Legal and Ethical Issues Affecting Portfolios

Only one thing is impossible for God: to find any sense in any copyright law on the planet.  
Mark Twain (1972)

Introduction

You may find yourself agreeing with Mark Twain's humorous criticism of copyright laws, but, as a professional communicator, you will need to understand intellectual property laws well enough to protect your own work and the intellectual property of your employers, as well as to avoid misusing the intellectual property of others. When creating your portfolio, and later when revising it, you will face a number of thorny ownership issues that you will feel more comfortable addressing if you have some basic information about fair use and public domain. You will also want to know when it is necessary to get permission for work that might be included in your portfolio.

In addition to intellectual property rights, Chapter 6 examines a range of other legal and ethical issues that may occur as you plan, design, and create both your paper and electronic portfolios. We encourage you to develop your own code of ethics to use daily as a professional communicator. You can begin this process by becoming familiar with the published ethical codes of various professional communication associations such as the Society for Technical Communication and the International Webmasters Association. Specifically, Chapter 6 covers the following topics:

- Copyright and intellectual property rights
- Works in the public domain
- Copyrighting your portfolio
- The fair use doctrine and your portfolio
- Work for hire doctrine
- Joint authorship
- The Digital Millennium Copyright Act of 1998
- Information liability
- Portfolios and ethical issues

COPYRIGHT AND INTELLECTUAL PROPERTY RIGHTS

Intellectual property is any original work that has commercial value. In its amended form (see the U.S. Copyright Office's Web site, www.copyright.gov for specific amendments), the 1976 Copyright Act remains the central piece of legislation protecting original works of authorship that are fixed, tangible forms of expression. Protection of intellectual property dates back to Article I, Section 8, of the U.S. Constitution, which grants authors and inventors exclusive rights to their writings and inventions. To be protected by copyright, a work must be both a fixed (in an unchanging form) and a tangible form of expression. Examples of fixed, tangible works include paper documents, digital media, photographs, and videotapes. The terms “fixed” and “tangible” have been interpreted to mean that the original work has a distinct, recognizable form. For example, a logo created for a client is both fixed and tangible because it can be viewed on both the client company's...
CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios

Literary works (i.e., articles, reports, poems, stories) that you may have created for your portfolio
Musical works, including the lyrics
Dramatic works (i.e., any plays that you may have created for your portfolio)
Pantomimes and choreographic works
Pictorial, graphic, sculptural work (i.e., any original photographs or original digital images you may have created for your portfolio)
Motion pictures and other audiovisual works (i.e., original video clips, streaming video, or multimedia projects)
Sound recordings
Architectural works

FIGURE 6.1
Original Works of Authorship Covered Under the 1976 Copyright Law
Source: U.S. Copyright Office, Copyright Basics (Circular 1), p. 5.

Web site and its printed correspondence. Knowing how to protect your own intellectual property is impor-
tant as you create your portfolio. If you have created, for example, an original multimedia project or if you
decide to include any original artwork in your portfolio, you should clearly label these original fixed creations
as being copyrighted (see the following section on copyright protection). Copyright ownership is a complex
issue that will be discussed later in this chapter in the section on work for hire. Original works of authorship
are identified in Figure 6.1. It is important to keep in mind that these categories should be viewed broadly.

WORKS IN THE PUBLIC DOMAIN

The term "public domain" refers to works that are no longer protected by copyright laws or works, such as
U.S. government publications, that do not meet copyright requirements. Ideas and facts are not protected
by copyright, but tangible, fixed expressions of ideas and facts are. You do not need permission to borrow informa-
tion from these sources, but you do need to credit the original source.

WORKS NOT PROTECTED BY THE 1976 COPYRIGHT ACT

Works that are not fixed in a tangible form (i.e., improvisational speeches and unrecorded choreographed works)
Ideas, procedures, processes, principles that are not expressed in a tangible form (i.e., not written down)
Familiar symbols or designs
Works comprised entirely of common property without original authorship (i.e., calendars, height and weight charts,
lists taken from public documents)
U.S. Government publications

FIGURE 6.2
Works Not Protected by the 1976 Copyright Act
Source: U.S. Copyright Office, Copyright Basics (Circular 1), p. 5.

