive license, the rights you seek to exercise will have to be cleared with each of the joint owners.

Exclusive Licenses: As we have mentioned, an exclusive license is an agreement whereby the rightsholder permits a licensee to exercise one or more of the exclusive rights under copyright, but on an exclusive basis. For example, if a rightsholder grants an exclusive license to exercise performance rights in a work, no one else can exercise performance rights, including the original rightsholder herself, without permission from the exclusive licensee. In effect, an exclusive licensee becomes a rightsholder for the particular rights they now hold exclusively, though only for the duration of




the exclusive license. If you find that one or more of the rights you need are subject to an exclusive license, in order to obtain permission to use those rights, you will most likely need to approach the exclusive licensee and obtain permission from them. But if you need other rights which are not subject to the exclusive license, you will need to clear those rights with the party that controls them, such as the author of the work. A common situation in which this arises is when an author exclusively licenses certain rights under copyright to her publisher, but retains others.

Translations: Translated textual works are another instance in which split copyright issues can arise. If an author wishes to use third-party materials in her own work that consist of a translation of an original work, she must clear rights in both the translation and in the underlying text. For example, if you want to use an excerpt from an English edition of Gabriel Garcia Marquez's *One Hundred Years of Solitude* in your book, and the use is either not permitted as a fair use or your publisher does not allow you to rely on fair use, you will need to clear both the underlying Spanish rights and the rights in the English translation. These rights will

almost always be controlled by different parties, which means that it is generally necessary to approach both the rightsholder for the foreign language work and the rightsholder for the translation.

Image Permissions: Another type of permission where split copyright issues are likely to come into play is for image permissions, particularly fine art. When an author seeks to use a third-party image in her own work, it is often necessary to clear permissions with multiple parties. The creator of the image—such as the photographer or artist—is the best initial point of contact, but publishers, galleries and museums, and other parties can also hold certain rights in these images if the creator transferred reproduction rights to the museum or gallery. In addition, museums and galleries sometimes *de facto* control reproduction rights to a work of fine art, even those in the public domain, by virtue of controlling access to the work—or copies of the work—and making your access contingent on agreeing not to reproduce the image without permission. Finally, your publisher may also require permission from a museum or gallery for your use of an image based on customs within the fine art community. For



example, if you would like to include a reproduction of Andy Warhol's famed screen print of a Campbell's Tomato Soup can in your book on fine art, you may need to obtain permission from both the Warhol estate (since he is the creator of the work) and the museum that owns the screen print (if the museum controls reproduction rights, if contractual provisions require you do so as a condition of your access to the work, and/or based on customs within the fine art community).

Elusive Rightsholders

If the above suggestions still leave you stumped, there are some other places you might check to find a rightsholder.

The U.S. Copyright Office offers a number of services that may also be useful starting points in your search for the relevant rightsholder(s). First, the Copyright Office houses records of copyright registration which authors can search to find ownership information, though these records are not all digitized so as to be searchable online. Second, the Copyright Office itself can perform a search of its records upon request, though will charge a fee for doing so. Authors should be aware that because a copyright holder does

