

Using Content in Your Assessments & Portfolios

Deakin University Copyright Office



What can I use without permission?

You can use content in your assessments and portfolio without permission from the copyright owner if:

- You own the copyright.
- Your use is covered by an exception in the Copyright Act.
- The work is out of copyright or the creator has waived their rights.
- The work is licensed for your requested use / you have permission.



This is Happening Without Your Permission
(<http://flic.kr/p/3Q8iB>) by What What (CC BY-NC-SA 2.0)

Exceptions in the Copyright Act

Insubstantial portions – applicable for both assessments and in portfolios



Cheese and Grapes #1
(<http://flic.kr/p/79Xqu2>) by Stéphanie Kilgast (CC BY-NC-ND 2.0)

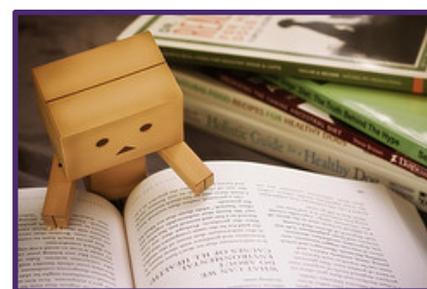
You can use insubstantial portions without requiring permission or a licence.

Insubstantial portions are not defined in the Act, however it's important to note that decisions regarding what is "substantial" are not just judged on a quantitative basis, but also a qualitative basis.

It is thought that a short quote or brief extract from a much larger work would be considered an insubstantial portion, from a quantitative approach. However, if that extract were to be particularly key, distinct or important to the overall work – such as a quote that – that portion would in fact be considered "substantial". So select extracts carefully. Please remember that citations are still required.

Fair Dealing for Study or Research – applicable for use in assessments only.

Under this provision in the Act, you may copy and use fair and reasonable amounts of material for your private research or study. It could be copying and using something to help you study for a test or exam, or for use in your essay. It could also be to help you research a hobby or past time you might have – such as copying a chapter from a book on painting techniques to help you with your craft project at home. It's important to remember that this exception only allows you to use the material privately – that means you can't share it with your friends, or post it online publically, it's just for your study or for use in your assessment.



4/366(Y2) – Research
(<http://flic.kr/p/boFmCe>) by Nomadic Lass (CC BY-SA 2.0)

"Fair and reasonable amounts"? – What does that mean?

The Copyright Act defines fair and reasonable amounts as 10% of the total number of pages (or 10% of the total number of words for works that are not paginated) or 1 chapter for most textual material. It also states that 1 article per journal/magazine issue – 2 or more if they're on the same topic is fair. However, you can have more than these amounts if:

- The work is out of copyright.
- The work is out of print.
- The work is part of a collection of works and is not separately available for purchase.
- You are unable to purchase an ordinary first hand copy at the recommended retail price within the time frame you need it in.



Is it fair? (<http://flic.kr/p/7fEg3W>) by Michael Stephens ([CC BY-NC-SA 2.0](https://creativecommons.org/licenses/by-nc-sa/2.0/))

- You look at the five factors of fairness (see below) and most of the time, your answer is that your use is 'more fair'.

There are no such quantifying limitations for artistic works or cinematographic films. For those items, we take into account the five factors of fairness to determine if our use is fair.

What are the five factors of fairness?

The five factors of fairness are questions we ask ourselves to establish whether our use is likely to be considered "fair and reasonable". These questions are:

- Why are you copying and how are you using the work?
It's more fair to use something in your assignment because it's necessary for your audience to understand what you're talking about as opposed to just using something to make your work look better. It's also less fair to copy something and use it in a way that allows you to make money or profit.
- How much time and effort went into creating the work?
It's more fair to use something that took less time and effort to create, than something that took more time and effort to create.
- Can you buy a copy at the recommended retail price within a reasonable time frame?
It's more fair to buy a copy if it's reasonable to do so given your time frame and compensate the copyright owner by purchasing it.
- How much are you using and how important is that piece to the overall work?
It's more fair to use a small part of something that is not particularly key, distinct and important to the overall work, than something that is a big piece, is important, key or distinct to the overall work.
- What effect does your copying have on the market for or value of the work?
It's more fair to make the copy if it doesn't de-value the work in the regular marketplace. If you're only copying a portion of the work and submitting for assessment, then your copying isn't altering the market or value of the work. If you were to put a section of the work on a public access website and that might deter people from purchasing a copy of that work, then your copying is having an effect on the market or value of the work.