All copyrighted works eventually enter the public domain. For example, Mark Twain's The Adventures of
Huckleberry Finn (1886) and Lewis Carroll's Alice's Adventures in Wonderland (1865) are both in the public do-
main and have been published in many new editions, some costing only a few dollars. Shakespeare's plays,
Da Vinci's "Mona Lisa," and Beethoven's symphonies are in the public domain because copyright laws were
not in existence when these works were created. Remember, however, that specific performances and pho-
tographs (digital or hard copy) are probably protected by copyright. For example, the book jacket photograph
of the "Mona Lisa" that appears on Dan Brown's novel The Da Vinci Code is protected by copyright.

Determining whether or not a work is in the public domain is not easy. There is no central database that
you can log on to, and the U.S. Copyright Office will not disclose whether or not a work is in the public
domain (Fishman 2000, 17/5). You may, however, do a keyword search using your favorite search engine,
including as part of your search string the words "public domain." Doing so will produce a range of choices,
particularly if you are searching for graphics and/or digital images that are more than likely in the public
domain. Another way to avoid copyright issues is to take your own digital photographs.

Public domain and the Internet

As you probably know, a work that is on the Internet is not in the public domain simply because it is on
the Internet. Works in the public domain that are on the Internet generally fall into one of the following
categories:

- Works without copyright protection
- Works that were in the public domain prior to being posted on the Internet
- Works specifically designed as public domain documents (Fishman 2000, 17/5)

U.S. government publications constitute perhaps the largest body of public domain work that professional
communicators might find useful. For example, you may want to include in your portfolio an article on an
environmental subject and need photographs for it. You can go to a U.S. government Web site, download
whatever graphic you wish as long as it is not already protected by copyright, and use it. Doing so would not
be copyright infringement since U.S. government publications are paid for by public tax dollars. Make sure,
however, that you give a credit line to the government publication.

EXERCISE 6.1 FINDING A DOCUMENT IN THE PUBLIC DOMAIN

Using your favorite search engine, do a keyword search for a document or graphic in the public domain that
pertains to a project in your portfolio.

Print the document or graphic and analyze how you might use it in one of your portfolio pieces.

COPYRIGHTING YOUR PORTFOLIO

As you create your portfolio, you will probably want answers to the following questions:

- Should I copyright my portfolio?
- How do I copyright my work?
- How long does copyright protection last?
- Can I apply for an International copyright?
- What protection does copyrighting my work give me?
CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios

Should I copyright my portfolio?

You may think that you should copyright your portfolio since you are working so hard on it and since it reflects your unique talents, skills, and qualifications. Remember, however, that your portfolio is an evolving document, changing as you change and being modified each time you present it to a potential employer, colleague, or classmate. You may, however, want to copyright some of the artifacts in the portfolio if you don’t want someone else’s copyrighted work (i.e., a borrowed graphic or sound clip). Another consideration is the format of your portfolio. If you decide to Web host it or prepare a CD so that you can distribute it as you wish, you may want copyright protection. However, make sure that all the work in the portfolio is yours and that you are not infringing on someone else’s copyright. You can find specific instructions on how to copyright your work on the U.S. Copyright Office Web site. Circular 66, Copyright Registration for Online Works—You cannot copyright your domain name.

How do I copyright my work?

First, you do not have to register a work with the U.S. Copyright Office to have it copyrighted. Once an original work or artifact is in a fixed, unchanging form, it is copyrighted. In today’s digital world, of course, few if any works are ever really fixed or unchanging. Still, an original digital work is copyrightable if it can be perceived as a whole and that whole is distinct from other artifacts of that genre or type. If you decide to register one of your works, you will need to submit a completed registration form, along with a filing fee of $30 and the required copy or copies of the works you wish to register. Online registration is now available.

Copyright protection lasts for the life of the author plus an additional 70 years. For works made for hire (discussed later in this chapter), copyright protection lasts for 70 years from the date of first publication or for 120 years from the year of creation, whichever comes first. For more information on the duration of copyright, see Circular 15a, Duration of Creation, which can be found at the U.S. Copyright Office Web site. You do not have to register your portfolio on the U.S. Copyright Office Web site. To perform the copyrighted work publicly or to display it publicly, you must pay a licensing fee of $30. You may submit your work as a CD-ROM but not as a floppy disk or zip disk.

How long does copyright protection last?

