

Copyright, Fair Use, and Obtaining Permissions for Your Book: Guidelines for Authors

As an author or collection editor you are responsible for obtaining the necessary permissions to include in your book any material for which the rights belong to anyone other than yourself—or, alternately, for determining if your inclusion of the material qualifies as fair use or if the material is considered part of the public domain.

By ensuring that you have the proper permissions in place and maintaining clear documentation of your process, you help protect yourself (and us) from facing legal action for copyright infringement. The process of reviewing the fair use of third-party materials, locating rightsholders, and negotiating permissions can take some time, especially if you are planning to include a lot of artwork in your book, or if you are putting together an anthology of previously published works. Because all rights information must be vetted and any necessary permissions paperwork must be submitted to your editor *before* a book can be accepted into copyediting, we encourage you to start the process early to avoid causing any delays with your book's production schedule.

Copyright and fair use are complex legal issues. These guidelines are meant to give you some initial instruction on what materials require permission, what types of documentation you should obtain, and what constitutes fair use. However, the information provided here is by no means exhaustive. If you have additional questions, or if you need advice on a specific image or reprint issue, please contact your acquiring editor or your editor's assistant. We recommend bringing these questions to your editor before seeking permission from a rightsholder, since it may turn out that you have a good case for fair use. Technical questions that cannot be answered by the editorial office will be directed to our Intellectual Property team. Additionally, you may want to seek legal advice from your university counsel's office or your own lawyer to get more specific guidance on legal issues pertaining to copyright infringement.

When do I need to request permission?

For a scholarly book it is likely that much of your discussion and analysis of third-party materials will qualify as fair use. However, that will not always be the case, and it is your responsibility (in coordination with your acquiring editor) to determine where third-party permissions will be necessary.

There are many types of materials that do not require permission to reproduce, or where you may not need to seek additional permission (though, in some of these cases, you will need to provide us with documentation). They include:

- Your own previously published piece, to be republished in verbatim or close-to-verbatim form, where the publication agreement specifies that you may reuse the material in your own authored book;
- Your own previously published piece, where you have retained publishing rights;

- Your own previously published piece, where you have made substantial revisions to the earlier version;
- Works made for hire on your behalf (if you have a written agreement to this effect);
- Images or text in the public domain (for example, something published in the U.S. before 1923, government documents, court cases, or images distributed by a government agency).
- Images or text analyzed within the book that qualify as fair use (for example, quotations included for the purpose of analysis), so long as the image is available from a source that does not require signing a “use” license for access.

There are situations, however, where you are obligated to obtain permission to reproduce any text and images that are not created and owned by you. For example, you may need to obtain permission to include in your book:

- Your own previously published work where the publishing rights are held by someone else;
- A contributor’s new or reprinted essay;
- Poems or song lyrics that are reproduced in large part or that are not analyzed within the text (for example, in an epigraph);
- Images, graphs, maps, or illustrations neither produced by the author nor created as a “work for hire.”

What is the “public domain”?

Works in the public domain are not protected by copyright, generally either because the work was never under copyright protection in the first place (e.g., works produced by the U.S. government) or where the copyright period has expired. You may reproduce works in the public domain without permission (although, as always, you should give full citation to your source). All materials published in the U.S. before January 1, 1923 are in the public domain. Many materials published between 1923 and 1964 are also part of the public domain, if the copyright was not renewed (although it can be somewhat complicated to make that determination). You can consult the AAUP Permissions FAQ, listed below in “Other Resources,” for a detailed account of what falls into public domain, as well as the quick reference chart “Copyright and the Public Domain in the United States” available at <http://copyright.cornell.edu/resources/publicdomain.cfm>.

What is “fair use”?

Fair use is a set of exemptions built into U.S. copyright law designed to guarantee the right to use of copyright-protected materials for the purposes of criticism, commentary, news reporting, and scholarship. There is no single litmus test for determining whether something does or does not qualify as fair use. Rather, fair use is a complicated set of legal guidelines and precedents that needs to be actively exercised and defended to

remain intact. Duke University Press is a staunch proponent of fair use and encourages its authors to assert fair use of materials where appropriate.