The point of these questions is not that you must answer in every case that your use is more fair. The point is to ask yourself these questions and find that more often than not, your use is deemed as being more fair.

ALWAYS remember to cite any material you use that is not your own! Citing helps you avoid plagiarism, copyright infringement and helps to abide by a creator's moral rights.

Fair Dealing for Criticism or Review –applicable for both assessments and in portfolios

The Copyright Act allows you to reproduce fair and reasonable amounts of material for the purposes of criticism or review. Whilst the Copyright Act does not define what criticism or review constitutes, it's likely that a genuine use under this provision requires passing a judgement on and evaluating the work, the creator, the underlying concepts or techniques used in that work. It is not enough to pass a judgement such as "I like this painting, it is good" and then including a copy of the work. There must be a more in depth analysis, evaluation and judgement taking place for it to be a genuine criticism or review.



327 of 365: Everyone's A Critic (<http://flic.kr/p/4W9CcL>) by Lis Ferla ([CC BY-NC 2.0](https://creativecommons.org/licenses/by-nc/2.0/))

Like the provision for Study or Research, remember that your use has to be "fair and reasonable" so consider the five factors of fairness before you copy the material. Unlike the provision for Study or Research however, the provision for Criticism or Review allows you to use the content even if your critique or review is published in print, online or made publicly available.

ALWAYS remember to cite any material you use that is not your own!

Fair Dealing for Parody or Satire applicable for both assessments and in portfolios



[Parody Is Not Infringement \(http://flic.kr/p/3qm7Y\)](http://flic.kr/p/3qm7Y) by Joe Gratz (CC BY-NC 2.0)

The Copyright Act allows you to reproduce fair and reasonable amounts of material for the purposes of Parody or Satire. The Act does not define “Parody” or “Satire” but it is thought that a dictionary definition would apply.

Like the other Fair Dealing provisions, your use has to be “fair and reasonable” so you must consider your five factors. Under Fair Dealing for Parody or Satire you can use the content even if your parody or satire is published in print, online or made publicly available.

Using material under this provision can be difficult because of the nature of parody and satire. It is not enough to reproduce someone else’s work just to make a joke. Your use has to genuinely fall within the definition of a “parody” or “satire”. The Copyright Council of Australia advises that a parody should “make some comment on the imitated work or on its creator” and that satire should “draw attention to characteristics or actions – such as vice or folly – by using certain forms of expression – such as irony, sarcasm and ridicule”. They also advise in relation to satire that “both elements are required: the object to which attention is drawn (vice or folly etc.) and the manner in which it is done (irony, ridicule etc.)” (See “Fair Dealing: What Can I Use Without Permission. Australian Copyright Council - <https://goo.gl/Qd4FFm>)

One of the other reasons that this is a tricky provision is it can be easy to use someone’s work in a way that could be construed as derogatory or even prejudicial and that’s against a creator’s Moral Rights. What are Moral Rights? They’re a group of rights that belong to a creator of a work, regardless of whether or not they are the copyright owner. You should be aware of these both so that you don’t infringe them, and so that you know when your Moral Rights are being infringed by someone else.

Moral Rights are:

- The right to be attributed as the creator of the work.
- The right to take action if your work is falsely attributed.
- The right to take action if your work is used in a prejudicial or derogatory manner.

So just be careful when you use parody or satire that you’re not treating the original work in a prejudicial or derogatory way.

What if my use isn’t covered under one of those exceptions?

If you’re going to do anything with your work other than submit it for assessment, you need to think carefully about any material you intend to use that you didn’t create yourself. If you didn’t create the content yourself, then it needs to be:

- Licensed under an appropriate Creative Commons Licence
- Licensed or permissible for your uses through the website terms and conditions
- In the public domain (that means the copyright has expired* or the copyright owner has waived their rights over the material)
- Content that you’ve received written permission from the copyright owner to use for your intended purposes.