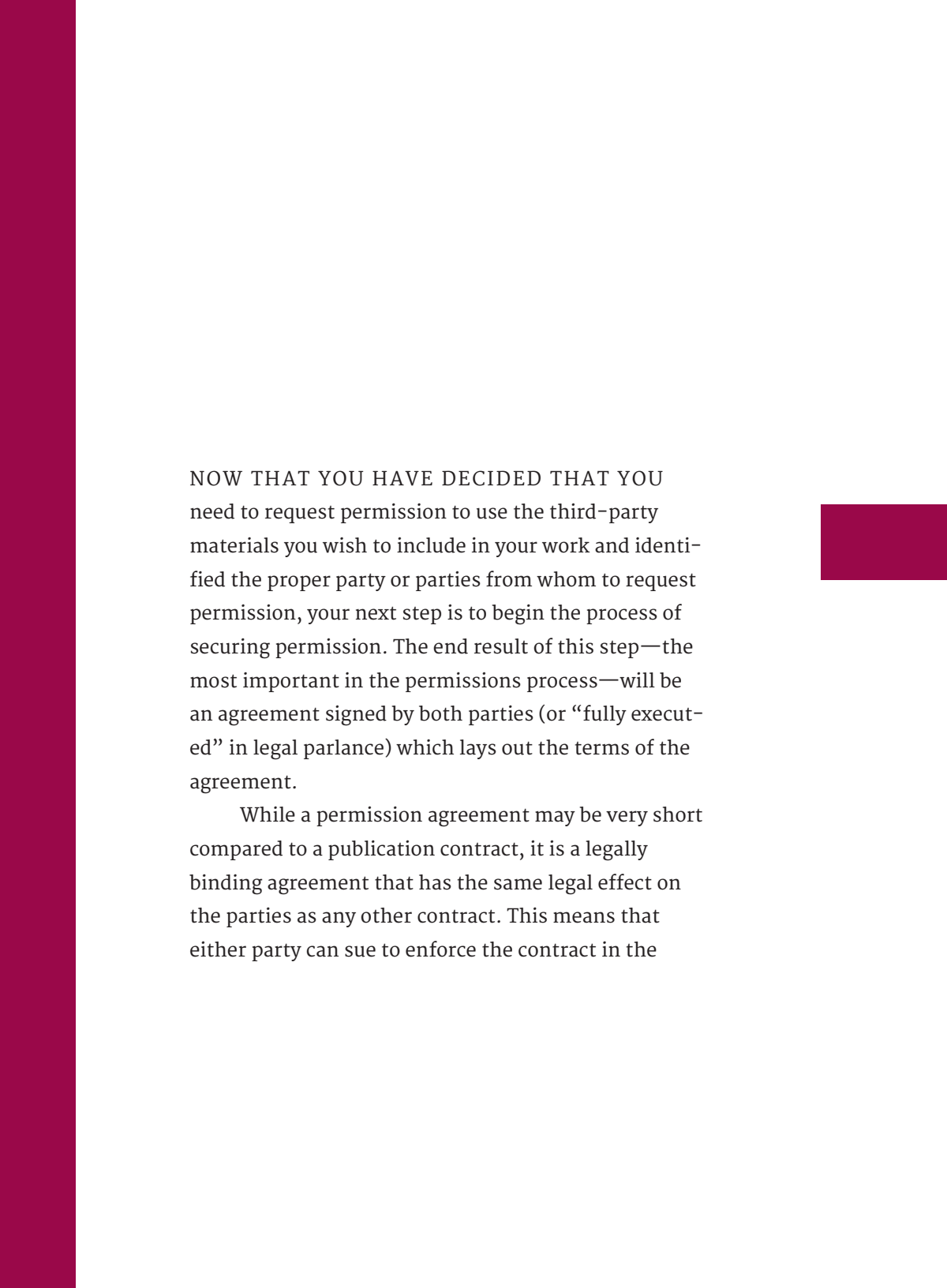
not actually need to register her copyright in order to obtain copyright protection, the Copyright Office may not have a record of registration or ownership for many works. However, more often than not, if the work has been published, a publisher will register the copyright in the work with the Copyright Office, either in its own name or in the name of the author or other copyright owner. For more information on the particulars of searching the Copyright Office's records, check out the Copyright Office's [**Circular 22: How to Investigate the Copyright Status of a Work**](#).²⁹

You can also ask your own publisher for advice if you have not had luck tracking down the rightsholder. Even if it is your responsibility to clear permissions in your work, publishers have more experience being on both sides of the permissions-granting process, and may be able to offer practical guidance beyond what we cover in this guide.

If you are still unable to identify or find the rightsholder for the work, you may have stumbled on an orphan work. Orphan works are works for which rightsholders cannot be identified and/or found, making it essentially impossible to request and be granted formal permission. For more information on orphan works and


some suggestions on how to proceed if the third-party work you wish to use is an orphan, see **Chapter 5**.

CHAPTER 4: HOW DO YOU SECURE PERMISSION?



NOW THAT YOU HAVE DECIDED THAT YOU need to request permission to use the third-party materials you wish to include in your work and identified the proper party or parties from whom to request permission, your next step is to begin the process of securing permission. The end result of this step—the most important in the permissions process—will be an agreement signed by both parties (or “fully executed” in legal parlance) which lays out the terms of the agreement.

While a permission agreement may be very short compared to a publication contract, it is a legally binding agreement that has the same legal effect on the parties as any other contract. This means that either party can sue to enforce the contract in the



event of a breach—that is, when one party violates (or “breaches”) the terms of the contract. For this reason, it is important to take the utmost care to ensure that you (and your publisher) abide by the terms of the permission agreement and that these terms match the terms needed for you and your publisher to make the agreed upon uses of the relevant third-party material. This also means authors may want to avoid relying on informal grants of permission. For example, while an oral permission agreement may be legally binding for non-exclusive licenses (exclusive licenses must be in writing in order to be valid, but as we have mentioned, it is unlikely that a rightsholder will be willing to grant you an exclusive license to use their materials in your work) your publisher is very unlikely to accept these, and such informal agreements may omit terms and conditions that may be necessary to enforce the agreement.