The Fair Use section of the Copyright Act of 1976 (Section 107) provides that there are four factors that must be taken into account to determine whether something qualifies as fair use:

1. *The purpose and character of the proposed use, including whether such use is of commercial nature or is for nonprofit educational purposes.* This relates to both how you use the material and how the material is distributed. If you are clearly reproducing material for the purpose of scholarly analysis, critique, or parody, that strengthens your claim to fair use. But the reproduction of the work must be integral to your argument, and the work must be discussed and critiqued in the course of the text (which, for images, may include the captions), rather than included merely as a form of illustration. Duke University Press is a nonprofit publisher with a scholarly mission, and thus our books are generally aimed towards academic markets; that helps us meet the requirements of this factor, but it is not always sufficient in itself.

2. *The nature of the copyrighted work.* This generally pertains to whether or not the material is considered to be “creative expression.” Factual documents, for example, would not generally fall under copyright protection. You can use historical information or data you found in another book without infringing on someone’s copyright. Furthermore, ideas themselves are not protected by copyright, so you may generally paraphrase or provide a summary of a copyrighted text without requesting permission.

3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole.* If you are quoting a few lines from a long novel or analyzing a few frames of a long film, you are only reproducing a small proportion of an entire work. Since poems and songs tend to be shorter works, however, even quoting a few words or lines could be considered a “substantial” portion of the work. The proportion of a total work is not the only factor, though. If you are including the most crucial aspect of a work, even if it is only a small part, then the question of “substantiality” comes into play.

4. *The effect of the use upon the potential market for or value of the copyrighted work.* This is often considered to be the most important factor in a fair use case. Will your use of an image or text adversely affect the copyright holder’s potential ability to sell or market the piece? Could inclusion of the excerpt serve as a “substitute” for the original work?

Consider each of these criteria when determining whether your use of material belonging to someone else falls under fair use. Do not ask the rightsholder for permission if you think that fair use may apply. First consult with your editor. Together you can decide whether it is necessary to seek out permission.

Also, please note that even if you are claiming fair use on an image, if the only source of the image (such as an archive or library) requires that you sign a use license, you must

abide by the terms of the license. Be sure to consult with your editor to ensure the license does not include unacceptable restrictions.

What if the materials I am using are not in the public domain and do not qualify as fair use?

You will need to seek permission from the person or entity that controls the rights to material (the rightsholder) in order to include the material in your book.

When seeking permission, we recommend that you use our letter template (Sample Permissions Letter, Appendix A), which indicates that permission may not be necessary but that you would prefer to have it.

How do I go about requesting permission?

First you need to determine who controls the rights to reproduce the material. In many cases the rightsholder will be the creator of the work. But the rightsholder could also be a publishing company, the creator's estate, a newspaper, or another private organization.

For a book or article it is often easiest to start with the publisher. A publisher should be able to tell you whether it holds reproduction rights for the piece, or whether those rights lie with the author or another entity. If you go first to an author or other listed rightsholder, they may well have signed over publishing rights to the publisher or someone else; but they may not always be clear about that. So starting with the publisher is best whenever possible.

For a work of art or a photograph, you may be able to contact the artist directly. In other cases you may need to do some research to find out if a gallery represents the artist's work, or if a licensing group (such as Artists Rights Society, VAGA, or Art Resource) is in charge of clearing reprint requests. If there is a credit line attached to the image, start there. For artwork you may need to obtain two permissions: one from the artist or creator of the piece and another from the museum or gallery for their reproduction of the work (e.g., a photograph of a painting). If you know where the artwork is housed or who can provide a quality reproduction, begin your inquiries with them. The gallery or the museum's image library may be able to provide additional information about how to clear rights with the artist. (This additional step is often stipulated in the museum's own permission.)

What do I ask for when requesting permission?

There are a few key terms that should be included in your permission request. Except in unusual circumstances we require *non-exclusive publishing rights for use in your book and any excerpts of the book, regardless of media, territories, and languages.*

Non-exclusive. This means that the rightsholder does not give up the right to license the work to others.

Regardless of territories. This means that the Press can sell the book anywhere in the world. Although our primary market is in North America, we also have strong markets in the U.K., Australia, and elsewhere. There are instances where our territory may be limited, as when we are co-publishing the book with another publisher or publishing a translation. In these cases, check with your editor about the proper wording for territory exclusions.

