



## **Copyright and Your Dissertation or Thesis: Ownership, Fair Use, and Your Rights and Responsibilities**

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This manual is principally intended to help readers learn and understand the copyright issues relevant to doctoral dissertations. Any views expressed in this manual are those of the author or ProQuest and do not necessarily reflect the views of any other person or university. This manual is not legal advice. For some copyright questions you may need to consult an independent legal advisor.

Thanks are due to the many good people at ProQuest who supported this project, and to colleagues around the country who commented on drafts and shared their experiences and insights. Special thanks to Sherri Barnes at the University of California, Santa Barbara; Tim Jewell and Thom Dierdorff at the University of Washington; Peg O'Donnell at The Catholic University of America; and my many supportive colleagues at Columbia University.

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## Part I: Getting Started

### *Why Copyright?*

In the academic context, copyright is primarily about getting the most from your scholarly work, and it is less about legal complications with threats of possible liabilities. Taking the time to learn a little about copyright can give you the insight to know your options under the law, to make your dissertation more successful, and to help you avoid possible copyright conflicts and dilemmas in the future. The subject of this manual is your dissertation, but many of the issues here will arise in all of your future scholarship. With each article, book, computer program, website, and other new work that you prepare throughout your career, you will find that giving some attention to copyright will make your publications more successful. Your dissertation is just the start.

Finishing your dissertation is exhausting and gratifying. You have invested countless days of research, followed by hours of writing late into the night. You made exciting breakthroughs, and you aspire to a career of further research. You probably did not expect to indulge in copyright at this stage of your study. However, attention to copyright can help avoid pitfalls and reveal opportunities to further your scholarly goals. Given the way that the law operates, copyright law most certainly protects your dissertation as well as the quotations, photographs, music, diagrams, and many other works that you have included in your doctoral study. The decisions you make about copyright can directly affect the quality of your work, your ability to publish your dissertation, and your opportunities for building upon your years of research throughout your career. Attending to the fundamentals of copyright can be important for your scholarship, regardless of your discipline or field of expertise.

### *Common Scenarios*

What copyright issues need your attention? Consider a few common and practical examples of copyright's relationship to dissertations. These scenarios highlight strategic alternatives for dealing with copyright challenges effectively and successfully.

*Photographs, Art, and Architecture.* Alice is completing her dissertation on art and architectural history and wants to include a variety of photographs, drawings, and artistic renderings from throughout the twentieth century. Nearly all of those works are protectable by copyright. We can ponder whether it is likely that any copyright owner would object, but when a copyright owner does show up to object, it is a serious nuisance or worse. At the very least, Alice may find herself scrambling to secure permissions, or dealing with objections as they arise with the ensuing prospect of modifying her dissertation or blocking online access to it. *Alice's solution?* With a little advance planning, she can explore her options, evaluate fair use, secure any needed permissions, and even find alternative images that are in the public domain or licensed for these uses—including the many images available on the web with Creative Commons licenses. Attending to copyright matters early can prevent complications and delays in filing her dissertation.

*Chemistry Journal Articles.* Belinda successfully published two articles in leading chemistry journals during her years as a graduate student. When the articles were originally accepted for publication, she and her advisor were delighted, and Belinda was happy to move the articles as quickly as possible toward publication. She is now preparing her final dissertation, and it will include full reprints of the two articles. However, she only now realized that her

publication agreements with the journals included a transfer in full of the copyrights. She may be the author, but she no longer holds the right to reproduce the articles in her dissertation. *Belinda's solution?* By understanding her own rights as an author and taking greater care with her publication agreements she might have avoided this situation. Most journals would probably support Belinda's dissertation, but she now needs to find the right contact for each journal and clear the right to use even her own articles. Advance planning when she originally published the articles would have been best.

*Scholarly Book on Asian Literature.* Carlos is filing his dissertation on comparative Asian literature and is pondering the various choices for open access and Creative Commons. Carlos is a strong supporter of open access to information, and his university requires that dissertations go into the digital repository. His advisor is cautioning Carlos that some university presses might not publish a scholarly book based on a dissertation that is easily accessible on the internet. *Carlos's solution?* Carlos has an opportunity to make careful and informed decisions about the management or stewardship of his own copyrights. He needs to anticipate future plans, investigate alternatives, and make well-informed decisions. Most publishers do not balk at a work based on an open-access dissertation, but a few may. Reactions will vary widely among publishers and across disciplines. Carlos should also evaluate his options about open access, temporary embargoes, and different CC licenses. He might explore nontraditional or innovative publishers that have adapted to more flexible terms. By recognizing his rights as the copyright owner, Carlos is positioned to better manage his work, allow appropriate access, and preserve his opportunities for future publications.

Notice that these scenarios are not filled with threats and allegations. Few copyright matters in higher education rise to that level. These scenarios are principally about two other concepts. First, they are about respecting copyright. Copyright is part of the process of creating and sharing research. We need to respect the copyrights of others, and we need to show respect for our own copyrights through careful management. Second, the scenarios are about advance planning and strategic choices. Solutions to the copyright concerns in each case are possible by learning a bit about the law, considering alternatives, and making informed and reasoned decisions that can help prevent problems before they have a chance to interfere with your work or stall the filing of your dissertation.

### *Making a Plan of Action*

The copyright guidance in this manual is structured to help you quickly understand and focus on the issues that are important to your dissertation and future scholarship. Here is a suggested process for addressing copyright:

- First, read the overview of copyright fundamentals in Part II.
- Second, review the questions in Part III and identify the ones that are relevant to your work.
- Third, make a plan of action related to your copyright questions. Some of the most important and common questions are reflected in the scenarios about Alice, Belinda, and Carlos:
  - If your dissertation will have photographs, extensive quotations, and other materials from third-party sources, evaluate the copyright status of each and whether your use may be fair use or need permission.
  - If you are in the middle of your graduate study and plan to publish some of your research, choose a publisher that will accommodate your dissertation plans, and study closely the terms of the publication agreement.
  - If you are completing your dissertation, evaluate and select the options about Creative Commons or open access that might be right for you.

## Part II: Fundamentals of Copyright for Dissertations

What do you really need to know about copyright? Start with the following core principles of copyright as applied to dissertations. Many of the most important points will be examined in greater detail with supporting references in Part IV of this manual.