The first step to securing permission is to contact the rightsholder identified using the resources laid out in the previous chapter to formally request permission. For trade and large academic publishers with dedicated permissions portals, this can usually be done on a web form, and for smaller or independent publishers as

well as individual creators or their agents, it is prudent to send an email in the interest of time and ease for all parties. Sending a request by fax or snail mail is unlikely to yield a prompt response and may result in a lack of a response altogether. This being said, if the only contact information you are able to locate for a particular rightsholder is a phone number or physical address, it does not hurt to try those methods to make contact.

TERMS

In the initial email, an author should provide all the information the rightsholder needs in order to grant the permission. This information will become the terms of the agreement once it is finalized. The terms will lay out what rights you need (as identified in **Chapter 3**), and a variety of other information. Preparing the terms may take some thought and research: your publisher will tell you what it needs to be included in the permission and may even supply permission forms that you can use, and the rightsholder's website may also tell you what information the party needs in order to grant the permission. The degree of flexibility that a publisher has with its own required terms for your work

will vary from publisher to publisher. At a minimum, a publisher will require an author to clear permissions for all formats the publisher will produce a book or other publication in—such as a hardcover book, print edition of a magazine, electronic edition, or audiobook—any subsequent editions or printings, and for each territory the work will be distributed in.

These terms will be used to determine whether an agreement can be reached and how the relevant rightsholder will calculate the permissions fee. Below, we provide a list of terms that are often required for a rightsholder to grant permission, and a brief description of what each term means where they are not self-explanatory. You should not expect this list to match *precisely* what your publisher and the rightsholder need to be granted, but it should provide a good jumping off point for the initial email if you cannot find the specific information that your publisher and the rightsholder require on their websites.

THEIR WORK: TEXT PERMISSIONS

- Title, author, and editor (if any) information on the work you would like to use in your own work;
- Page numbers from which you wish to excerpt (if a written work);
- Word count of the text you wish to excerpt: it is important to provide a word count since the word count on each page may vary;
- International Standard Book Number (ISBN): often required for permissions for excerpts from a book, this is the identifying numerical sequence for the work, which you can find in the book itself or online.

THEIR WORK: IMAGE PERMISSIONS

- Title and creator of the image you would like to use in your own work;
- Name of publication or institution (such as museum, gallery, or university) where you found the image.

YOUR WORK

- Title and author/editor of your book or article: note that by “editor,” we mean the editor (if there is one) responsible for an anthology or textbook, not the book editor employed by your publisher;
- Publisher of your book or article;
- Formats your work will be published in (hardcover/paperback/electronic/audio/etc.);
- Tentative price for your work in each format;
- Publication date for your work in each format;
- Projected print run for your work in each format;
- Distribution territory (i.e., world, U.S., North America, etc.);
- Languages your work will be published in;
- Term of the agreement: note that by “term” we mean the duration of the agreement, not “term” as we’ve been using it thus far to refer to the conditions of your agreement;
- For images, whether the image will be black and white or full color and whether it will be used on the work’s cover or its interior. You should note that permissions to use images on a book’s cover often involve permission to modify the image by overlaying text or cropping slightly. Your publisher is

likely to have more detailed advice if this situation applies to you.

Other commonly included terms are provisions about advertising (whether you or your publisher can use the third-party material to advertise your work), requirements that the part(ies) that granted the permission and/or the creator be credited or sent copies of your work once it is published, or terms that govern add-on uses like making your work available on an open access basis. Either your publisher or the rightsholder will indicate whether any of these terms, or others, should be included in your permission agreement.

Term or Duration

“Term” refers to how long the grant of permission will last—you are unlikely to get permission with an unlimited duration in most cases, but you can always go back to the rightsholder and request a renewal of the permission if your work is still commercially available when the term of the permission agreement expires. You should take care to pay attention to the date on which the term begins, and try to negotiate for a starting date on or close to the publication date for

your work. Terms for permission agreements can vary substantially based on a number of factors, though you should expect a term of somewhere between one and ten years, with five years being about average.


Duration of the license is a bit different from the other terms you commonly see included in permissions in that the duration need not match the duration of your publishing contract. Publication contracts for books often span quite a long time, in many cases for the entire commercial life of a book or for the duration of its copyright protection, whereas permissions agreements will usually be limited in the way described above. This is because, if a work has a commercial life longer than the duration of the permission agreement, its author can always go back and “re-clear” the permission. While having to clear permissions again after a work has been published is undoubtedly a burdensome situation for authors, this will be simpler than the first time around because you already have all the relevant information. The rightsholder may be able to simply edit the original permission letter with the new relevant dates.