Regardless of the media in which it is distributed or displayed. This ensures that the Press can make your book available in multiple formats. Most of our books are published both in print and electronic versions. As publishing media evolve, though, your book may be distributed and viewed in other ways. The broadness of the language in this clause ensures that your book could be included in any new forms of publishing that we undertake in the future. You can reassure rightsholders that the reprinted image or text will only appear in the context of your work, no matter what medium it appears in.

Regardless of the languages. Although your book will likely only be published in English by us, requesting use in all languages means that it will be easier to include the licensed material in any translations of your book. For example, if we later granted a French publisher the rights to translate your book, they would not need to seek out new permissions to use the copyrighted material.

The Press does not accept any time limitations on text or images. Our publications stay in print and in circulation in a variety of formats for a long time, and it is not practical to renew and renegotiate permissions after publication.

Our sample permissions request letter (Appendix A) includes all of this required language.

What if the rightsholder will not grant the requested rights?

Some rightsholders may not agree to all of these terms when you submit your request. Or they may demand that you pay quite a bit extra for electronic rights or additional language rights. First, try to negotiate with the rightsholder. Permissions fees are rarely set in stone. Emphasize that this is a scholarly book coming out from a not-for-profit publisher and that as author you are responsible for paying your own permissions fees. Often rightsholders resist granting electronic rights or limit the number of copies or print runs you can include the piece in because they are concerned that their work will be made too easily accessible.

If you are unable to convince them otherwise or cannot get them to lower an exorbitant fee for such rights, then you should either drop the image or replace it with something comparable. If the image or text is essential to your book, contact your editor or his or her

editorial assistant. Your editor will work with you to decide how best to handle the particular circumstances, since not having full rights, even for a single small piece, may limit the forms in which your book can appear or how long we can keep it available for purchase.

Rightsholders will frequently ask you to provide estimated print runs and prices for your book so that they can assess an appropriate fee. Your editor can give you this information. While estimates may be a standard part of your request, we prefer not to accept limitations on *print run* in the actual permission. As a general rule we publish small first printings and then reprint as necessary, and it would be impossible for us to renegotiate permissions before each and every printing. If the rightsholder insists on including a limitation, we suggest that you ask the rightsholder to grant you a one-time permission for a single *edition* of the book. This will cover usage for any reprintings, but would require a renegotiation of the permission before any revised or new editions of the book were published.

What type of documentation should I request?

You should keep written documentation for each piece that requires permission, including relevant author agreements if you plan to reuse any of your previously published work. This can be a letter that you send to the rightsholder and that he or she countersigns; it can be a letter issued by the rightsholder; or it can be an email response to your written request. In each case the permission should clearly state what images or text you are being granted reprint rights for and what rights are being granted (as well as any restrictions). If you sent an email or letter to the rightsholder and received a simple assent back from them, keep a copy of your initial request so that we can see what the terms of the agreement are.

There are rare occasions when it is not possible to obtain permission in writing (for example, when someone grants verbal permission over the phone and cannot follow up with a letter). If such a case arises, please keep a written account of your discussion, including the date and what the rightsholder said to you. This would not be acceptable from a publisher or other entity that regularly provides permission to reuse its work; rather, this would apply in cases where written permission would not be easily obtained (for example, from an individual informant you met during ethnographic fieldwork).

For original essays that will be part of an edited collection, you will need to obtain signed contributor agreement forms from each author. Your editor's assistant will provide you with this form (and it can be found on our website). No other permissions are needed for original contributed essays, unless they include embedded materials for which the rights are held by third parties or the publishing rights are held by someone other than the author (in which case you would seek permission to include the materials from the rightsholder rather than from the author).

If you plan to include any original interviews in your work where the interview will be transcribed verbatim rather than paraphrased, be sure to consult with your editor. You may need to obtain a contributor agreement (not a permissions letter) from the interviewee granting us the right to publish the interview.

There is a sample permissions letter appended to these guidelines, which you can use as a template for your requests (Appendix A).

What if I cannot locate the rightsholder?