*Your dissertation is protectable.* Copyright law protects “original” works that are “fixed” in some medium—for example, written on paper, stored on a computer drive, sculpted in clay, or recorded on tape or other media. You wrote your dissertation, using your original words or other expression. You probably have “fixed” it in various ways.

*Your dissertation in fact is protected.* It would be a rare and unusual dissertation that is not protected. A work that is “original” and “fixed” is protected automatically under copyright law. You do not need to register it with the U.S. Copyright Office or even put a copyright notice on the dissertation. It is copyrighted upon creation. Those procedures and formalities may be a good idea—as will be explained later—but they are not required for copyright protection.

*You are most likely the copyright owner.* Copyright ownership vests initially with the person who created the new work. If you wrote the dissertation, you own the copyright. However, it is possible that you may have entered into a funding or employment arrangement that would place copyright ownership with someone else. Review your agreements carefully.

*You can decide how to publish your work.* Students should consult with their advisors and other officials about local university policies related to depositing dissertations with university repositories and possible “embargoes” or postponements on public release of your dissertation. To be clear, when you deposit your work with ProQuest, the company does not ask for a transfer of the copyright. Your rights in your work do not change. As long as you hold the copyright, you are in general able to decide how your dissertation may be made available, reworked into a book, or divided into a few journal articles. As the copyright owner, you get to make those decisions. But if you give away your copyright—as some publication agreements require—you can lose all of those opportunities and privileges.

*You can decide to enforce your rights or share them.* As the copyright owner, you have the legal right to enforce claims against infringers. At the same time, you also have the privilege of allowing uses. You can grant permission on request, or you can attach a Creative Commons license to your work that permits broad public use.

*The works you included from other sources are also likely copyrighted.* Just as the law protects your dissertation, it also protects most of the original text, music, photographs, computer code, and other materials that you borrowed from other sources to include in your dissertation. Respecting those copyrights is part of the process.

*You have options for properly including materials from other sources.* Copyright law offers three basic possibilities. First, the work may be in the public domain. Copyrights eventually expire, placing the works in the public domain. Some works, such as works of the U.S. government, are not protectable at all. Second, your use of copyrighted works may be within fair use. Third, you may secure permission from the copyright owner. That permission may come from an individual request, or the source itself may have a Creative Commons license or other statement permitting your use.

*Keep your copyrights and keep copies of your agreements.* Whenever you enter into a publication agreement or other agreement related to your dissertation or any future work, read it, negotiate the terms, and keep a copy of everything you sign. Similarly, keep copies of all permission letters—ones you send to secure permission, and ones you receive from the next researcher wanting to use your copyrighted works.

As you can see, copyright grants rights and imposes responsibilities. One virtue of copyright law is that it offers options. You can manage your own copyright in ways that are protective or generous. You can be cautious or assertive about fair use. For the most part, you decide how you want to face up to the copyright tasks at hand. Either way, you need to learn a little about the law and make well-informed choices.

### **Part III: Copyright Decisions and Your Dissertation**

The recurring point of this overview is the importance of making well-informed decisions as you work through the copyright issues related to your dissertation. Outlined below are two sets of questions that you can help you address the range of copyright issues that might be relevant to your dissertation. Not everyone will need to address all questions, but by working through these groups of copyright issues, you will probably have attended to all issues that are realistically relevant to your research.

#### *Decision Group One: Managing Your Copyright*

- 1.1 Do you Own the Copyright in your Dissertation?
- 1.2 Should you Register the Copyright?
- 1.3 Should you use a Creative Commons License?
- 1.4 Should you make your dissertation Open Access?
- 1.5 Should you choose the ProQuest Open Option?

#### *Decision Group Two: Using Other Copyrights*

- 2.1 Have you Identified all Third-Party Materials?
- 2.2 Are any Materials in the Public Domain?
- 2.3 Are your activities within Fair Use?
- 2.4 Do any of the Materials have Creative Commons Licenses?
- 2.5 Do you have Permission?
- 2.6 Are you Including any Materials by you but Previously Published?
- 2.7 Can you Avoid some of these Issues?

The following overview of the Decision Groups can guide you through some of the most common issues and options. Many of the legal concepts are examined in greater detail in Part IV.

#### *Decision Group One: Managing Your Copyright*

- 1.1 Do you Own the Copyright in your Dissertation?

Barring such extraordinary conditions, you wrote your dissertation and you are the copyright owner. It is generally good practice to include a proper copyright notice on your dissertation (for example, “Copyright 2014, Belinda Fullname”).

## 1.2 Should you Register the Copyright?

You should seriously consider registering your copyright claim with the U.S. Copyright Office. The fees are modest and the possible legal benefits are enormous. ProQuest offers a registration service when you file your dissertation, making the process easy and affordable. In addition to the legal benefits, ProQuest has negotiated an arrangement with the Library of Congress to be sure that every registered dissertation is entered into the searchable catalog and contributed to the Library’s collections, assuring that future researchers can find a record of your work. Every dissertation author should consider seriously the merits of registration.

More information on registration is available through ProQuest here [[http://www.proquest.com/en-US/products/dissertations/submitted\\_authors.shtml](http://www.proquest.com/en-US/products/dissertations/submitted_authors.shtml)] and via the United States Copyright Office website at <http://www.copyright.gov/>.

## 1.3 Should you use a Creative Commons License?

Creative Commons is a means for you, as the copyright owner, to share your work with others. A most versatile CC license permits any uses of your work with attribution; you might instead want to limit the license. An overview of the various CC license options is available at <http://www.creativecommons.org/licenses>. You might skip the CC system and simply write your own statement on your dissertation spelling out the uses you want to permit. As the copyright owner, you generally have the right to decide whether to attach such a permission or license to your dissertation. For uses beyond the license term you have established or those uses permitted under law (such as fair use), researchers may come to you for permission.

## 1.4 Should you make your dissertation Open Access?

Open access allows you to support access to information and future research. From a purely copyright perspective, the decision to make your dissertation open access is your choice. However, universities may set other requirements, and it is common today for universities to require electronic submission of dissertations for deposit in the university’s digital repository. There is some small potential that open access might limit your future publishing options, although that possibility will vary greatly among publishers and disciplines. You might have other reasons to restrict public access to your work, particularly if your work deals with sensitive or confidential matters, or if your dissertation includes patentable findings. ProQuest and many universities allow you to request an embargo, delaying open access for a period of months or years.