Print Run

One term that rightsholders often require authors to provide in order to obtain permission is print run, a projection of how many copies of your work will be printed and/or sold in each format. Depending on your project, your publisher may not have a projected print run, which can be a stumbling block when approaching some rightsholders. If your publisher projects an “unlimited” print run, a rightsholder may be willing to grant you a permission that is not limited by a set print run. Alternatively, a rightsholder may be able to accommodate this arrangement by agreeing to a permission for a very high print run.

Special Case: Term and Print Run for Third-Party Material Used in Open Access Works

When a work is released on an open access basis, it becomes difficult if not impossible to project a print run, because open access works are intended to be freely accessible to all without limitations on the number of copies downloaded or distributed. Yet rightsholders may be willing to accommodate these requests by agreeing to an unlimited print run for the open access work. Alternatively, a rightsholder may



accommodate this situation by agreeing to a very high print run, though authors should be aware that this may be inconsistent with the terms on which the open access work will be distributed since it will be impossible to know when the print run has been reached. A similar situation can arise when it comes to specifying the “term” for third-party materials used in open access works. Since Creative Commons licenses and other public licenses are typically irrevocable, the appropriate term for third-party materials used in open access works is the remaining term of the copyright for that material.

Exclusivity


As we have discussed, a permission agreement, or license, can be either exclusive—meaning only the licensee can exercise the right(s) granted in the license—or non-exclusive, meaning others can also exercise the right(s) granted in the license. In general, a rightsholder is very unlikely to grant you an exclusive license to include their work in your own, because this would mean that the rightsholder could no longer exercise the right themselves. The rightsholder also may have granted others non-exclusive rights to use

the same work in the past, meaning they would be unable to grant an exclusive license as they would no longer hold exclusive rights, having already licensed them to someone else. This means that authors can generally expect to receive a non-exclusive license rather than an exclusive license when they request permission.

Fees

A final term of significant import to most authors is the fee for, or cost of, the permission. As discussed in **Chapter 1**, authors are generally responsible for clearing permissions and paying associated fees, though sometimes a publisher will agree to pay or help with these fees, and this information can be found in the publication contract. If you think you may not be responsible for paying permission fees, it may be worth reviewing your publication contract to find out.


Some permissions may be granted free of charge (or “*gratis*”), but in many cases, an author and rightsholder(s) will have to come to an agreed upon fee for the permission and arrangement for the payment, and an author will have to pay this fee when it is due. As a practical matter, fees may be the most important



aspect of the permissions process for an author. This is because it is very uncommon for a rightsholder to refuse permission outright (unless there is some philosophical, political, or moral objection to your including their work in your own), but it is relatively common for a rightsholder to charge a fee that is not within an author's budget. This is most likely to be the case with so-called "high-value works" that are performing well commercially. Another common scenario where the fee proposed by the rightsholder can seem exorbitant is one in which you seek to use a significant amount of material from the third-party work.

Calculating Fees: Permissions fees are generally calculated based on the terms of the agreement. The rightsholder might charge by the word or page count, the duration of the license they are granting you, the print run of your book, the identity of your publisher, the nature of your book, or a combination of these and other factors. There is no set formula for calculating permissions, but rightsholders or their agents are likely to have established methods they use to calculate fees.

Negotiating Fees: You are not necessarily beholden to the rightsholder's proposed fee, and you should feel empowered to try to negotiate if the fee requested is outside of your budget or much higher than you were expecting. You should be prepared to explain your project and cost constraints to try to make your case—a rightsholder will likely be more willing to grant you a reduced cost permission if they understand why your budget is what it is and why you want to use the material in your work. Depending on your budget and the nature of your project, the rightsholder may even agree to grant a *gratis* permission. This is more likely to be the case for academic authors, books published by university presses with small anticipated print runs, self-published works, or when the rightsholder is a member of your community. Shorter excerpts are also good candidates for free permissions. If you think you might be able to obtain a permission free of charge, it is a good idea to ask for this in your initial communication. If you imply that you are willing to pay a fee and then ask the rightsholder to waive that fee, the rightsholder is unlikely to agree to do so based on their own commercial interests.