[LuMaxArt Golden Guy Now What Pose \(http://flic.kr/p/4uHR53\)](http://flic.kr/p/4uHR53) by Scott Maxwell (CC BY-SA 2.0)

Creative Commons

Using content licensed under Creative Commons is a good solution. You can find high quality content that clearly outlines how you can use it without needing to seek permission from the copyright owner. Selecting a Creative Commons licence that suits your needs is really important to ensure you're not in breach of copyright.



The most flexible licence is the Creative Commons Attribution licence. That allows you to do anything with the work and use it for any purpose, so long as you attribute the creator. So look out for (CC-BY) and use them where you can.

Beware of using Creative Commons licences that include SA (Share Alike), NC (Non-Commercial) or ND (No Derivatives). If any of these conditions are present you need to examine your use carefully and work out whether these conditions are appropriate for your use.



Share Alike means that if you alter, transform or build upon the work – rather than using it as a stand-alone work, then you'll need to release your modified version under the same licence. Say a picture of a cat was licensed under a CC-BY-SA and I want to change some colours, put a hat on to the cat and then include some witty text. I now need to release my copy of the work with my changes under a CC-BY-SA licence as well, acknowledge the original artist and state that my version is a derivative.



Non-Commercial, this can be a tricky one because definitions of “commercial” and “non-commercial” are notoriously problematic. However, general consensus is that if you make a direct or profit from the use of the work or you receive something of value in exchange for the use of the content, it is likely your use is considered commercial. Because the primary point of a portfolio is to gain employment and money, it is likely that use in a portfolio would be considered commercial use. If you're not sure if your use is commercial, contact the copyright owner to see what they think.

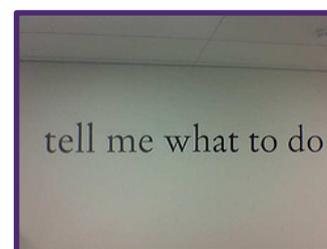


No Derivatives means that you must use the work ‘as is’ – it cannot be altered in any significant way without permission from the copyright owner (resizing and minor cropping are not generally not considered to be a significant change).

The above are just the four basic licensing terms – some of which can be combined. Creative Commons is a really good system to understand – it can open up a whole world of content, so if you don't know about Creative Commons licences, do yourself a favour and learn more about the licences here – <http://creativecommons.org/licenses/>

Terms and Conditions on sites

Sometimes a website will be very generous in what they allow you to do with their material on their site. Their ‘Terms and Conditions’, ‘Terms of Service’, ‘Terms of Use’ or ‘Copyright’ page should outline what sort of uses are okay. Just be careful that your use definitely falls within what's outlined in the terms. If in doubt, you're best to play it safe and seek permission.



Tell me what to do
(<http://flic.kr/p/rXov5>) by Katrine Thielke (CC BY 2.0)

In the public domain/there is no copyright

Over time it seems that people have incorrectly adopted the term “public domain” to refer to publicly accessible content. Whereas, “public domain” actually means that the rights in that material have been given to the public – either because:

- the copyright in that material has expired or;
- the creator has waived their rights over the work

If there is no copyright in the work then it is in the public domain and you can use the work for any purpose without needing permission from anyone.

Duration of copyright – How do I know if the copyright has expired?

In Australia, copyright duration generally lasts 70 years after the death of the creator if the work was made public in their lifetime – this differs in different countries and even differs in our own, due to changes in law. Prior to the January 1 2005, duration was for 50 years after the death of the creator. As a result, if the creator was the copyright owner and they passed away before 1955, that work is likely to be out of copyright. However, you have to be careful because different types of material can have different durations – in particular, photographs, films and music can have quite complex durations. (For more information on duration of copyright, see the Australian Copyright Council’s information sheet on duration here - <http://goo.gl/bLdnGk>)

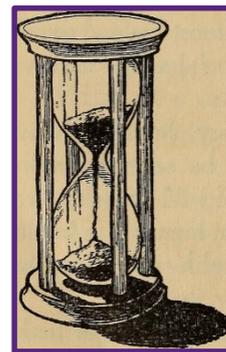


Image from page 783 of “A dictionary of Greek and Roman antiquities...” (<http://flic.kr/p/oeQJuZ>) by William Smith [Public Domain]

The other thing to keep in mind when you’re looking at work that is likely to be out of copyright, is to watch out for zombies.... what?! Yeah, zombies...

