

INTELLECTUAL PROPERTY GUIDE

Concordia University, Inc. advocates compliance with intellectual property laws. The purpose of this guide is to provide the Concordia University community with an understanding of intellectual property laws. It is the responsibility of faculty, administration, employees, and students to act as responsible users of others' property and to make informed, good faith decisions that comply with intellectual property law and the mission of Concordia University, Inc.

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

Justice Sandra Day O'Connor
Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340, 349 (1991)

Disclaimer

The information in this Guide is not legal advice and is not intended to serve as legal advice. Every effort has been made to provide accurate information; however, because laws are constantly subject to judicial interpretation, the authors make no claims, promises, or warranties about the information provided. This Guide will provide you with general information about intellectual property issues but it is neither a complete discussion of all legal issues nor is it a substitute for legal advice regarding your specific questions or concerns.

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COPYRIGHT

1. What is a copyright and what does it protect?

The government provides protection to the authors and creators of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. (Title 17, U.S. Code). This protection extends to both published and unpublished works.

Copyright protects creative works in a fixed form of expression including, but not limited to:

- © Textbooks
- © Novels
- © Stories
- © Poetry
- © Photographs
- © Movies
- © Videos
- © Sound recordings
- © Plays
- © Paintings
- © Sheet music
- © Architectural designs

Section 106 of the 1976 Copyright Act generally gives the **owner** of the copyright the exclusive right to do and to authorize others to do the following:

- © Reproduce the work;
- © Prepare derivative works based upon the work;
- © Distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- © Perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- © Display the work publicly¹.

2. How does a work qualify for copyright protection?

To qualify for copyright protection, a work that resulted from creative efforts must be “fixed in a tangible medium of expression.” (Title 17, U.S. Code). This means that the

¹ Not an exhaustive list

work must exist in some physical form, *e.g.* written or recorded. In addition, the work must be original; independently created by the author.

Copyright law protects only fixed, original, and creative expression. Copyright law does not protect the *ideas* upon which the expression is based. Copyright law also does not protect facts - scientific, historical, etc. Facts that an author has discovered during research cannot be copyrighted. These facts are freely available to everyone to use provided that they express these facts in their own words.

Once the work is in a fixed form of expression, the author *automatically* has a copyright. There are no reporting, registering, or notice requirements. The author does not have to register the work and the author does not have to use the copyright symbol (©).

3. How do I know if a work is copyrighted?

You should assume that every work is protected by copyright unless you can establish that it is not. Since copyright is automatic, you cannot rely on the presence or absence of a copyright symbol (©) to make this determination. Copyright notice is not required for works published after March 1, 1989. And even for works published before 1989, the absence of a copyright notice may not affect the validity of the copyright. An author or creator may place a notice on the work that indicates that the work is not protected by copyright. Without this indication, it will be necessary to determine if the work falls into one of the exceptions discussed below.

4. What is copyright infringement?

The unauthorized use of copyrighted material is considered copyright infringement. Any use of copyrighted material without permission from the owner is potentially an infringement even if you cite the author or creator in your work/class/paper. Infringement occurs with or without monetary gain from the use of the copyrighted materials.

5. What are the penalties for copyright infringement?

It is against the law (both civil and criminal) for anyone to violate someone else's rights protected by copyright law. Copyright infringement exposes you to both civil lawsuits as well as federal criminal charges. Each violation can result in civil damages of up to \$150,000 and criminal imprisonment of up to 10 years. Either the government or the owner of the copyright can file suit against you in civil and/or criminal court. Ignorance of the law is no excuse and is not a defense against either civil or criminal charges.

6. How long does a copyright last?

Due to changes in copyright law, there is no simple answer to this question. The following table should help clarify the timeframes regarding published materials; however there are exceptions to the following guidelines and you will need to determine on a case-by-case basis whether copyright law still applies.

WHEN	CONDITIONS	PROTECTION TERM
Published before 1923	None	None – Public Domain
Published 1923 - 1963	Published without © notice	None – Public Domain
Published 1923 – 1963	Published with © notice but copyright not renewed	None – Public Domain
Published 1923 – 1963	Published with © notice and copyright renewed	95 years after publication date
Published 1964 – December 31, 1977	Published without © notice	None – Public Domain
Published 1964–December 31, 1977	Published with © notice	95 years after publication date
Published 1978 – March 1, 1989	Published without © notice and without subsequent registration	None – Public Domain
Published 1978 – March 1, 1989	Published without © notice but with subsequent registration	Life of the author + 70 years ²
Published 1978 – March 1, 1989	Published with © notice	Life of the author + 70 years ²
After March 1, 1989 – ongoing	No conditions – copyright is automatic	Life of the author + 70 years ²

COPYRIGHT EXCEPTIONS

1. Permission

Copyright owners can grant permission for the use of their work. Obtaining permission can be simple, or it can be complex, depending on who holds the copyright. In order to

² If corporate authorship, the shorter of 95 years from date of publication or 120 years from date of creation.

obtain permission, you must first determine who the proper owner of the copyright is, and then you must contact that owner with your specific request. If the owner does not have a specific form for you to fill out, you can draft a simple letter stating your request, the reasons for the request, and the proposed use of the copyrighted materials. It is possible to get permission via telephone; however, you will need to document the telephone conversation in case there is a dispute later on. If you receive oral permission, send the owner a letter documenting the agreement and indicate in the letter that the owner should contact you immediately in writing if there are any inaccuracies in the letter.