Copyright protection lasts for the life of the author plus an additional 70 years. For works made for hire (discussed later in this chapter), copyright lasts for 95 years from the date of first publication or for 120 years from the year of creation, whichever comes first. For more information on the duration of copyright, see Circular 15a, Duration of Creation, which can be found at the U.S. Copyright Office Web site. You do not have to register your portfolio on the U.S. Copyright Office Web site. To perform the copyrighted work publicly or to display it publicly, you must pay a licensing fee of $30. You may submit your work as a CD-ROM but not as a floppy disk or zip disk.

Copyright Basics

Copyright protection gives the owner the right to control, among other things, the following:

- To reproduce the work
- To make derivative works based on the work
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership
- To perform the work publicly

Copyright registration is not always necessary, but it does provide you with certain benefits, which are listed in Figure 6.3.

Copyright registration is not always necessary, but it does provide you with certain benefits, which are listed in Figure 6.3.

FIGURE 6.3 Benefits of Registering Your Work with the Copyright Office


Can I apply for an international copyright?

There is no such thing as an international copyright that will automatically protect your work throughout the world. Protection from unauthorized use in a particular country depends largely on the laws of that country. If you desire to have copyright protection in a specific country, you should research the protection provided to foreign authors by the copyright laws of that country. It is best to do this research before the work is published anywhere, since copyright protection in that country may depend on when the work was first published. Most countries offer some protection to foreign works under certain guidelines, and these guidelines have been clarified by international copyright treaties and copyright conventions. If those countries have agreed to the provisions of one of the international copyright conventions, then your work will be protected according to the agreements of that convention. If you want additional information in this area of intellectual property rights, including a list of the countries that have copyright agreements with the United States, you can visit the U.S. Copyright Office Web site (www.copyright.gov), International Copyright Relations of the United States, Circulars 38a and 38b.

What protection does copyrighting my work give me?

As noted earlier, the copyright law protects your work from misuse by others. It also provides you, the author of the work, with exclusive rights to any of the activities identified in Figure 6.4.

THE FAIR USE DOCTRINE AND YOUR PORTFOLIO

The part of the 1976 Copyright Act that will play a major role in helping you determine what materials to include in your portfolios and how to use those materials is often referred to as the "fair use doctrine." This doctrine, defined in Section 107 of the act, is complex and has far-reaching implications. What is true today regarding fair use may not be true tomorrow, so it is important to stay current on existing copyright laws. While the language used in defining fair use is not easy to understand, the doctrine attempts to strike a balance between an author’s right to own and profit from a work (addressed in points 1 and 4) and the public’s right to have the work for educational purposes. The doctrine itself is relatively short and appears in Figure 6.5. To determine whether you are using copyrighted material under the protection of the fair use doctrine, you need to apply the four factors listed in this figure to each use of copyrighted material. Remember, when in doubt, it is always best to get permission in writing to use copyrighted material.

In preparing your portfolios, be aware of the guidelines governing fair use. The three types of fair use that will have the largest impact on your portfolios are the following:

- Educational fair use
- Personal fair use
- Creative fair use

(Permission to use the three types of fair use as stated is granted by the USG Office of Legal Affairs. Copyright and Fair Use <http://www.usa.gov/copyright>.)

To reproduce the copyrighted work
- To prepare derivative works based on the copyrighted work
- To distribute or sell copies or phonorecords of the copyrighted work to the public or to rent, lease, or transfer ownership of the work
- To perform the copyrighted work publicly or to display it publicly
CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios

"Notwithstanding the provision of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any 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 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."

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 of the above factors.

FIGURE 6.5
The Fair Use Doctrine

Educational fair use
The fair use doctrine of the 1976 Copyright Act makes it clear that a limited amount of copyrighted material may be used in teaching, scholarship, and research without requiring written permission and without violating copyright law as long as this is done for a nonprofit organization. Educational fair use permits teachers to bring in photocopies of pages from published portfolios for critical review in order to present your own portfolio. In doing so, you acknowledge her sources, and you use these images solely for educational purposes. However, educational fair use does not cover commercial copiers. A major commercial copier once made course packs for classroom instruction at the request of teachers. Such use of copyrighted materials was ruled by a federal district court to be an infringement of copyright.

Over the years, there have been many interpretations of the fair use provision of the copyright law. As noted earlier, the doctrine is complex, and each situation is different, depending upon such variables as the nature of the material, the length of the passage quoted, paraphrased, or summarized, and the impact of this use on the market value of the copyrighted work. How much of someone else’s work you can use without permission is not an easy question to answer, for each case is different. Your English teacher may have told you that you can use up to 250 words in total (or no more than 5 percent of the original work) from a copyrighted work without getting permission, and this guideline is often used by publishers. However, if the copyrighted work is a song lyric or a poem, as little as one line or two notes may be an infringement of copyright. When in doubt about whether or not you may be in violation of copyright law, get permission from the copyright owner.