Zombie copyright

In many countries, an organisation or institution can claim copyright in a digitised version of an out of copyright image. For some museums, archives and other institutions, this is a particularly important revenue stream in an age where many people are more likely to virtually visit the collection, rather than physically visit the collection.



Day 1: Zombie!!! (<http://flic.kr/p/91Kipk>) by The Artist Formerly Know... (CC BY-NC 2.0)

It’s possible for organisations to claim copyright in a digitised image where they have put human effort and creative thought into making the digital image. That could be things like: the specific set up of lighting when the item is photographed, particular framing that was used, touching up an old photo or painting digitally, adjusting the brightness of the colours or other similar efforts to make the digital copy of a high quality.

So when you look at an image on a website that should be out of copyright, you need to check whether the source of the digital image claims copyright in it. Museums, galleries and archives tend to make this pretty clear in their copyright statement, terms of use/service/conditions, sometimes they even provide that information on or near the work. If the organisation does claim

copyright, check their terms and conditions to see if they allow your particular intended use without needing to seek their direct permission.

NB* The U.S. has law that states that “faithful reproductions” of out of copyright works, are also out of copyright. Be wary of US websites that use this law to protect them when posting digital copies of content they have obtained from museums, galleries, archives or institutions. Always check if the source website for the content claims copyright in it or not.

Incidental works

Sometimes it’s impossible to avoid using other people’s material where your use is unintentional or accidental. For example, if you take a photo of someone on a street, it’s likely that all sorts of copyright material – like

advertisements – will appear in your photo. If your capturing those copyright works is not the intention of your photo, then those works will be considered “incidental” to your work and will not require permission from the copyright owners. If the intention of your photo IS to capture that work – such as deliberately framing a work in the background of your shot, that use is not incidental and will require permission from the copyright owner.



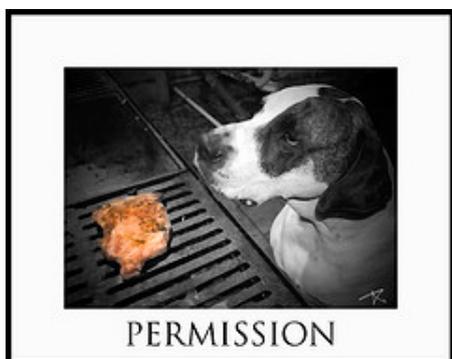
Oslo (<http://flic.kr/p/bkVB7Y>) by Moyan Brenn ([CC BY-ND 2.0](https://creativecommons.org/licenses/by-nd/2.0/))

Seeking Permission

If all the above fails and there’s nothing that obviously lets you use the image, then how about seeking permission? It’s not particularly hard, but it does require some effort.

First – you need to identify who owns the copyright in the material and find contact details for them. Generally, copyright is owned by the creator, however copyright is often transferred to a publisher, producer or employer where work is done for hire. So, if it’s something from a book or a journal, contact the publisher in the first instance, they may be able to grant you permission or pass on your request to the author. If it’s an artist and you can’t find their contact details, try getting assistance from VISCOPY (who manage rights on behalf of artists – they might be able to grant you permission, pass on your request or provide you with contact details. Rights for films are usually managed by production companies or distributors. If the creator has passed away, you’ll need to contact their estate. Be aware that there may be numerous copyright owners – such as there are for sound recordings of musical works – if there are numerous copyright owners, you must seek permission from all of the copyright owners (and they all have to agree!).

Second – once you have contact details, you need to write a letter of request. Your request should state the following things:



- Who you are.
- The content you want to use.
- How you want to use it.
- Why you want to use it.
- Where it will be made available
- How many copies will be available.
- Who will have access to it and under what circumstances.
- If a fee will be charged.
- If there is a fee – whether it is for profit or cost recovery only.
- How long you want to use it for.

Seeking Permission (<http://flic.kr/p/6QeBUE>) by Scott Maxworthy ([CC BY-NC-ND 2.0](https://creativecommons.org/licenses/by-nc-nd/2.0/))

Example

This is just an example of a formal request. You’ll need to change the details according to the material and your use, you may need to add information or remove information depending on what the content is and how you want to use it.