## 1.5 Should you choose the PQDT Open Option?

ProQuest offers you the option to make your dissertation fully accessible to the public from the ProQuest Dissertation and Theses (PQDT) database. This option is your choice. For information and fees, visit the ProQuest website at:

[http://il.proquest.com/assets/downloads/products/open\\_access\\_overview.pdf](http://il.proquest.com/assets/downloads/products/open_access_overview.pdf).

## *Decision Group Two: Using Other Copyrights*

### 2.1 Have you Identified all Third-Party Materials?

Comfortably before filing your dissertation—preferably several months before—do a systematic review of your draft. Identify all materials that you might include in the final product, ranging from ordinary quotations to full reproductions of photographs, music, software, and any other copyrightable material. Each item will need at least brief consideration for copyright clearance, but others may require careful evaluation and perhaps even the time to track down a copyright owner for permission. The next questions summarize the likely possibilities. You should also identify third-party materials in order to give them an appropriate citation. Citing sources is of great importance for intellectual honesty, but citations do not resolve the copyright questions.

## 2.2 Are any Materials in the Public Domain?

Works in the public domain have no copyright restrictions on use. Copyright does not apply to facts, slogans, processes, and procedures. Copyright does not apply to works produced by officers and employees of the U.S. government, such as congressional reports and State Department studies. Copyrights also expire, placing many older works in the public domain.

## 2.3 Are your activities within Fair Use?

Fair use is one of several statutory exceptions to the rights of copyright owners. If your use is within fair use, you are not infringing on the legal rights of the owner. Fair use may not be what you expect. It is determined by a balancing of four factors. Avoid making hasty determinations about fair use. Fair use favors research and scholarship, but that does not mean that every use you might make is fair under the law.

## 2.4 Do any of the Materials have Creative Commons Licenses?

Just as a CC license on your dissertation can help future researchers, a CC license on other materials can help support your work. For example, works that have the generous CC “attribution only” license may be included in your dissertation, provided you give proper credit to the author or rightsholder. Add a footnote as you would for any other source, and look for suggestions from the author about preferred form of attribution. Some CC licenses allow only noncommercial uses, and those materials will most likely be acceptable for inclusion in your dissertation. You may have to revisit the use those materials if you later revise your dissertation for commercial publication as a book, monograph, or journal article.

## 2.5 Do you have Permission?

If you have permission from the copyright owner to use the materials, you are in great shape. That permission may be in the form of a formal letter, printed and signed. It can also be an email, or a suitable Creative Commons license, or a license that you or your university may have for the use of materials in a database or other collection. Check with your librarians for the terms of use of materials from your library’s collections.

## 2.6 Are you Including any Materials created by you, but Previously Published?

Many dissertations include text, diagrams, images, and other materials that may well have been written and created by you, but they were published before filing the dissertation. Be careful. You may be the author, but take the time to locate and review your publication agreement. Did you transfer the copyright to the publisher? Did you retain the right to reuse the content in future projects? Unfortunately, if you gave away too much, you might have to return to the publisher and seek



permission to use even your own work. One important lesson: Read and negotiate your publication agreements with care.

## 2.7 Can you Avoid some of these Issues?

Yes, you can. For example, you can avoid issues of fair use and permissions by selecting photographs and other works that have Creative Commons licenses. Flickr.com and many other sources have extensive collections of photographs with CC licenses that may serve your needs very well. Museums are increasingly putting art images online with clearance for use. Another strategy may not be as elegant, but it is effective. You can always remove the problematic materials or use them in a different way. Some students may be willing to omit certain materials from the dissertation, especially if they might be included in a future publication based on your dissertation. You might replace full-size photographs with images that are thumbnail, low-resolution, and even black and white. That option is hardly ideal, but it is more likely to be within fair use and may be acceptable to you and your committee for purposes of filing the dissertation. You can then postpone the quest for permissions until you have lined up a publisher your future book or articles. Finally, you can avoid copyright problems related to your own works by choosing your publishers carefully and negotiating your agreements wisely. A good agreement can allow your work to become more accessible and more valuable for future study.

Information about what is required when submitting your dissertation to ProQuest for publication in its ProQuest Dissertations and Theses database, see [http://www.proquest.com/assets/downloads/products/UMI\\_CopyrightGuide.pdf](http://www.proquest.com/assets/downloads/products/UMI_CopyrightGuide.pdf).

## Part IV: A Closer Look at Copyright

The fundamentals of copyright are reasonably straightforward, but details can get complex. Writings on the law of copyright fill volumes. For a few of the issues relevant to dissertations, a closer look at some details is warranted.

### *Background of the Law*

Copyright law in the United States is made by Congress and interpreted and applied by the courts. The Constitution empowers Congress to enact copyright law, and it has done so since 1790.<sup>1</sup> The current statute—fully revised in 1976, but amended many times since—gives authors exclusive rights to reproduce, distribute, and make many other uses of their original works.<sup>2</sup> Copyright applies to much more than traditional writings—it can protect artwork, sculpture, sound recordings, videotapes, motion pictures, maps, graphs, computer programs, databases, and a host of other original creations. Those rights are subject to limitations. Copyrights expire. Copyrights are also subject to fair use and other exceptions detailed in the U.S. Copyright Act.

This overview is about the law in the United States. Almost every country in the world has its own copyright law, and laws around the world have some important similarities and differences. Yet one basic principle prevails: When in the U.S., apply U.S. law. That simple statement has these fundamental implications:

- If you are in the United States, but using a work that comes from another country, you may ordinarily apply general concepts of U.S. to that work. In other words, you can apply American principles of fair use to a work that originated in the U.S. and to works that came from Japan, Brazil, Turkey, or any other country. In some nuanced ways, U.S. law does

apply differently to foreign works, but those complex situations are not likely to arise and are beyond the scope of this overview.<sup>3</sup>

- If you are doing your research, writing your dissertation, or publishing an article outside the United States, you are governed by that local law. Your use of works from the U.S. is also governed by the law where you are located. Some principles of copyright are similar in many countries, but significant differences are inevitable. For example, every country has various copyright exceptions, but only a few have anything like the U.S. concept of fair use.
- For further reference, please see [Copyright Laws Around the World](#), which includes specific summaries. Additional Information is also available from the United States Copyright Office, Fact Sheet on International Copyright at <http://www.copyright.gov/fls/fl100.html> and Circular 38a, International Copyright Relations of the United States, available here <http://www.copyright.gov/circs/circ38a.pdf>.

