

**THE TEN MOST IMPORTANT THINGS YOU SHOULD KNOW
ABOUT PERMISSIONS AND RELEASES***

**Workshop on Intellectual Property Issues
in the Publishing Industry**

New Delhi, India, February 15 and 16, 2007

1. What are permissions (also called “clearances”) and releases; what functions do they serve?
 - Intended to provide protection against intellectual property infringement and publishing tort claims – claims against unauthorized publication or usage
 - Facilitates learning about the origin/origination of content and proper/accurate attribution
 - Facilitates sourcing and learning best what content is most suitable for editorial purposes
 - Provides a legal record as to diligence to obtain authorization

2. What are the potential downsides of not obtaining a proper permission and release?
 - Publisher and author bear greater risk of adverse claims
 - If there is a claim, potentially
 - publication ceased
 - distraction of your time
 - dealing with claimants and attorneys (theirs and yours)
 - potential adversity to author
 - depending on applicable law, potential liability for actual or statutory damages, attorneys fees of claimant, and certainly your attorneys’ fees
 - embarrassment to reputation
 - violation of the law

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- Frustration of standard that publishers respect the intellectual property rights of others.
3. Determine the nature and type of content author/publisher wants to use and where they want to use it, in order to evaluate (i) whether or not a permission/release is needed, and (ii) if so what it must address. Start early in manuscript preparation/project planning; permissions often become “pacing” items – everything else is substantially done but clearances have not been obtained. Certain items to ascertain:

Copyright

- is there substantial similarity of copyrighted matter
- text – exact replication, or comprehensive nonliteral similarity or fragmented literal similarity?
- photos – there will be similarity, even if cropping to some extent – cropping could raise fair use analysis depending on use, and raises ‘moral rights’ or ‘droit morale’ issues
- music – assuming usage of master recording or musical composition in a non-parodical manner, there will likely be substantial similarity – cases often do very technical analyses breaking down and examining the components of the composition and the use
- is the content/material in the public domain – term of copyright – varies country by country – i.e., is it protected by copyright at all
- is it being used to enhance and supplement the material around it, in a synergistic manner – 1st fair use factor
- is the content fiction or non-fiction – 2nd fair use factor
- how much is intended to be used and how is it intended to be used – debunk the myths about certain quantities not requiring permission – 3rd fair use factor
- is it content that is often licensed through an in-house permissions department or independent clearance agency – 4th fair use factor

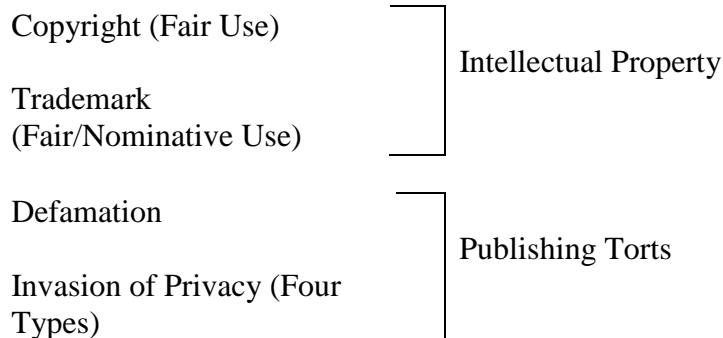
Trademark

- does the content contain a trademark; if so, where and how do you intend to use it
- do you propose to use a title similar to a well known book title or book series
- would there be a likelihood of confusion between your title and another well known product or book series
- have you searched a proposed trademark or title

Invasion of Privacy

- does the content contain information about a person, or use a person's name, image, likeness, voice, or other persona, in a commercial, endorsing or sales-oriented manner – misappropriation
- will a private person depicted in the content be embarrassed about a private matter that arguably the public has no right to know and has no inherent public interest in
- have you done research as to the truth and accuracy of the content you propose to publish
- is or will the information be derived from an interview with the subject person

4. Determine whether the permission is intellectual property based and/or publishing tort based.



See Attachment A for summary of fair use, defamation, and invasion of privacy elements.

5. Determine who owns the “rights” to the particular content or information, in order to ascertain from whom to obtain the permission/release.

- author/writer
- subject person/interviewee
- publisher/licensee/assignee
- artist/graphic designer/photographer
- website proprietor
- software publisher or developer
- record company
- musician/music publisher
- trademark owner
- estate, heir or descendant

6. Determine whether obtaining a permission or release is feasible, practical, and cost-effective.

- evaluate ease of finding, and dealing with, authorized representative

- evaluate using an experienced consultant or attorney
- costs– your time, payments to third parties such as person holding rights, communications, legal or other advisor possibly, documentation (as to all, how much are you willing to spend!)
- what if they say no? you can go ahead and get sued – this happens
- what happens if you can't ascertain who holds the rights, or if you do you can't find that person or entity – this happens
- alternatives – also evaluate early – do you really need that photo – yes because I want to use it on the cover of the book!!!

7. Determine exactly what rights you need to secure under the permission or release.

- worldwide
- exclusivity (or not)
- translation
- print
- electronic
- digital
- audio – visual
- entertainment
- theatrical
- dramatic
- database – compilation
- other media
- marketing/promotion
- assignment and sublicense
- other

8. Bear in mind that if not self-published, publisher may (should) want to see written permission or release and will require representations and warranties in publishing agreement.