It bears mentioning here that a rightsholder's willingness to negotiate can vary substantially. As you may recall from **Chapter 3**, when a large trade publisher holds the rights you are requesting permission to use, that publisher often has a dedicated permissions portal that you can use to make your request. This has the advantage of being streamlined and straightforward, but it also means that you may not be able to negotiate for a reduced fee, as you will not have direct interactions with a person when submitting your request through the portal. When you do this, the publisher will tell you what the relevant fees are, whereupon you can either pay them or change your permissions strategy. Many companies that license images follow a similar procedure whereby a fee is not negotiable. On the other hand, other types of rightsholders may be willing to accommodate your budget or waive fees altogether.

Another strategy an author might try in order to avoid accumulating excessive permission fees is to offer an alternative form of compensation. You could offer to send the rightsholder a copy of your book once it has been published, or agree (in consultation with you

publisher) to credit the rightsholder on the copyright page of your book.

Payment of Fees: The final step in securing your permission is the payment of the fee (if a fee is required). The fee amount, as well as its due date, will be laid out in the permission letter. The permission letter may also stipulate how you should pay the fee—how payment should be sent (typically by check or bank transfer) and to whom. If an author’s literary agent granted you permission, payment is typically sent to them, and not the author directly. If you are not sure where payment should be sent or when it is due, ask the party that granted you the permission.

Authors should take care that they actually do pay this fee, and do so by the date laid out in the agreement. While a rightsholder is unlikely to do much more than write you an email requesting payment, the permission agreement is likely to contain language stating that the agreement is cancelled, or null and void, if payment is not received. Even if this is not the case, paying the permission fee is likely to be one of your duties under the agreement. As we mentioned before, either party can sue to enforce a contract once it is breached, so you

open yourself up to potential legal liability by failing to abide by the payment term.

Once the fees have been paid pursuant to the permission agreement signed by both the author and rightsholder, an author has successfully secured permission to incorporate the third-party material in her work, so long as their use is consistent with the terms of the agreement.

RECORDKEEPING

Before we move on, a few words on recordkeeping. The most important recordkeeping you will do during this process is signing the permission letter and making sure you, the rightsholder, and your publisher (if they require it) have copies signed by both the author and rightsholder—a crucial step in finalizing the permission. Your publisher may also require you to maintain a summary log of all permissions you are clearing in your work for their own internal recordkeeping purposes. Be sure you understand what your publisher needs from you before you begin the process; it may be difficult to reverse engineer recordkeeping if you do not do it from the outset.

Particularly for authors clearing a multitude of permissions, keeping a permissions log can be a good idea even if your publisher does not require it. Because permissions agreements are legally binding contracts that put you on the hook legally speaking, you must ensure that you understand all the permissions agreements (which may have different terms) and fully perform your obligations under each agreement.

CHAPTER 5: WHEN BEST EFFORTS FAIL

SOMETIMES, AN AUTHOR IS UNABLE TO CLEAR the necessary hurdles of obtaining permission to use third-party materials in their own original work. This can happen for a number of reasons, such as when an author is unable to identify or locate the copyright holder at all or if there is a failure to come to an agreement on terms. If you have determined after reading **Chapter 2** of this guide that you *do* need to request formal permission to make your intended use of the relevant third-party materials, but your efforts to undertake the steps laid out in **Chapters 3** and **4** have not borne fruit, you may be asking yourself what recourse you have now that your best efforts have failed.

In this chapter, we identify and discuss common roadblocks that authors encounter when trying to obtain permission, using real world examples gleaned

from interviews and research. We offer practical guidance on how an author might proceed at this point in the process. While failure to obtain permission after trying your best is undeniably a setback, our suggestions provide some ideas for recourse so you can still meet your goals as an author.

ORPHAN WORKS

As we mentioned in **Chapter 3**, an orphan work is one which remains under copyright, but for which the copyright holder cannot be identified and/or located after a diligent search. If, after going through the steps outlined in this guide, you determine that the third-party work you wish to use is an orphan work, you are probably wondering whether you can proceed with your use and what other options you may have.

A work can become an orphan for one of two reasons: first, because the rightsholder cannot be identified, and second, because a rightsholder cannot be located. Orphan works tend to be older works which are still subject to copyright protection. In many cases, a work is orphaned because its authorship is unknown, its creator has died, or a corporate copyright holder has dissolved or changed hands. Copyrights can be

inherited or transferred, and the lack of a recognized mechanism for formally abandoning copyrights means that, until copyright protection lapses, a work remains protected and owned, even when the rightsholder is not clearly identified. But, particularly for works with low commercial value, a rightsholder's estate or corporate successor entity may not even know about the copyrighted work or understand that it controls the rights.