Dear Sir/Madam,

RE: (Grovermyer, C.) ‘Cats in the sunlight’ from *The Cats of Southern Europe*. Solstice Publishing House. London 2003. P.46

My name is John Students and I am writing to request your permission to reproduce a portion of the above mentioned material as part of an animation project to showcase my abilities in the form of an online portfolio.

I am a current student of the course Media and Graphic Design at Deakin University and as part of the course, we are encouraged to commence developing our portfolios to showcase our work to potential employers. One of my strengths is animating still images and I would like to seek your permission to create a short animation

(2.5 mins) from your image *Cats in the sunlight*. A story board and script for the animation is attached for your consideration.

Once completed, the animation would appear online for world-wide public access in my online portfolio here: www.jstudentsanimation.com/portfolio. Access to the portfolio is free of charge and whilst I intend to publicise my site while seeking employment, based on Google Analytics I expect no more than 1000 people per year to access the site.

The animation is intended to remain open on the site indefinitely, however if you will not allow on-going use of your material, I would like to negotiate for a minimum of 2 years.

Should permission be granted, a full bibliographic citation will appear in the end credits of the animation, including an acknowledgement that Solstice Publishing House granted permission for the reproduction.

If Solstice Publishing House are the copyright owner in this material and are agreeable to the use requested above, please complete and return the form that appears below for my records, or alternatively, please send through your required licensing documentation for my consideration.

Thank you for your time, if you have any questions, please don't hesitate to contact me.

Kind regards,

John Students.

0412 041 204

john@jstudents.com.au

Permission form: *Please complete and return this for my records*

RE: (Grovermyer, C.) 'Cats in the sunlight' from *The Cats of Southern Europe*. Solstice Publishing House. London 2003. P.46

I _____ as an authorised member of Solstice Publishing House that own or manage the copyright in the above stated material; grant John Students non-exclusive permission to use the requested material for use in an animation to appear online for world-wide public access, under the following conditions:

- Permission is granted for this requested use only
- A full bibliographic citation will appear in the credits for the animation
- Solstice Publishing house will be acknowledged as granting permission
- Permission is granted indefinitely/for two years (*please delete one*)

Name:

Position:

Date:

Some things to remember:

Be polite – remember that you are asking someone for something, and would like them to give it to you, so be as respectful and polite as you can.

Get it in writing – A verbal agreement is a good start, but if there’s a disagreement in the future, it’s very hard to prove a verbal agreement. So, if it starts verbally, thank them and ask if they will put something in writing for your records by responding to your email. Even if you’re getting permission from a friend – always get it in writing. It’s not uncommon for relationships to break down years into the future and for disputes to arise due to a lack of written record. This is a common problem and easily avoidable by keeping a written record.



Writing Tools (<http://flic.kr/p/9wShWM>)
by Pete O’Shea (CC BY 2.0)

Keep a record – Keep records of any correspondence you send and receive.

Once you have permission in writing, make sure you keep it somewhere where you can find it if you need it in the future.

Follow up – If you don’t hear back from them within a week, send another email politely asking if they could confirm whether they received your request or not. If they have received your request and don’t respond in two weeks, politely contact them and advise you’re following up on the request, has there been any progress and is there anything further you can do to assist them in progressing the request.

You may be asked to pay a fee – As a copyright owner of a work, you have a right to place a value on your work and charge someone to use it. As a result, if you ask someone if you can use their content and they request a fee, be respectful and mindful that it is their right to charge whatever they see fit. If the fee is too high for you, you can negotiate and politely advise “Thank you for advising your licensing fee. Unfortunately this fee is outside of my budget” you may then want to advise them of what your budget is and see if they are happy to licence the material to you for a fee within your budget or you may wish to ask if there is any way to lessen the fee such as using it for 1 year rather than 2.