### *Scope of Copyright Protection*

Part I of this manual includes a few scenarios about graduate students facing copyright issues as they completed their dissertations. Look again at the example of Alice and her dissertation about art and architectural history. Alice may be wondering if copyright even applies to her dissertation and the many new and old materials she is finding in her research. Copyright does not apply to everything, but it likely does apply to many of the materials Alice is creating and using. Copyright protection vests automatically to “original works of authorship” that are “fixed in any tangible medium of expression.”<sup>4</sup>

“Originality” encompasses new writings, musical works, artwork, photography, computer programming, and more. You may also find originality in a new arrangement of existing facts or information.<sup>5</sup> For example, scientific findings or facts may not be copyrightable, but their arrangement on a table or their presentation in text can be protectable.<sup>6</sup> Similarly, Palladio’s architectural studies from the sixteenth century may never have had any form of legal protection in their first incarnation, but a new translation is easily an “original” work subject to copyright law.

The “tangible medium” requirement means that the work must be fixed in some medium from which it can be perceived.<sup>7</sup> The open language of the law expands copyright from traditional writings and pictures into the realm of video, sound recordings, computer disks, and Internet communications. If you can see it, read it, watch it, or hear it—with or without the use of a computer, projector, or other machine—the work is likely eligible for copyright protection.

Under today’s law, you no longer need to add a copyright notice (such as “Copyright 2014, Alice Fullname”) to the work, nor do you need to register your work with the U.S. Copyright Office.<sup>8</sup> As the author of your dissertation, you get automatic protection. This rule also means that many of the works you find in your research are likely protected even in the absence of a notice or registration. Although not required, adding a notice is good practice, and registering your dissertation can give you additional legal benefits.

The legal benefits of registration can be enormous. You probably are not thinking of lawsuits at this stage of your work, but in the unlikely event of legal action by you to protect your copyright, registering the copyright can put you in a much stronger position. For most works, you need to register before you can file a lawsuit.<sup>9</sup> Once registered, you may seek the significant “statutory damages” in an infringement claim. If your lawsuit is successful, you can ask the court to order

reimbursement of your attorney fees.<sup>10</sup> That fact alone might determine whether you can realistically proceed with enforcement. Also important, registration creates a public record of your claim and your contact information, which can be important to future researchers who might want to use your work as they produce yet the next generation of scholarship.

Based on these principles, Alice can conclude that copyright has a lot to do with her research and dissertation. Her new writings, diagrams, images, and even charts and graphs that she creates for the dissertation are almost certainly protected. The same holds true about the many books, journals, websites, software programs, and other resources that she uses in her study. Alice might also register her work with the U.S. Copyright Office in order to secure a variety of valuable benefits under the law. ProQuest offers a service to help with that process.

### *The Public Domain*

Look at the second scenario about Belinda's dissertation in chemistry. While almost all recent books and journal articles are protected by copyright, Belinda is wondering if many other materials she is finding and developing are outside the bounds of copyright. Works without copyright protection are in the "public domain," which means that Belinda can use them without concern about restrictions or legal claims based on copyright law.<sup>11</sup> The public domain comprises several categories of works, all of which are potentially useful to Belinda and other students:

*Ideas and Discoveries.* The law specifically states that ideas, processes, concepts, and discoveries are not eligible for copyright.<sup>12</sup> Belinda may be using crucial concepts and formulas that can earn Nobel prizes in chemistry, but copyright law does not protect them. If copyright granted legal control over ideas, the expansion of knowledge would be severely constrained. Belinda is free to build on the ideas of others, although the words and the computer code manifesting those ideas may well have copyright protection.

*Works created by the U.S. Government.* A specific statute prohibits copyright protection for federal government works, but even this rule is not so simple.<sup>13</sup> Reports written by members of Congress and employees of federal agencies, as part of their public function, are not copyrighted. But projects written by non-government officials with federal funding are protectable. Belinda's graduate research may be funded by the NSF or other federal agency; the grant alone does not put her work in the public domain. Further, the exclusion applies only to works of the United States *federal* government. State, local, and foreign governments are left to decide whether their own works will have copyright protection. If it is not clear whether a specific governmental work may have copyright protection, inquire with the appropriate agency that created or published it.

*Some Foreign Works.* Consistent with the terms of the Berne Convention and other multinational treaties, U.S. copyright law protects most foreign works on generally the same terms as domestic works.<sup>14</sup> Only a few countries have not entered into copyright treaties or agreements with the U.S., leaving their works unprotected in this country. A publication from the U.S. Copyright Office notes the few countries with no copyright ties to the U.S., or whose relations are "unclear."<sup>15</sup>

*Works that are not "Fixed."* Works that are not "fixed" in a tangible medium are not protected under federal copyright law. A speech or music performance that is not recorded, written, or otherwise "fixed" in some medium is not protectable under U.S. copyright law. Works that are not "fixed" are sometimes protected under legal systems created by individual states, and some countries protected works that are not fixed.

*Images of Art.* An important court decision in 1999 clarified the nettlesome question of whether “copy photography” of a public domain artwork is a new copyrighted creation.<sup>16</sup> Whether the work is a recent Warhol or a public domain Rembrandt, many photographers have claimed a separate copyright in the photographic reproduction. The court ruled that a direct and accurate reproduction of the original painting lacks “originality” and is not protected by copyright.<sup>17</sup> Photographic reproductions of works of art and other graphic images are important in many scholarly studies. Alice may have art images in her study of architectural history. Belinda’s dissertation could have similar issues if, for example, she is analyzing the chemistry of art restoration. If the work is recent and still protected by copyright, such as a painting by Warhol or Picasso, the artist or the artist’s successors clearly have some rights in the image.

*Expired Copyrights.* Copyrights may last a long time, but they do eventually expire, and the works enter the public domain.<sup>18</sup> The U.S. Constitution specifies that copyrights shall last only for “limited times,” and the current law grants privileges in most cases for the life of the author, plus 70 years.<sup>19</sup> For many dissertations, identifying works to use that are in the public domain can be enormously important. Alice’s study of architectural historical and Carlos’s study of literature might realistically include lengthy reprinting of images and text from decades ago, and those works might be without any copyright restriction. The law of copyright duration in the U.S. is an awkward blend of contemporary rules and holdovers from the legal regime that existed before 1978. The law of copyright duration varies in different countries. The following rules will likely address almost all of the situations you will encounter under U.S. law in your research.