There may be instances when there is a clear copyright holder for a work but you are unable to locate that person or company, or when you ask for permission but receive no response. The original publisher or magazine may have gone out of business, or there may be no record of who inherited an artist's estate. In these cases you should keep a detailed account of your attempts to locate and contact the rightsholder. You should note the number of times you attempted to contact the rightsholder (by email, mail, or phone) and received no response, as well as any information you may have found about the copyright holder (his/her death, information obtained from the U.S. Copyright Office, research into who controls the estate, etc.). Such due diligence is not a replacement for a permission, but it does indicate a good faith effort to locate and obtain permission from the rightsholder. This form of documentation would not be acceptable when attempting to contact an operating business, such as *The New York Times* or Random House.

Works produced outside of the U.S. are also protected by the copyright laws of the country where they were published or created. U.S. law always pertains, since the work will be published in this country. However, our works can be distributed worldwide. When the work as a whole is substantially about another country or region, the laws of that country or region should be consulted. In some cases, non-U.S. copyright law provides greater protections for rightsholders than does U.S. law and it is your responsibility to ensure that your use of the material does not violate the copyright laws of that country. In this case, you should consult with your editor early in the process for guidance.

What if I hired someone to create illustrations or maps for me? Do I still need to obtain permission?

If material to be included in your work is created by someone else as a "work for hire," the U.S. Copyright Office requires written documentation of this fact in order to ensure that the creator transferred his or her copyright to you and did not merely grant you permission to use it. Please submit a copy of your work-for-hire agreement with your permissions documentation.

Do I need permission to include material from a previously unpublished work by another author?

There is specific copyright law for unpublished materials. For example, unpublished and unregistered works become part of the public domain 70 years after the death of the author. Unpublished anonymous or pseudonymous works (including works published by a corporation) enter the public domain 120 years after creation. Similar rules apply to unpublished letters and documents that you might access through an archive. If the work is not in the public domain, you will either need to obtain permission from the rightsholder (which may be the author's estate) or seek permission from the archive holding the materials (if they have the right to grant such permission, which is not necessarily the case just because they hold the material in their collection).

I have an image I'd like to use for my book cover. Should I go ahead and get permission to use it?

Our in-house design staff will make final decisions about the cover design for your book. They are, however, quite amenable to hearing author suggestions for cover images. If there is an image you would like to use, obtain as much information as you can about the rightsholder and the licensing fee for the image. The cost for using an image on the cover in color is usually higher than for reproducing an image inside the book, so specify the use when you request a fee estimate. You should submit a copy of the image (or a link to it) and the rights information with your artwork.

Some authors are able to obtain quality versions of a potential cover image plus permission to use the image at little or no cost. In that case you should feel free to submit both the image and permission with your final artwork. But we do caution authors against spending a lot of money on an image that may turn out not to be appropriate (for design or quality reasons) for use on a cover.

Portions of my own writing have appeared in other publications. How do I handle permissions for these pieces?

It is perfectly acceptable for you to include in your book discussions of topics that you have addressed in previously published work. And some parts of those discussions can largely repeat arguments, analyses, or examples that you have used in earlier publications, without causing any rights and permissions difficulties. That's because ideas that have been publicly discussed—whether your own or someone else's—are fair game for further discussion.

But if you are including in your book any chapters that reproduce substantial portions of text from another publication—text for which you have transferred, in whole or in part, the copyrights related to that material—then you will need to discuss the matter with your editor. Reuse of previously published articles or chapters in your book will affect our copyright registration and may well affect our ability to distribute your book as widely as possible (e.g., via licensing for electronic uses, for translations, or for coursepacks).

For this reason, we hope you will consider significantly reworking, expanding, or otherwise altering significantly any chapter-length concepts and ideas that carry over from your previously published texts to your book with Duke University Press. This will help to integrate the earlier work into the book as a whole, which is important if the book is to contain an extended argument rather than a collection of discrete pieces that might sometimes repeat the same points or might not be carefully woven together.