Personal fair use
Personal fair use involves using a copyrighted work for learning or entertainment. For example, you may decide to copy two articles from a trade journal in your library and to download two articles from the Internet as part of your research on different portfolio designs. These activities are protected by personal fair use. You can also transfer songs from your personal CD to your portfolio Web site (if these CDs have been purchased legally onto a single CD for your own enjoyment. Doing so is sometimes referred to as "format sharing," which is protected by personal fair use. You cannot, however, make the CD of your personal favorites available to your friends on an Internet site. Doing so would no longer be covered by personal fair use. The Digital Millennium Copyright Act of 1998 (discussed later in this chapter) may change how personal fair use is legally interpreted.

Creative fair use
Creative fair use is the oldest form of fair use, going back at least to the nineteenth century. The principle here is the recognition that knowledge is a public good and that new works are often built on what has gone before. Often this work is copyrighted, and creative fair use permits an author to use copyrighted work to create new works. For example, the U.S. Supreme Court ruled in 1944 that a rap group's song, "Big Hair Woman," a parody of the famous Roy Orbison song "Oh, Pretty Woman," was fair use of that work because the rap song resulted in a new creative work, even though that new work was based heavily on Orbison's song (Crawford and Murray 2002, 70). Creative fair use supports the basic goal of advancing knowledge by encouraging creators to develop new intellectual property. The distinctions between educational fair use, personal fair use, and creative fair use are often blurry, however, and contribute to the complexities of the fair use doctrine.

Photographs, digital images, and copyright
As mentioned earlier, Section 102 of the 1976 Copyright Act lists "pictorial, graphic, and sculptured works" as one of the categories of authorship protected by copyright. Unless you are using such works for academic/educational use, you will need to get permission to use them. However, if your portfolio is an academic project, you may use digital images/artwork, photographs, and print graphics in it without getting permission as long as you credit each source. Such academic use is protected under the fair use doctrine. If you decide to Web host your portfolio containing copyrighted work, you are no longer protected by the fair use doctrine governing academic use. Your Web site is now available to anyone on the Internet and is not restricted to the academic community. To abide by educational fair use, you should limit access to your Web site and your Web-hosted portfolio by using technology, such as password access, so that your portfolio isn't available to everyone on the Internet. Since the U.S. Copyright Law is amended frequently, you may want to double-check the U.S. Copyright website (http://www.copyright.gov) before posting anything on the Internet.

Getting permission to use copyrighted material
If you decide that your use of copyrighted material falls outside of the fair use doctrine, you must get permission to use it. If you want permission to use a Web document, you will often find an e-mail address that you can use for this purpose. If you want to use copyrighted material from a book or journal, you can visit the publisher's Web site, where you will find information on how to request permission to use it. You can also check the copyright notice for the author's name. If you want to use material from a copyrighted work that isn't registered with the Copyright Office, you may find the author's name by contacting the Authors Registry, which maintains a database of authors who have been paid for their work (Crawford and Murray 2002, 74). If you find only the author's name and no other contact information, you may need to conduct an Internet search to get an e-mail address or Web site that you can use to get permission. An e-mail or fax, of course, is the quickest way to get permission. Most authors will want to know how you plan to use their work, so you may end up writing an explanatory letter. Your letter should also include a signature section that the author can sign granting you written permission to use the copyrighted material. Figure 6.6 provides guidelines for writing a permission letter. Considerable information is available in print and on the Internet on how to get permission to use copyrighted material.
CHAPTER 6  |  Legal and Ethical Issues Affecting Portfolios

1. Address your letter to the copyright holder, whether it be an individual, company (get the name of the correct person), or publisher.
2. Clearly describe the subject matter of the portfolio piece that will include the copyrighted material.
3. Provide the following information about the copyrighted materials you wish to use:
   - Author(s)
   - Title
   - Copyright date
   - Copy of material for which permission is sought
4. Clearly describe how this information is to be used, including how the information will be reproduced.
5. Include an authorization form with the following information:
   - Author and title of work
   - Use
   - Conditions, if any
   - Signature line preceded by the words “Permission granted by:”

FIGURE 6.6
Guidelines for Writing a Permission Letter

WORK-FOR-HIRE DOCTRINE

One of the areas of intellectual property that is likely to affect you now and later on in your career is the work-for-hire doctrine. This section examines the work-for-hire doctrine from two vantage points: how it may affect you and your portfolio and how it may affect your work throughout your career.