Please Pay Here 3-14-09 19
(<http://flic.kr/p/67rRe3>) by
Steven Depolo (CC BY 2.0)

No response doesn’t mean you can just go ahead and use it – Sometimes you won’t get a response – for whatever reason. This isn’t a licence for you to go ahead and use the content. If you use the content without permission you are in breach of copyright and could be asked to cease and desist, or worse, you could be charged. Sometimes you’ll see people with statements like “All reasonable efforts have been made to contact the copyright owner, if you are the contact owner please contact us” – that isn’t a get out of jail free card. The copyright owner could still request you remove the content and could still charge you for using their content without their permission. Statements like this can assist you if you get into trouble, but you need to prove that you really did take reasonable steps (i.e. records of searches made, copies of correspondence sent etc.). Such disclaimers may lessen the charges, but it is certainly not a guarantee. The Copyright Office does not recommend that you use material without permission unless you have legal advice that supports your use.



no content
(<http://flic.kr/p/5raMFX>) by
Chris Dlugosz (CC BY 2.0)

No means no – Sometimes a copyright owner will deny your request. Remember that as the copyright owner of the work, it is their right to choose if, how and when they want their material to be used. If your request is denied, do not be disrespectful, refocus your energies on finding something else to use instead.

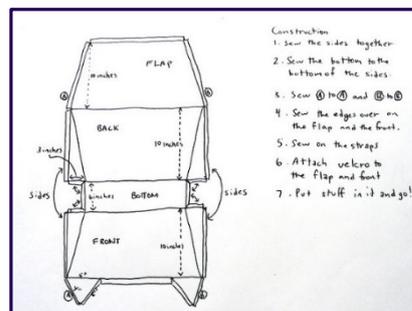
Creating your own content

Sometimes it’s easier to create your own content rather than using someone else’s. Please remember though that copying something by hand, is still making a copy and therefore has the same implications as copying something from a website, book or other source.

Copyright doesn’t protect ideas or information – only the physical expression of those ideas. So, it is possible for you to create your own interpretation of someone else’s idea so long as your expression of that idea is different and unique. Always remember to cite your sources of ideas and information.

If you are creating your own material and using someone's idea – be careful not to create a derivative work of the original by reproducing significant parts or aspects of the original. Creating a derivative work requires permission from the copyright owner.

In some circumstances, it's difficult to give something a unique expression, because the thing itself is generic. For example, if I ask 3 people to draw a tennis ball, they will all draw something circular, that's a light greenish/yellow colour with a set of curved lines on it. These people aren't copying each other nor are they in breach of copyright of the original object. They will all have very similar images because a tennis ball is a generic object that has a particular appearance.



Bag Construction (<http://flic.kr/p/Uawm4>) by Brett Pettis (CC BY-NC 2.0)

If I placed pictures of fancy tennis balls around the room – say one with rainbow colours instead of yellow/green, one with tiny rackets printed all over it and one with raised curved lines – and then I asked the 3 people to draw a tennis ball and I received a tennis ball that was rainbow coloured, or had rackets printed on it, or one with raised curves, then we might have a problem because the drawing is reproducing the unique aspects of the generic object that are unlikely to have been independently thought of by the person drawing the picture.

In a nutshell, being inspired by an idea is fine and limited expression of generic objects is also fine, but you must always be careful that you are copying the idea and not the expression. This is one of the more complex areas of copyright - infringement cases are notoriously difficult, but if you have the appetite for learning more about it judging if an infringement has occurred, then the following cases are worth reading:

<http://mirskylegal.com/2013/06/copyright-in-photography-harney-v-sony-and-ae-and-other-cases/>

This one is U.S based but doesn't rely on Fair Use and is a good example of examining "copyrightable" elements of an image.

http://en.wikipedia.org/wiki/Barack_Obama_%22Hope%22_poster

The famous Obama 'Hope' poster – in particular, read the section at the end of the article about 'copyright and origins'.

<http://ipwhiteboard.com.au/copyright-and-biscuits-big-questions-asked-in-donna-hay-and-womens-weekly-stoush/>

Something a little closer to home.

Need more help?

Contact our office – copyright_inquiries@deakin.edu.au

Australian Copyright Council - <http://www.copyright.org.au/>

Creative Commons Australia – <http://creativecommons.org.au/>

Creative Commons Search – <http://search.creativecommons.org/>

Learn how to cite - <http://www.deakin.edu.au/students/study-support/referencing>

Arts Law Centre Info on Copyright - <http://www.artslaw.com.au/info-hub/results/cat/copyright-moral-rights/>

deakin.edu.au

Deakin University CRICOS Provider Code: 00113B

Deakin University Copyright Office

e: copyright_inquiries@deakin.edu.au

p: 03 9244 6508

w: <http://tinyurl.com/ducopyright>