In some cases, a work can be an orphan because its creator is unknown. For example, a well-known photograph of civil rights leader James Forman, taken with a camera that was smuggled into a jail where he was being held, is an orphan work because it is near-impossible to determine which of the prisoners took the photograph.³⁰ A work can also be an orphan because its creator cannot be found, even if that creator is identified. For example, even if it were possible to identify the prisoner who took the photo of Forman, it could well be the case that an author would struggle to contact him or his estate based on a lack of publicly available information.

We lament that there is no easy solution to the so-called "orphan works problem." When authors are unable to identify or locate rightsholders, both

authors and publishers can be hesitant to include the orphan works in the author's work, because there is no guarantee that a copyright holder will not "emerge from the woodwork" and allege that the use infringes on her copyright. Using copyrighted materials without permission, when the use does not fall into an exception or limitation to copyright like fair use, can constitute copyright infringement, even when the rightsholder is lost or unknown.

As we have discussed throughout this guide, it is the author's decision whether to include third-party materials in her work, though publishers often have policies or practices regarding permissions to incorporate orphan works in an author's work. Your publisher may have some guidance on the use of orphan works based on its experience working with authors in the past. Your publisher may decide to allow you to use an orphan, perhaps after conducting a "risk analysis" of the likelihood that the use of the orphan work could result in a lawsuit and the potential consequences (financial and otherwise) if such a lawsuit results in a finding of infringement. In this case, publishers may require an author to provide a record establishing that she made best efforts to track down the rightsholder, so

it is prudent to document your search efforts and save emails and other communications sent in an effort to locate the rightsholder. But a publisher may also have a policy of not allowing authors to use copyrighted works in their own without permission, even if the work is an orphan.


At the end of this chapter, we review some ways that you might modify your use to avoid the orphan works problem, among other roadblocks to obtaining permission.

NO AGREEMENT ON TERMS

As we mentioned in **Chapter 4**, one unfortunate situation that can befall an author who is requesting permission to use third-party materials is a failure to agree on the terms and conditions of the permission. Like all contracts, permission agreements require the parties to agree on all terms, so failure to agree effectively results in a failure to obtain permission.

Fees

By far, the most common reason an author and rightsholder fail to come to an agreement is that the rightsholder insists on a fee outside of the author's budget



for permissions. As we discussed in **Chapter 4**, negotiation is a tactic you can use to try to find middle ground with a rightsholder, but the viability of this strategy depends on the particular rightsholder, their willingness to negotiate, and how far outside of your budget the requested fee is. For example, if you contact a rightsholder seeking to obtain permission to use a photograph in your work and your budget allows for only modest or token permissions fees, but the rightsholder requests thousands of dollars for your use of the photograph, you will probably not be able to find common ground with the rightsholder because your starting positions are simply too far apart. If, after exhausting the negotiation tactics set forth in **Chapter 4**, you are not able to come to an agreement on a fee, you might consider moving on to the suggested next steps in **What Now?** in this chapter.

Mismatch Between Terms Offered

Another reason an author and rightsholder fail to come to an agreement on the terms of a permission license is a mismatch between the terms that you or your publisher require and the terms upon which the rightsholder will grant permissions. For example, many

rightsholders calculate permissions fees on the basis of the total print run of a work, among other factors. But your publisher may not have a set print run for your work, perhaps because your work is being released as a “print on demand” work for which copies are printed as they are ordered, or perhaps because you or your publisher plan to release the work openly. Both of these conditions could mean that no print run can reasonably be calculated, and instead, that the permission contemplates an unlimited number of copies being printed and/or distributed. While a rightsholder might be willing to compromise and grant permission for a very large print run to accommodate the situation, a rightsholder may also simply refuse to grant permission on this basis. This breakdown in negotiations could make obtaining a formal permission agreement on mutually acceptable terms impossible.

Another example of a disconnect on acceptable terms is when a rightsholder has a particular moral or philosophical view that is inconsistent with the rights and terms an author needs. For example, a rightsholder may be mistrustful of technology, and refuse to license e-book editions of their work altogether, despite controlling the exclusive rights needed for the production

of an e-book edition. If your work will be published as an e-book and you are dealing with a rightsholder that takes this position, you may not be able to obtain the permission you need, unless your publisher can accommodate the issue in some way, such as producing an e-book edition of the work with the relevant third-party materials “blocked out.” If this situation or a similar one emerges, it can be useful to speak with your publisher to see if they have any advice on the matter.

WHAT NOW?