#### *Works Created in or after 1978:*

- *Works Created on or after January 1, 1978:* As a general proposition, the copyrights last for the life of the author, plus 70 years.<sup>20</sup> All copyrights expire at the end of the year. As an example, the author Saul Bellow died on April 5, 2005. His copyrights created in and after 1978 will enter the public domain at the end of the day on December 31, 2075. This rule applies to all types of works, and regardless of whether the work is published or unpublished.
- *Works Made for Hire created on or after January 1, 1978:* If the work is made “for hire,” such as a work created by an employee acting within the scope of employment, the duration depends on whether the work is published or not.<sup>21</sup> The copyright lasts for the shorter of either of these terms: 120 years from the date of creation, or 95 years from the date of publication.<sup>22</sup> For example, your dissertation on business economics may be based on memos and internal correspondence of a major company. A document created in 1980 will have copyright protection through the year 2100. If it had been published in 1985, the copyright will instead expire at the end of 2080. Either way, the copyright has a long time still in store. The same rules apply to anonymous and pseudonymous works.<sup>23</sup>

#### *Works Created before 1978:*

- *Works created and published before 1978:* As a general rule, works published before 1978 have a maximum of 95 years of protection.<sup>24</sup> In a convoluted statutory twist, this rule applies only to works published on or after January 1, 1923. Works published before 1923 are in the public domain. An important variation on this rule is detailed below.
- *Works created before 1978 and not Published:* If the work has never been published, the copyright last for the terms outlined above.<sup>25</sup> The general rule is life of the author

plus 70 years. For example, because the author F. Scott Fitzgerald died in 1940, his copyrights in unpublished materials entered the public domain in the U.S. at the end of the year 2010. His letters, journals, photographs, and other works that were never published are now in the public domain. If the unpublished material is deemed to be works made for hire, then the copyrights last for the term of 120 years. The copyright in an internal corporate memo from 1880 expired and entered the public domain at the end of 2000.

- *Works created before 1978, but published before the end of 2002:* Before the copyright revisions that took effect in 1978, the copyright in unpublished works lasted in perpetuity. The time limit on copyright duration did not begin until the author or other rightsholder chose to publish the work. As a result, the papers of George Washington and other writers from the distant past were long restricted by copyright law. Congress brought perpetual protection to an end, but it allowed owners a grace period through December 31, 2002. If the rightful owner of a copyright from the past were to publish it by that date, Congress gave assurance that the copyright would not expire before December 31, 2047.<sup>26</sup> For example, Mark Twain died in 1910. His papers have been curated at the University of California, Berkeley, where many of them were rather formalistically published in 2001 in microfilm at the hefty price of \$50,000. Few buyers showed up, but the act of publishing was accomplished. Instead of expiring at the end of 2002, the Twain copyrights were thus stretched through 2047. As a researcher trying to determine whether materials are in the public domain, this provision means you may have to track the full publishing history of the works.

Consider again the basic rule that a publication from before 1978 may be protected for up to 95 years. It is possible that the copyright expired sooner, depending on compliance with the “formalities” of notice and registration as were once required. Under the law before 1978, a formal copyright notice (such as “Copyright 1940, Dolores B. Author”) was required. Upon publication with a proper notice, the copyright lasted for a term of 28 years. By filing a renewal registration with the Copyright Office in the twenty-eighth year, the term could be extended to what is now a total of 95 years. If a published work from 1940, for example, were renewed in 1968, the copyright would remain in force until 2035. Such a work had two chances to enter the public domain: It might have been published without a notice or with a defective notice and entered the public domain in 1940; or the copyright owner might have neglected to renew the copyright and it entered the public domain in 1968. As a result, it is possible to investigate specific works published between the beginning of 1923 and the end of 1963 to determine whether they are in the public domain.

Investigating these possibilities can involve research in the law, the facts, and the registration and renewal records. Registration records are public, and the Copyright Office will conduct searches for a fee.<sup>27</sup> Computer online searches are also available through some database providers and on the Internet.<sup>28</sup> A current study at the University of Michigan is leading to identification of numerous books in the public domain due to failure to renew the copyrights.<sup>29</sup> These publications and many other public domain works from 1923 to 1964 are being opened for access on HathiTrust, the Internet Archive, and other online services.<sup>30</sup>

While the details of copyright duration can be daunting, the following table can help clarify the fundamental rules of copyright's duration and ease your way through this aspect of the law.

<u>Creation/Publication of the Work</u>	<u>General Rule of Duration</u>
Created in or after 1978 by a named author acting in an individual capacity, whether published or not.	Life of the author, plus 70 years.
Created in or after 1978 by an anonymous or pseudonymous author, or by a corporate author, or as a work-made-for-hire.	The earlier of either 95 years from publication, or 120 years from creation.
Created before 1978, but not published.	Life of the author, plus 70 years. The expiration date is extended through December 31, 2047, if the work had been published by the copyright owner before the end of 2002.
Published after 1922 and before 1978 with a copyright notice and renewed if required.	Ninety-five years from the date of original publication.
Published in the U.S. before 1923.	Copyright has expired.

### *The Importance of Fair Use*

Nearly every dissertation includes some example of a fair use of copyrighted works. Looking back at the scenarios in Part I, the dissertations on diverse subjects are almost certain to include brief quotations from other sources. Carlos's study of literature may have quotations from novels and poems. Belinda's chemistry study might reprint diagrams, graphs, and charts. Alice's study of architecture history may well include extracts from archival correspondence, architectural drawings, photographs, video clips, and many other types of works in diverse media.

Whenever you work with materials from other sources, your general strategy should be to keep all options open. First, your strongest option is to identify some materials as public domain. Second, you will sometimes need to secure permission. You may have to track down rightsholders, or in other instances the permission may be granted up front in the form of Creative Commons or other license. Third, fair use permits the limited use of some copyrighted works without permission from the copyright owner. Fair use is especially applicable to scholarly research and study, but it does not allow everything. The following summary offers an overview of the factors that you need to evaluate and weigh in the balance, and it wraps up with examples and a few practical suggestions about common fair use situations.