In terms of publishing rights, we do need to know whether any of your chapters are reproducing either verbatim or significantly the text (rather than the ideas) from an earlier publication. If another publisher controls the rights to one or more chapters of the book, that can severely restrict our ability to license the material for future uses. While journals and other university presses often do allow authors to reuse their own work verbatim in new projects of their own authorship (with proper credit expected but no need to request formal permission), even these situations can create future problems that might hinder the fullest distribution of your book. For example, if the original publisher is the rightsholder for a particular chapter that was not significantly altered before being published in your book, and that publisher has not returned those rights to you, that may mean we will face restrictions from the other publisher on licensing your entire book for electronic use, for translations, etc.

Should you wish to reference your previous scholarship on the topics discussed, you can and often should do that in the acknowledgments section of your book, using language that makes it clear that the text draws on your earlier publications but that it does not simply reproduce text from them. Please use the words “reprinted by permission” (or alternative language if required by the rightsholder) in the acknowledgments *only when the text truly is verbatim*—in which case you will need to note the verbatim reprinting on your permissions log (and include documentation), and we will need to note that another publisher holds the copyright for the reprinted material in the frontmatter of the book. Where the ideas are largely the same as those you previously expressed but the text is significantly different, please use the language, “An earlier version in a different form appeared in X.” Please include this information on the permissions log, but make sure to note that no permission is necessary since the piece has been substantially revised.

If you are in doubt about any of this, please discuss with your editor what sorts of changes to previously published material make sense before it is included in your book, and whether that level of alteration would do what is needed to make your book chapter an original work.

Do I need permission to use epigraphs in my book?

Whether an epigraph requires permission depends on both the source and your use of the quoted material. Epigraphs from materials that are in the public domain do not require permission. Epigraphs from copyrighted materials must either qualify as fair use or be used with the permission of the rightsholder.

An epigraph must be sufficiently tied to the text that follows in order to qualify as fair use. There must be either an *articulated link* or a *readily articulable link* between the epigraph and the text that follows. If so, then we can apply the same principles of fair use that we do to other forms of quotation and excerpt.

An *articulated link* means that you have referred back in explicit terms to the quotation, perhaps explaining its relevance to your claims or commenting on the quotation itself. (“As Foucault suggests in his description of the prison...” or “Baldwin’s words remind us that...””) A *readily articulable link* means that an average reader would without any strain be able to infer a clear connection between the epigraph and the main text. For example, if the epigraph is a quotation referring to worries about crime in downtown St. Louis, and the ensuing discussion is about contemporary perceptions of urban crime, this would be a readily articulable link. The reader can see that the epigraph is meant to show how people are discussing crime in this context.

If the link is not clear, you should either strengthen the connection, drop the epigraph, move the quotation to the main text, or obtain permission from the rightsholder.

If an epigraph is being used for purely decorative purposes, you should obtain permission to reprint the material. The use is “decorative” when the epigraph is not clearly linked to the main text. For example, if you are using an epigraph simply to set the tone for the chapter or as a form of inspiration that is not followed up on in the text, that would be considered illustration and would not qualify for consideration as fair use.

Song lyrics and poetry tend to be highly protected by rightsholders, and there is a higher burden to justify fair use since the proportion of quoted text to that of the entire work tends to be higher than in other written works. If you would like to use quotations from these types of materials in an epigraph (and they are not in the public domain), you should carefully consider the epigraph’s link to the main text, as well as the proportion of the work being reproduced. If your use of the material does not qualify as fair use, then you will need to obtain permission from the rightsholder. If that is difficult or prohibitively expensive, then we suggest moving the quotation into the main body of the text, where you can analyze the material in more detail.

How do I submit my permissions to Duke?

Ideally you should submit a complete set of permissions when you send in your final manuscript and artwork. This will give the editorial office enough time to go through the permissions and contact you with any questions that may arise while the manuscript is being prepared for production. If you are unable to submit a complete set of permissions when you send in the final manuscript, please let your editor or his or her assistant know. We must have all of your approved permissions in house before your book can be accepted for copyediting.

A completed Art & Permissions log should accompany the documentation. This log lists each item (reprinted essay, piece of art, or other text or visual element requiring permission), along with any pertinent information about restrictions on use or distribution. Your editor's assistant will provide you with an electronic version of the log, along with instructions for how to complete the log.