In this section, we offer some possible avenues forward when your efforts to obtain permission have not been successful. While this is admittedly a less than ideal situation to be in, the below suggestions may be jumping off points for creative solutions to the problem.

Modify Your Use

An option you might consider when you are unable to come to an agreement with the rightsholder is to modify your use so that you do not need to obtain formal permission. In **Chapter 2**, we covered the question of whether you need permission for your

planned use of third-party materials. If your best efforts have failed, you may be able to modify your use so that the requested permissions fees are reduced or one of the situations discussed in **Chapter 2** applies to make permission unnecessary. Modifying your use of the third-party materials so that you are using less of the third-party materials that you originally intended or only using uncopyrightable subject matter are the two main ways you might accomplish this.

Abridge Your Use of the Materials: One way to modify your use in order to avoid breakdowns in the permissions clearance process is to use less of the copyrighted third-party materials than you had originally intended. For example, you might shorten a textual excerpt you plan to use in your work. This strategy can work to your advantage in two different ways. First, in the event that you are unable to afford the permission fee proposed by the rightsholder, using less of the third-party work may result in a reduced fee. As we have discussed, permissions fees for textual materials are often calculated on the basis of word count, so reducing the word count can result in a reduced fee. For images, you might consider using fewer images, black and white images, or only

part of the relevant image(s), in order to reduce your fees. Second, using less of the materials than you had originally planned may bring your use within the ambit of fair use. This strategy can favor fair use because, in general, the less of a copyrighted work you seek to use, the more likely it is to be fair use. For a discussion of fair use and suggestions as to when it may apply, see **Chapter 2**.

Use the Materials Selectively: In addition to simply using less of the third-party materials than you originally envisioned, you could also consider whether you might be able to modify your intended use so that you are only using uncopyrightable subject matter. As you may recall from **Chapter 2**, facts, concepts, and ideas are not subject to copyright protection. If you can achieve your goals for your work by using only uncopyrightable subject matter from the third-party materials, you may be able to avoid the need for permission altogether.

Recall from our discussion of uncopyrightable subject matter in **Chapter 2** that facts are not protected by copyright. If you wish to use a bar graph representing factual information in your work, but are unable to come to an agreement with the rightsholder, you could

consider representing the underlying data (facts) in a new way, such as in a table or another type of diagram. This strategy allows an author to graphically represent the same factual information—uncopyrightable subject matter free from the shackles of copyright—without having to obtain permission to use the original diagram.

Use Alternate Materials

If modifying your intended use of the third-party materials isn't possible or desirable, another potential path forward is to select alternate materials to use instead. As a practical matter, this is more likely to be a viable strategy for image permissions than text permissions. The viability of this strategy will also depend on your particular situation: if you are writing a book on a particular photographer's work, but are unable to obtain permission to use any of her photographs, it is highly unlikely that using another photographer's work would be a sufficient alternative. On the other hand, if you want to use a photograph of the New York City skyline in your book about skyscrapers, but are not able to obtain permission to use a specific photograph you have found of the skyline, you may be able to meet your

goals for your work while using alternate materials, such as a different photograph of the New York City skyline.

For example, one *Authors Alliance* member encountered difficulties obtaining permission to use a photograph of an indigenous tribe in the Amazon that she wished to include in her book. Through diligent searching, the author eventually identified the photographer and located his son—who held the rights in the photograph since his father had since died. Unfortunately, the son was unable to find the photograph in his father’s negatives, which had not been digitized, and some of which were located in a remote area. Ultimately, the author decided to select alternate materials, using a different image of the same tribe that she was able to license in exchange for a small donation to the nonprofit that held the rights in the photograph.

One potential pitfall of this strategy is that it may require you to start the permissions process over again—contacting a rights holder or rights holders and working to agree on acceptable terms. For this reason, it may work to your advantage to consider whether a public domain or publicly licensed work might work

for you (for a recap of the public domain and public licenses, see **Chapter 2**).

If a particular image is not essential to your work, and you are unable to obtain permission on acceptable terms, there are a variety of resources you can consult to find an alternate image for which the permissions process will not be so daunting. First, large art museums, including the National Gallery, the Metropolitan Museum of Art, and the Rijksmuseum, have in recent years begun creating databases of images of works of fine art in the public domain and making them available for anyone to use without payment. Similarly, Creative Commons offers an **image search function** which allows would-be users to find images and photographs licensed under public licenses.³¹ **Unsplash** offers a similar service.³² If a publicly licensed image is appropriate for your project, you may be able to find a suitable image on one of these sites and use it without payment.