### *What is Fair Use?*

Fair use is an exception to the rights of copyright owners. Few countries have a concept akin to fair use, but it is a central part of U.S. law. Congress articulated the framework of the law in Section 107 of the U.S. Copyright with four factors that had been developed through a long history of court decisions: (1) The purpose and character of the use; (2) The nature of the copyrighted work used; (3) The amount and substantiality of the work used; and (4) The effect of the use on the market or potential market for the work.<sup>31</sup>

Keep in mind that all four factors work together in the fair use equation. Be careful not to reach hasty conclusions, such as assuming that all academic uses are “fair” or that all commercial uses are not fair use. You also need not satisfy all four factors; courts balance them to identify their dominant disposition. The following summaries offer insights into the meaning of the four factors in common situations:

*(1) Purpose and Character of the Use.* Fair use law favors scholarly uses over commercial uses.<sup>32</sup> Nearly every dissertation is most certainly a scholarly work, but once you make it available for sale through publication, it can take on some characteristics of a commercial product. Nevertheless, even some commercial or for-profit purposes may be overshadowed by the scholarly or educational objectives of the use. A commercially lucrative biography, for example, can still serve educational purposes and thus be allowed considerable latitude for fair use.<sup>33</sup> Publishing your dissertation through ProQuest might be similarly viewed as a blend of academic and commercial purposes, yet many customary uses of materials in the context of a scholarly work can still be fair use. Think of your uses on a relative scale. If your dissertation went no further than your faculty committee and your university’s library, this “purpose” factor would likely tip strongly in your favor. At the far end of the scale might be purely commercial publications, where you and the publisher may have a primary motivation of selling copies. Don’t be dissuaded; commercial sales of academic works can still enjoy appreciable fair use.

In analyzing the “purpose” factor, a “transformative” use of the work can tip this factor even more strongly in favor of fair use.<sup>34</sup> For example, cutting, adjusting, and altering the work to place it in the context of scholarly study can be transformative.<sup>35</sup> Selective quotations in a scholarly study, short clips in an analytical multimedia work, or deconstruction of text in a critical analysis are also likely to be transformative. The use of photographs and other images can be transformative, especially when they are small images or detailed close ups and are clearly tied to the scholarly analysis.<sup>36</sup> By contrast, full-size and high-resolution color images can compete with licensed originals and may not be as transformative.<sup>37</sup>

*(2) Nature of the Work Used.* Evaluate carefully the work you are proposing to use. Is it a scholarly nonfiction work? Is it the type of material from which quoting is normal, expected, or even encouraged? Fair use of these works may be greater than for other materials.<sup>38</sup> Is it published? Fair use for unpublished manuscripts is often more restrictive than for published works, although limited uses in a scholarly study can be fair use.<sup>39</sup> The fair use of workbooks, survey instruments, and other “consumable” works may also be limited. Courts favor uses of nonfiction more readily than they favor uses of fiction or artistic works.<sup>40</sup> Courts have given modest guidance about the “nature” of videotapes, software, and other relatively new media and whether they merit special treatment, but recent cases have indicated that even the use of creative artworks and photographs can still be fair use, although usually within tighter limits.<sup>41</sup> One place to start your consideration of this factor is by evaluating the importance and relevance of selecting and copying the work to further your educational or scholarly purpose; be sure any music, video, and photography in your dissertation is important for advancing your research objectives.

*(3) Amount and Substantiality of the Work Used.* This factor may be intuitively the clearest to assess, but still without simple answers. The law has avoided strict measures such as word counts, bars of

music, or minutes of film footage in favor of a flexible standard that can adapt to changing needs and circumstances. In most cases, the more you use the less likely you are within fair use, and courts consider whether you are using the central “essence” or “heart” of the original work.<sup>42</sup> Yet courts seem to look most often at whether the amount that you are using is appropriate and necessary for serving your research or educational purpose. Keep your quotations and clips to a minimum, and keep them tightly tied to your scholarly objectives. One important court decision held the use of small-size and low-resolution images were necessary to tell the historical story in the book and thus were within fair use; the court also cautioned that full-size color reproductions might not be allowed.<sup>43</sup>

(4) *Effect on the Potential Market for or Value of the Original.* This factor centers on whether your use interferes with a realistic purchase or even license of the copyrighted work. Does your proposed use compete with or supersede the original work? Is your copy or excerpt likely to substitute for purchasing the original? Many people make downloads and reproductions with the rationale “I wouldn’t buy one anyway,” but the real question is whether the work is available on the market on terms that reasonably would serve your needs.<sup>44</sup> Brief quotations in books and on websites are usually allowable, but substantial excerpts and reprints are harder to justify if the material is licensable on reasonable terms. If a professional photographer, for example, offers a simple and affordable license for including an image in your dissertation, this factor might weigh against fair use. On the other hand, your use might not harm the market if the price is unusually high, the terms restrictive, or the license simply does not permit the type of use you need for scholarly research. Further, the more that you alter or adjust the work for your specific research needs, the less you are competing with the original. Once again, no simple rule can apply. Fair use depends on the particular circumstances of each situation. Finally, this factor is implicated if you post your dissertation online. Photographs and other copyrighted works might be easy fair use if your dissertation went only to your committee, but allowing public access can arguably produce market competition.

### *Giving Meaning to the Four Factors*

Consider again the example of Alice’s dissertation about art and architectural history. She is planning to include in her study a variety of materials from many different sources. As she considers the scope of fair use, her thinking may be along these lines:

*Purpose:* In the context of a dissertation, she has a strong argument that many of her uses are for nonprofit research and scholarship. Alice’s uses may also be transformative, greatly strengthening the weight of this factor. For example, if she uses a photograph and overlays commentary, graphics, and explanations, she may be making highly transformative uses of it. Even without actually altering the work, a use can be transformative. For example, reprinting an image and presenting it in the context of her scholarly analysis can “transform” the purpose of the original. Alice purpose probably remains scholarly even when the dissertation is posted online, made available from ProQuest, or later revised and published for sale. In some such cases, the weight of her scholarly purpose may be lessened, but she can look to the other factors to add strength to her fair use argument.

*Nature of the Work:* This factor will vary, but if the images, text, and other materials are published and generally used for their factual content, then this factor may lean in her favor. If the materials are highly creative and artistic, Alice should be more cautious. One should be more circumspect about using art, poetry, music, plays, fictional literature, and other highly creative works. One simple strategy would be to use more limited portions of the more creative materials, which takes her to the next factor.