2. Public Domain

The public domain consists of a variety of materials. Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries are not protected under copyright law and are considered to be part of the public domain. Works of the U.S. government (produced by government employees) are in the public domain.

Materials that were under copyright enter the public domain when their protection term ends. (see above table). Once materials enter the public domain, anyone can use them without getting permission from the author or owner, *regardless* of the extent or purpose of the use.

3. Fair Use Doctrine

a. What is the Fair Use Doctrine?

Rights established by the 1976 Copyright Act are not absolute and there are limitations on these rights. One major limitation is the doctrine of “fair use,” which is found in section 107 of the 1976 Copyright Act.

b. When does the Fair Use Doctrine apply?

The Copyright Act provides guidance in determining whether the use of copyrighted materials is permissible even though you do not have permission from the author or creator.

§ 107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

Emphasis added.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Educational use of copyrighted materials is NOT automatically Fair Use. Even though you will use materials in an educational setting, you still must apply the above standard to see if your use qualifies for the fair use exception. If it does not, you must obtain permission from the copyright owner before using the materials.

c. Good Faith Fair Use Defense

If you believed and had reasonable grounds for believing that your use of the copyrighted work was a fair use (although later a judge or jury determines it was not a fair use) and you are an employee or agent of a nonprofit educational institution or library acting within the scope of your employment, the court can refuse to award damages even though you technically violated copyright law.

4. Face-to-Face Teaching

The Copyright Act permits the performance or display of copyrighted materials (e.g. videotapes, DVDs, artwork) during face-to-face teaching activities, without the permission of the copyright holder. This exemption does not permit copying or distributing the work, but merely allows you or your students to display or perform it during class time. The copy which is performed or displayed must have been otherwise lawfully made or obtained.

COPYRIGHT AND THE INTERNET

1. Digital Millennium Copyright Act (DMCA)

DMCA amends the Copyright Act to extend the scope of copyright law to include digital materials and to provide limited liability for service providers. Sharing digital copyrighted material, including, but not limited to, music, movies, television shows, videos, and games is potentially illegal and the University does not permit such activity.

Valid complaints filed in accordance with DMCA by copyright holders can result in loss of network access and/or other legal action.

For additional information regarding DMCA:

- ❑ <http://www.copyright.gov/legislation/dmca.pdf>
- ❑ <https://www.law.cornell.edu/uscode/text/17/512>

2. **TEACH**

The Technology, Education and Copyright Harmonization Act (TEACH) is an effort to address the unfulfilled areas of copyright and discrepancies that were either not addressed by the fair use exception or DMCA, or that have come about as a result of the expansion of technology in distance education. TEACH is intended to make the fair use protections available in face-to-face courses adaptable in distance education. TEACH has several criteria that are required to be met by the instructor and the institution in order to be TEACH compliant and have copyright protection. CUW is in the process of becoming TEACH compliant.

For additional information regarding TEACH:

- ❑ <http://guides.lib.utexas.edu/copyright/teachact>
- ❑ <http://www.ala.org/advocacy/copyright/teachact>

TRADEMARKS, SERVICE MARKS, & TRADE SECRETS

1. **What are trademarks and what do they protect?**

Trademarks are words, phrases, symbols, or designs (or any combination thereof) that help us identify and distinguish between the sources of products. They are typically identified by either the ® or ™ symbol. Trademarks protect the owners of the marks by providing them with exclusive use of the trademarks to identify goods or to license the use of the trademarks to others.

2. **What are service marks and what does they protect?**

Service marks are generally the same as trademarks, except that they protect the source of a service, rather than a product.

3. **What are trade secrets and what do they protect?**

Trade secrets are valuable business information not commonly known that have been protected from disclosure or discovery by those in possession of them. A trade secret protects businesses from the unlawful disclose of confidential information.

4. **How long do trademarks, service marks, and trade secrets provide protection?**

Unlike copyright, which provides protection for a specific period of time, trademarks, service marks, and trade secrets have the potential to provide protection for an unlimited amount of time. The holders of trademarks, service marks, and trade secrets must continually protect their property so that it is not considered abandoned and does not enter the public domain.