Second, commercial image banks and stock image companies carry millions of images which you can license by paying that service a fee. This obviates the need to identify and contact the relevant rightsholder, but it also limits your choices to images those

companies can license and typically restricts you to paying a standard fee rather than allowing for negotiation.

Finally, image permissions present a unique case in that, when best efforts fail, you may be able to create or commission an original work to use in lieu of the relevant third-party materials in some circumstances. As you will recall from **Chapter 1**, copyright ownership typically vests with the creator of the work at the moment of its creation. But a work can also be produced on a “for hire” basis, where you hire a creator, who agrees that the copyright in that work belongs to you. Therefore, one tremendous advantage of commissioning a new work on a work made for hire basis is that you will hold the copyright in that work. You can simply grant yourself a *gratis* permission to use the new, commissioned work in your publication without worrying about rightsholders or fees.

As a practical matter, commissioning a new work is unlikely to be a viable option for text-based works. As we have alluded to, this approach might be appropriate for photographs you can feasibly re-create. For example, as in the previous example, you may be able to hire a photographer to photograph the New York City

skyline instead of using a photograph of the skyline that you found in a book. On the other hand, if you wish to use a well-known poem as an epigraph in your novel, with the goal that readers recognize the poem, it is highly unlikely that an original poem you commissioned could serve the same purpose.

CONCLUSION

IN THIS GUIDE, WE HAVE COVERED THE BASICS of the permissions process to help authors navigate permissions. Permissions clearance is a unique issue within publishing in that it is intimately related to the legal aspects of publishing, but responsibility is typically placed with the author, who may lack the legal expertise to understand the various issues at play. We created this guide in order to fill that gap: while permissions can be complicated, breaking the permissions process into discrete steps and carefully walking through the considerations involved can make the process less daunting. It is our hope that the information contained in this guide will empower you to approach third-party permissions with confidence, and moreover help ensure that the process goes smoothly and does not interfere with or detract from your goals as an author.

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INDEX

A

advertising **75**
agent **55, 57, 71, 80, 83**
attribution **30–31, 41–42**
Authors Alliance **3, 35, 43, 98**

B

black and white images **74, 95**
budget **45–46, 48, 80–82, 91–92**

C

community norms **5, 41, 42**
Copyright Office **7, 23, 28, 40, 50, 57–58, 64–65**
copyright page **51, 82**
Creative Commons **29–30, 99**
Creative Commons license **29, 31, 42, 78**

D

derivative rights **8, 31, 49–50**
duration of copyright **19–23, 78**

E

exclusive rights **8-9, 11-12, 60-62, 93**
exclusive license **12, 61-62, 71, 78-79**
expiration of copyright **19-23, 39**

F

facts **24-26, 96-97**
fair use **12, 17, 31-42, 43, 62, 96**
federal government publications **23-24, 39**
fees **48, 79-84, 91-92, 95-96**
fiction **27, 34**
fine art **56-57, 63-64, 99**

I

ideas **24-26, 96**
image permissions **56-57, 63-64, 73-75, 82, 95-101**
indemnity clause **10-11**
infringement **9-10, 12, 18, 24-29, 90-91**

J

joint ownership **60-61**

L

legal advice **5, 16, 37, 43**

M

museums **9, 30, 34, 53, 63–64, 73, 99**

N

negotiation **11, 75, 80–82, 91–94**

non-exclusive license **12, 60–61, 70, 78–79**

nonfiction **33–34**

O

open access **30, 75, 77–7, 93**

orphan works **65–66, 88–91**

P

permissions portals **58, 70, 82**

photographs **53, 56–57, 63–64, 89, 97–101**

print run **74, 77–78, 92–93**

publication contracts **4, 9–13, 16–17, 35–36, 46–49, 54, 79**

publication date **47, 74–75**

public domain **19–29, 39–40, 98–99**

R

renewal **22, 52, 75**

rightsholder **9, 11–12, 50–65, 70, 72–84, 88–94**

S

scènes à faire **24, 27**

short excerpts **38–40, 81, 95**

T

terms **30–31, 42, 48–50, 69–85, 91–94**

territory **72, 74**

text permissions **55–56, 73**

timeline **46–47**

transfer of copyright **9, 51, 54, 57–58, 88–89**

U

uncopyrightable subject matter **24–27, 94–97**

unpublished works **21–22, 51, 53**

W

warranty clause **10–12, 54**

work made for hire **7, 21, 100**

**Introduction to Copyright, Publication
Contracts, and Permissions**

Do You Need Permission?

Who Holds the Rights?

How Do You Secure Permission?

When Best Efforts Fail

Conclusion