*Amount Used:* Brief excerpts, tightly selected to serve scholarly objects, are strongly preferred. Images are a challenge in many dissertations, and Alice should think about her alternatives when using them. She will usually want the full image, but courts have found that small-size and low-resolution reproductions are more likely within fair use.

*Effect on the Market:* Alice needs to make at least a brief check of the market for the materials she is proposing to use. She may be fine with short quotation and other conventional uses, but for extensive uses of photographs, art, music, and other such works, she may have to evaluate whether a license or permission for the material is reasonably availability.

### *A Few Specific Examples and Guide Points*

Dissertations today include a rich variety of materials from diverse sources. The fair use of materials from common quotations to complex video clips can probably be evaluated with a few recurring principles and concepts. These points are not mandated under law, but they can help strengthen your assertion of fair use:

- *Context:* Use selected materials that are important for supporting your scholarly objectives. Present the works in a clear context of scholarly analysis. Include images and other materials in close coordination with the text of your dissertation, usually on the page with your text and analysis. Include quotations in the flow of or alongside your own text.
- *Embedded Media:* If you are using sound recordings or audiovisual media, embed the clips in close proximity to your analysis. Adding commentary and graphics can be a transformative use of the original works, and the innovative uses can underscore that you are using the materials for scholarly purposes.
- *Quantity:* Limit portions and quotations to the amount that you need to fulfill your scholarly objectives. If you can reasonably edit and reduce the amount, you probably should. For more creative works – such as poetry, music, and novels – tightly limited excerpts may be in order.
- *Size and Resolution:* Especially for photographs, drawings, paintings, and other images, consider using small size “thumbnail” images and low-resolution reproductions. Use black-and-white versions of color images if they will suffice for your scholarly purposes.
- *Licensed Materials:* Your university may have acquired a variety of databases and other materials with a license for using some of the content in dissertations and other projects. Consult with your library. In any event, extensive collections of photographs, music, books, articles, software, and many other works are available online with Creative Commons licenses.
- *Permissions:* Some uses are simply beyond the reach of fair use, and permission from the copyright owner may be necessary. If your dissertation is a thorough analysis of a modern opera, and you need to include all or substantially all of the music, the libretto, or a recording, then you might well need permission. Similarly, if your dissertation is an analysis of new-found manuscript collections that are still within copyright, you might need the cooperation of the author or estate to reproduce large portions.
- *Realistic Markets:* Sometimes when you seek permission, you might be faced with paying a fee. If the price is modest, and the permission meets your needs, you might have to pay the cost. Recall that one factor of fair use is the potential harm to the market for the copyrighted work. If you find that a license serves your needs at a reasonable price, then you should include that fact in your scrutiny of fair use.
- *Orphan Works:* Copyright applies to multitudes of works, but often you cannot identify or find the current copyright owner. You might be willing to seek permission and pay a fee, but

you cannot find anyone to receive your letter or money. That circumstance suggests no active market for the work, which should help lean the “market effect” factor in favor of fair use. Orphan works are of many types, including manuscripts, photographs, software, films, and art.

- *Citing Sources:* Fair use does not specifically require citing sources and crediting authors, but it cannot hurt, and it is important practice for good scholarship. Be sure to cite your sources.

Putting these concepts together, consider these common scenarios about including copyrighted materials in your dissertation:

- *Photographs:* Your dissertation examines the missionary movement in the American West during the mid-twentieth century. You found a collection of informal photographs evidently made by different photographers at different times and places. Selected photos, reprinted in small size and in low-resolution on the page with analytic text is likely to be within fair use. Similar standards could apply to uses of architectural drawings, art, and other images.
- *Music:* Your dissertation is a study of modern stage musicals, and you would like to include some lyrics and music from various famous musicals through the last century. Fair use will likely permit including excerpts of several lines through the dissertation as relevant to reinforcing your scholarly analysis. In that context, fair use would probably allow brief selections of lyrics and the score, as well as clips of sound recordings.
- *Text:* Nearly every dissertation has quotations of textual works. Your best guide might be to follow common practices in the many books and articles you probably read while doing your research. Fair use does not have precise limits, but if quotations are reaching beyond a couple of paragraphs, you might need to have another look at whether you need the full amount. The law is more flexible about the use of factual or nonfiction materials; fair use applies more narrowly to excerpts from novels, poems, and other creative works.

If you are looking for additional guidance to and resources to help you make more detailed applications of fair use, consider these websites:

- United States Copyright Office , Copyright Fact Sheet on Fair Use
  - <http://www.copyright.gov/fls/fl102.html>
- University of California, UCCopyright
  - <http://copyright.universityofcalifornia.edu/fairuseresources.html>
- Copyright Advisory Office of Columbia University
  - <http://copyright.columbia.edu/copyright/fair-use/>

The “Fair Use Checklist” on the Columbia University website is a popular tool for organizing and evaluating some of the variables that relate importantly to fair use.

Finally, a few strategic suggestions:

- Start early with your evaluations of fair use and keep all options available. If you need to secure permission, contact the copyright owners and send permission letters at least a few months in advance of your deadline.
- If you need permission for various materials, but time is tight and permission is not forthcoming, you need to consider alternatives. Sometimes substitute works may suffice. In

order to meet your filing deadline, you might include only references or links to the desired materials.

- Because you might have to be more restrictive about including copyrighted materials in the version of your dissertation that is publicly accessible, it is possible that the version in the repository or that goes to ProQuest might be different from the official version you file with your department. You are generally best advised to create one version, but sometimes you have to be flexible.
- If you are planning to rework your dissertation to be published as a book or article, you might postpone the permission effort until you secure a publisher. You will likely have to address permissions once again at that time. To avoid duplicate effort, an effective strategy might be to include only links or references in the dissertation. Review your alternatives with your advisor.

As you evaluate your needs, be sure to stay flexible and practical. Don't let the copyright decisions prevent your finishing and filing the dissertation on time.