Each permission should be clearly marked with the image number or chapter number in the upper right hand corner. If you are working on an edited collection, please indicate the contributor's name as well as the figure number or chapter on each permission. For any permissions submitted in a language other than English, please supply a translation that clearly indicates what rights have been granted and any stipulations. Details on image numbering are available in our Art Submission Guidelines.

For artwork, you should include any required credit lines or copyright notices in your image captions. For reprinted text, please include a separate document with the required credit lines and a note about where this information should be placed (if specified on the permission). You should not include acknowledgments of earlier publications that do not require permission in this document. That information can be included in your own author acknowledgments.

You do not need to list contributor agreement forms on your permissions log. Simply send the contributor forms to your editor or editorial assistant along with the other materials.

Make sure to retain a copy of the permissions and all other paperwork for your own records.

Other resources

Here are some places you can find more information about copyright, permissions, fair use and the public domain:

General resources

The U.S. Copyright Office (<http://www.copyright.gov>) includes a number of useful resources and the Circulars and Fact Sheets are particularly popular for reference. See: <https://www.copyright.gov/circls/>

The Association of American University Presses (AAUP) provides a Permissions FAQ that includes helpful information on permissions considerations for different types of works (photographs, unpublished material, interviews, etc.).

See: <http://www.aaupnet.org/images/stories/documents/aauppermfaqs.pdf>

Cornell University's Copyright Information Center also includes a number of helpful FAQs:

See: <http://copyright.cornell.edu/faq/index.cfm#domain>

The American Society of Picture Professionals (ASPP) has published a guide titled "Best Practices for Locating Copyright Owners of Photographic and Visual Art."

See: <http://aspp.com/resources/best-practices/>

Fair Use

For a good brief overview of the basics of determining fair use, especially what is required to show that a use qualifies as "transformative," see "Measuring Fair Use: The Four Factors." See: <http://fairuse.stanford.edu/overview/fair-use/four-factors/#1>

The College Art Association has published useful guidelines for fair use of artwork, photography and other creative images in its *Code of Best Practices in Fair Use for the Visual Arts*.

See: <http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf>

The Society for Cinema and Media Studies has created a statement on fair use of cinema and television images.

See: http://www.cmstudies.org/?page=fair_use

The Poetry Foundation and other organizations have also published helpful discussion about the fair use of poetry in their guide *Code of Best Practices in Fair Use for Poetry*.

See:

https://www.poetryfoundation.org/uploads/documents/FairUsePoetryBooklet_singlepg_2.pdf

Public Domain

The Public Domain Sherpa website includes a wealth of useful information on copyright and the public domain:

See: <http://www.publicdomainsherpa.com/>

Cornell also maintains a very useful chart for determining whether a work is in the public domain titled "Copyright Term and the Public Domain in the United States."

See: <http://copyright.cornell.edu/resources/publicdomain.cfm>

Stanford also has a Copyright Renewals database where you can search for renewal records submitted to the U.S. Copyright Office between 1950 and 1992 for books published between 1923 and 1963 (a period when copyright renewals were not automatic).

See: <https://exhibits.stanford.edu/copyrightrenewals?forward=home>

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Appendix A: Sample Permissions Letter

Dear ---:

As the author of [or editor of, or a contributor to] the forthcoming book tentatively entitled BOOKNAME, I am responsible for clearing and paying for rights and permissions with the advice and support of the scholarly publisher Duke University Press.

I would like to include in this book the following [chapter/image/table/poem/etc.] which you appear to hold the rights for:

DESCRIBE WHAT IS TO BE REPRODUCED HERE

I am not certain whether I need your permission for this, but I would prefer to have it.

To make this work easily available to scholars, I am requesting non-exclusive publishing rights for using the requested material in this book and in any excerpts of this book, regardless of the media, territories, and languages in which it is distributed and displayed.

I will acknowledge the source of your material in accordance with scholarly norms. If you require any particular form of acknowledgment, please let me know.

In setting a fee for the permission, please bear in mind that the book is with a not-for-profit publisher and will be used primarily for educational and scholarly purposes. I will be truly grateful if you can waive altogether any fee you charge for commercial uses.

If you do not control the rights in this material, would you please let me know? In that case, I will also be grateful for any information you can provide about who does control rights to the material.

Thank you for your consideration of this request.

Sincerely,