9. Understand:

- this entire area is factually specific; potential issues require careful, informed examination
- when evaluating a publication, one must evaluate each instance where there is a potential issue on its own facts and evaluate the pub. as a whole
- this all applies to print and electronic publishing
- fair use is difficult and a “troublesome” area of copyright law
- defamation and invasion and privacy are matters of state law often where the claimants reside, and thus claimants can bring claims in home forums
- claimants can sue to stop sales of the publication at issue (injunctive relief)

- have qualified legal counsel as to the laws of your country/the home country of the person from whom you need the permission to assist you with prepare proper clearance and permission forms

10. Other Important Items.

- do your due diligence
- be meticulous and ‘picky’ about this area
- no objection letters – evaluate how best to document – evaluate how best to approach a rights holder
- evaluate your appetite for risk; do a practical risk assessment on tough questions – some say, this includes (i) what is the likelihood of being sued, (ii) if you are sued, what is the likelihood that you will win or lose, and (iii) if you lose what is the likelihood of plaintiff having damages; this author refers to Item 2 above and is neutral on this type of assessment
- keep good records on permissions, releases, and correspondence; print for your files
- media perils/publishers liability insurance

Remember: It’s easier to stay out of trouble than to get out of trouble.

Attachment A – Fair Use, Defamation, and Invasion of Privacy

1. **Fair Use - Section 107 of the Copyright Act.** The fair use of a copyrighted work, for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” Factors to be considered in determining whether a particular use is fair include:

- “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”

The Four Factors. These factors are non-exclusive and illustrative.

Purpose and Character of the Use - the primary focus is whether the new work is transformative, in that it adds something new or synergistic to the original work.

The Nature of the Copyrighted Work - the more creative a copyrighted work, the more difficult it is to invoke the fair use doctrine; the more factually-based a work, the more likely, depending upon the other factors, that a use will be fair.

The Amount and Substantiality Used - this portion of the analysis focuses on the amount of the copyrighted work used. The more used, the less likely fair use can be successfully evoked. Additionally, even though a small portion of a work is used, if it is the most important, critical piece of the work a court may conclude that it is not fair use.

Effect of Use On Market or Value of the Copyrighted Work - the effect on the market is the single most important element. The court must assess whether the secondary product (i) reduces consumer/market interest in the original copyrighted work, (ii) is in markets that the copyright holder intends to enter, or is in derivative markets that the copyright holder "may potentially" reasonably enter.

2. Elements of Defamation.

a. A factual statement (not opinion – be sensitive to context) must be published or broadcast to a third party.

b. The statement must be about a particular living person or extant corporate entity, who or which is identifiable to the average reader or listener.

c. The statement must be false.

d. The plaintiff's reputation must be damaged.

e. A claimant's status as a public or private figure, and whether or not the publicized matter is of public or private concern, dictates the publisher's degree of fault necessary for liability. Public figures have less protection than private figures and, in order to recover must generally show that the publisher published the defamatory statement with malice. The courts have held that the standard of intent required for defamation of private figures is a matter of state law, and the trend has been that as to private figures publishers can be held liable based on proof of negligence.

Sliding Scale of Standard of Intent for Author/Publisher Liability.

Status of Claimant	Matter Involving	Standard of Intent for Author/Publisher Liability
public official/figure X	official conduct/matter of public concern X	actual malice (knowledge or reckless disregard of falsity)
public official/figure X	private matter X	trend toward same standard as above
private figure X	public matter X	negligence/possibly more
private figure X	private matter X	typically negligence

Public officials typically include persons in the various governmental branches at federal to local levels, as well as persons who publicly (who are in the public's eye) wield power and influence such as celebrities and corporate titans.

3. Elements of Invasion of Privacy (Four Types). The Restatement (Second) of Torts provides that a person's right of privacy is invaded by:

- (a) unreasonable intrusion upon the seclusion of another, or
- (b) appropriation of the other's name or likeness, or
- (c) unreasonable publicity given to the other's private life, or
- (d) publicity that unreasonably places the other in a false light before the public.

a. Intrusion into Seclusion. Intrusion into seclusion is the intentional intrusion, "...physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, ..., if the intrusion would be highly offensive to a reasonable person."

b. Misappropriation of Name or Likeness. The tort of misappropriating one's name or likeness is the unauthorized use of one's name, likeness, voice or photograph as part of or to advertise a product or service, or to promote a commercial enterprise. Often the use is tantamount to an express or implied advertisement or commercial endorsement.

A claim's success can turn on whether the use is primarily for commercial purposes, or instead considered to be a matter within the public interest and therefore protected by the First Amendment. In order to qualify for First Amendment treatment, the use must be truthful and accurate, the matter must be one of "legitimate public concern," and the use must not imply that the subject endorses the product.

c. Disclosure of Private Facts. The public disclosure of private and embarrassing facts involves the publication of material which is not of public concern and which would be highly offensive to a reasonable person.

i. Truth is not a defense.

ii. The offending material must not be of legitimate, public concern. If the plaintiff is a private figure, it is more difficult, compared to the plaintiff being a public figure, for a defendant to credibly assert that the material is within the public concern.

iii. The subject must be alive and identifiable to third parties.

iv. The matter must become one of public knowledge; there must be a public broadcast.

v. The disclosure must be highly offensive to the general community.

d. False Light. Publishing false facts or statements which place or characterize a person or entity in a highly unfavorable light to a reasonable person, is an invasion of privacy.

i. The publication must be false.

ii. Here also, the degree of fault necessary to impose liability is predicated on the status of the claimant as a private or public figure and whether the matter is one of public concern.

iii. Look for fact distortion, important details omitted, made up details, and/or fictionalization.