## **Conclusion**

Return to an opening point of this manual: You should take the time to learn and apply copyright in order to make your dissertation and your scholarly study more successful. How is that possible? First, by clarifying your ownership of the dissertation, registering the copyright, and deciding whether a Creative Commons license is appropriate can help resolve issues that may arise as other scholars use of your dissertation. Second, by taking the time to review all of the third-party content that you are including in the dissertation, you can resolve in advance that the materials are in the public domain, or are within fair use, or require permission. With advance attention to these issues, you can prevent questions or conflicts that might arise in the future and stall your progress toward publication or jeopardize availability of your dissertation through your repository or the ProQuest Dissertations and Theses database (PQDT).

Copyright is an inevitable aspect of scholarly research. Many of these issues will continue to arise in all of your academic pursuits. With each project or publication, the issues will become easier to address, and the constructive aspects of copyright will become more clear. For now, however, you can look forward to getting over the few copyright hurdles leading to filing your final dissertation and receiving the honor of a graduate degree. Congratulations!

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- <sup>1</sup> U.S. Constitution, art I, § 8.
- <sup>2</sup> U.S. Copyright Act, 17 U.S.C. § 106 (2013).
- <sup>3</sup> Perhaps most important is the “restoration” of the copyrights in many works that had entered the public domain in the United States. For example, copyright in a 1940 book might have expired in 1968 due to failure to renew. For many foreign works, the U.S. was required under treaties to “restore” those copyrights, starting in 1996. U.S. Copyright Act, 17 U.S.C. § 104A (2013).
- <sup>4</sup> U.S. Copyright Act, 17 U.S.C. § 102(a) (2013).
- <sup>5</sup> U.S. Copyright Act, 17 U.S.C. § 103 (2013).
- <sup>6</sup> *Feist Publications v. Rural Telephone Services*, 499 U.S. 340 (1991).
- <sup>7</sup> U.S. Copyright Act, 17 U.S.C. § 102(a) (2013).
- <sup>8</sup> Although registration is not required for copyright protection, the law offers incentives to registration. Registration is generally required before filing an infringement lawsuit, although that is often procedural step that can be undertaken when needed. U.S. Copyright Act, 17 U.S.C. § 411(a) (2013). Statutory damages and attorney fees may be recovered only if the work had been registered with the U.S. Copyright Office before the infringement took place. U.S. Copyright Act, 17 U.S.C. § 412 (2013). Without timely registration, you will not get the fullest benefits of legal protection. Do not confuse “registration” with “renewal.” Renewal was a similar filing with the U.S. Copyright Office that was required under previous law to extend the term of copyright protection.
- <sup>9</sup> This requirement generally applies to works first published in the U.S. or unpublished works created by a U.S. author. U.S. Copyright Act, 17 U.S.C. § 411(a) (2013). The concept of “United States work” is defined at U.S. Copyright Act, 17 U.S.C. § 101 (2013).
- <sup>10</sup> U.S. Copyright Act, 17 U.S.C. § 412 (2013).
- <sup>11</sup> Under copyright law, a work can be in the public domain, but its use may be limited for other reasons. For example, private correspondence or journals may have privacy implications, and you may be using research collections, databases, and software under the terms of a contract you may have entered. This manual addresses only the copyright issues.
- <sup>12</sup> U.S. Copyright Act, 17 U.S.C. § 102(b) (2013).
- <sup>13</sup> U.S. Copyright Act, 17 U.S.C. § 105 (2013).
- <sup>14</sup> U.S. Copyright Act, 17 U.S.C. § 104 (2013).
- <sup>15</sup> See U.S. Copyright Office, *International Copyright Relations of the United States, Circular 38a* (Washington, D.C., 2010) (available at <http://www.copyright.gov/circs/circ38a.pdf>).
- <sup>16</sup> *The Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp.2d 191 (S.D.N.Y. 1999).
- <sup>17</sup> *Bridgeman*, 36 F.Supp.2d at 197.
- <sup>18</sup> U.S. Copyright Act, 17 U.S.C. § 203 (2013).
- <sup>19</sup> See U.S. Constitution, art I, § 8. See also, U.S. Copyright Act, 17 U.S.C. § 302(a) (2013).
- <sup>20</sup> U.S. Copyright Act, 17 U.S.C. § 302(a) (2013).
- <sup>21</sup> The concept of “works made for hire” is defined in somewhat technical detail in the U.S. Copyright Act, 17 U.S.C. § 101 (2013).
- <sup>22</sup> U.S. Copyright Act, 17 U.S.C. § 302(c) (2013).
- <sup>23</sup> *Id.*
- <sup>24</sup> See U.S. Copyright Office, *Duration of Copyright, Circular 15a* (Washington, D.C., 2011) (available at <http://www.copyright.gov/circs/circ15a.pdf>).
- <sup>25</sup> U.S. Copyright Act, 17 U.S.C. § 303(a) (2013).
- <sup>26</sup> *Id.*
- <sup>27</sup> See U.S. Copyright Office, *Copyright Office Fees, Circular 4* (Washington, D.C., 2012): 2-3 (available at <http://www.copyright.gov/circs/circ04.pdf>).
- <sup>28</sup> See U.S. Copyright Office, *How to Investigate the Copyright Status of a Work, Circular 22* (Washington, D.C., 2013) (available at <http://www.copyright.gov/circs/circ22.pdf>).
- <sup>29</sup> The Copyright Review Management Systems projects are listed here: <http://www.lib.umich.edu/copyright-office-mpublishing/projects>.
- <sup>30</sup> For details about this initiatives, visit the websites at [www.hathitrust.org](http://www.hathitrust.org) and [www.archive.org](http://www.archive.org).
- <sup>31</sup> U.S. Copyright Act, 17 U.S.C. § 107 (2013).
- <sup>32</sup> *Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194, 203-04 (4th Cir. 1998)
- <sup>33</sup> *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).
- <sup>34</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994).
- <sup>35</sup> *Warren Publishing Co. v. Spurlock*, 645 F.Supp. 2d 402 (E.D. Penn. 2009).
- <sup>36</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).
- <sup>37</sup> *Id.*
- <sup>38</sup> *New Era Publications Intl. v. Carol Pub. Group*, 904 F.2d 152, 157 (2d Cir. 1990).
- <sup>39</sup> *Sundeman*, 142 F.3d at 206.
- <sup>40</sup> *New Era Publications Intl.*, 904 F.2d at 157.

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<sup>41</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>42</sup> *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

<sup>43</sup> See *Bill Graham Archives*, 448 F.3d at 613-14.

<sup>44</sup> *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1387-88 (6th Cir. 1996).