5. **What kind of trouble can I get into if I use someone's trademark, service mark, or trade secret without permission?**

Trademarks and service marks are protected by both state and federal laws. The Lanham Act (15 U.S.C. § 1051) is federal law that allows the owner of a trademark or service mark to obtain injunctions, as well as seek monetary damages for infringement. With regards to trade secrets, every state has laws prohibiting theft or disclosure of trade secrets. In Wisconsin and most states, misappropriation of trade secrets can result in injunctive relief and monetary damages that include punitive damages and attorney fees. (Wis. Stat. Ann. § 134.90). More importantly, intentional theft of trade secrets could constitute a federal crime under the Economic Espionage Act of 1996 (18 U.S.C. § 1831-1839); penalties include fines up to \$500,000 (for an individual) and a prison sentence up to ten years.

6. **How do I get permission to use someone's trademark or service mark?**

Ask. It can be as simple as contacting a company's Trademark Licensing Office/Division/Director. Please review the procedures for obtaining copyright permission.

7. **Do I always need permission to use someone's trademark or service mark?**

No. There may be exceptions that would permit the use of a trademark or service mark. The Lanham Act permits you to make "fair use" or "nominative use" of a mark (15 U.S.C. §1125). Generally it is acceptable to use others' marks for the purposes of description or identification. It may also be permissible to use the marks for noncommercial uses and in news reporting and news commentary.

8. **How do I get permission to use someone's trade secret?**

Ask. It is highly unlikely that a company will grant you access to their trade secrets, so unless you can otherwise lawfully obtain access to the information, you will not be able to use the secrets.

9. **Do I always need permission to use someone's trade secret?**

The law does not prohibit competitors from discovering trade secrets through a process known as reverse engineering. It is important to keep in mind that the obligation is upon the holder of a trade secret to keep it secret; disclosure of the trade secret without a confidentiality agreement can result in the secret entering the public domain.

PATENTS

1. What is a patent and what does it protect?

A patent is the grant of a property right to an inventor that allows him or her “to exclude others from making, using, offering for sale, or selling” the invention in the United States or “importing” the invention into the United States. (35 U.S.C. 154) A person may obtain a patent for any invention or discovery of a “new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof.” (35 U.S.C. 101)

2. How long does a patent last?

Patents are granted for twenty years from the filing date of the application although design patents only receive fourteen years of protection from the date of issuance. Different rules apply for patents covered by applications filed before June 8, 1995. Once the term has expired, anyone can make use of the invention without a license from the patent holder.

3. What kind of trouble can I get into if I use someone’s patent without permission?

Patent infringement is a civil wrong, or tort, that occurs when you make, use, or sell someone’s patented design, product, or process without permission. 35 U.S.C. 271 The remedies for infringement can include injunctive relief, monetary damages for royalties or lost profits, punitive damages, attorney fees, and court costs.

4. How do I get permission to use someone’s patent?

As with copyrights and marks – the simplest way to obtain permission is to ask. Patent holders can enter into a patent license agreement with you that would allow you to use their invention. Your first step is to determine who holds the patent; then you must contact that person or company with your specific request. The U.S. Patent and Trademark Office maintains a searchable database containing U.S. patents granted since 1976. Keep in mind that written agreements are preferred so there will not be any misunderstandings regarding the scope of the license.

INTELLECTUAL PROPERTY AT A GLANCE

	WHAT PROPERTY?	HOW LONG?	PENALTIES?	EXCEPTIONS?
COPYRIGHTS	Creative works in fixed form of expression	Life of author + 70 years <i>(most recent term – could be different depending on when original © obtained)</i>	Civil and criminal	Many – including permission, fair use, public domain, face-to-face teaching
MARKS	Words, phrases, symbols or designs used to identify or distinguish products or services	Indefinitely	Civil and possibly criminal	Many – including permission, fair use, nominative use, noncommercial use, and news reporting
TRADE SECRETS	Valuable business information not commonly known to the public	Indefinitely	Civil and criminal	Reverse engineering, disclosure, and lawful discovery
PATENTS	Invention or discovery of new and useful processes, machines, manufactures, or compositions of matter	14 or 20 years, depending on type	Civil	Licensing agreement

Resources

A plentiful amount of books and videos on intellectual property or copyright are available through the Concordia University Library with this search in Primo:

[https://switch-cuw.primo.exlibrisgroup.com/discovery/search?query=any,contains,\(%22intellectual%20property%22%20OR%20copyright\)&tab=DN_CI_EBSCO&search_scope=DN_and_CI&vid=01SLCO_CUW:CUW&facet=tlevel,include,available_p&mfacet=library,include,4246%E2%80%93221713580004246,1&mode=basic&offset=0](https://switch-cuw.primo.exlibrisgroup.com/discovery/search?query=any,contains,(%22intellectual%20property%22%20OR%20copyright)&tab=DN_CI_EBSCO&search_scope=DN_and_CI&vid=01SLCO_CUW:CUW&facet=tlevel,include,available_p&mfacet=library,include,4246%E2%80%93221713580004246,1&mode=basic&offset=0)

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