Work-for-hire and portfolios

If you are hired by a company as either a paid or unpaid intern and you want to use any of the work you created or contributed to in your portfolio, you should get written permission from the company first. Even though you are using that work for educational purposes, by law you will probably be considered a company employee, even though you may work for only a few hours a week and for only a prescribed period of time. The company owns the copyright to the work that you created unless (and rarely, if ever, does this apply to professionals) the employer assigns and schedules employee projects and pays the employee on a regular basis, not as a one-time fee.

Employers control over the employee (e.g., the employer assigns and schedules employee projects and pays the employee on a regular basis, not as a one-time fee)

The higher the level of skill required, the greater the likelihood that the creator is an independent contractor. If the hiring party had a right to control the manner and means for creating the product, the likelihood is increased that the creator is an independent contractor. This element is especially important in the work-for-hire context because the employer, not the creator, controls how the work is created.

In discussing the work-for-hire doctrine as it relates to employer status, Herrington (1999) identifies 13 elements for determining the employer-employee relationship under agency law. These elements may help you, as a professional communicator, clarify whether your relationship with your employer is likely to be considered a work-for-hire status. Figure 6.8 lists these 13 elements. For a full discussion of each of these points, see Herrington (1999).

FIGURE 6.7
The Work-for-Hire Doctrine
Source: U.S. Copyright Office. Works Made for Hire Under the 1976 Copyright Act (Circular 9).

Interpretations of the work-for-hire doctrine are made on a case-by-case basis. Whether or not a work is made for hire depends on the relationship between the parties involved. As Herrington notes, interpretations of work-for-hire status are rooted in agency-partnership law (Herrington 1999, 126). For an excellent detailed discussion of the work-for-hire doctrine and agency law, see Herrington, A Legal Primer for the Digital Age. Here we cover a few of the broad issues related to the work-for-hire doctrine so that you, as a professional communicator, have a basic understanding of how this doctrine affects the intellectual property that you create. For a work-for-hire relationship to occur, three factors must be in place:

1. Employer control over the work (e.g., the work is done at the employer’s place of business, using the employer’s equipment)
2. Employer control over the employee (e.g., the employer assigns and schedules employee projects and pays the employee on a regular basis, not as a one-time fee)
3. Status and conduct of employer (e.g., the employer provides benefits and withholds taxes.)

Changes in technology are also major factors affecting the work-for-hire relationship. Many professional communicators (and you may be one of them) telecommute part-time or even, perhaps, full-time from a home office or an Internet cafe. As a result, work-for-hire distinctions regarding place of work are blurry at best, and these distinctions still need legal clarification. It is best for you and your employer to spell out in writing exactly what the work-for-hire agreement covers.

In discussing the work-for-hire doctrine as it relates to employer status, Herrington (1999) identifies 13 elements for defining the employer-employee relationship under agency law. These elements may help you, as a professional communicator, clarify whether your relationship with your employer is likely to be interpreted as that of an employee or an independent contractor under agency law. Herrington also notes that these elements should be viewed collectively rather than individually when you try to determine your work-for-hire status. Figure 6.8 lists these 13 elements. For a full discussion of each of these points, see Herrington (1999).

1. If the hiring party had a right to control the manner and means for creating the product, the likelihood is increased that the work is for hire.
2. The higher the level of skill required, the greater the likelihood that the creator is an independent contractor.
3. Where a hiring party provides instruments and tools to create the intellectual product, the court will find support for determination of a work-for-hire.
4. If the hired party works at the hiring party’s place of business rather than his or her own, this element will lead to a more likely finding of work-for-hire.
5. The longer the duration of the relationship between the two parties, the greater the possibility of a work-for-hire.
6. When the hiring party assigns additional projects to the hired party, he or she has more control and is more likely working in the status of employer for purposes of work-for-hire.

7. The more discretion the hired party has over when and how long to work, the more likely he or she is an independent contractor and can maintain control over the work.

8. Hired parties who are paid by the hour, week, or month, rather than by the job, are likely to be employees.

9. When a hired party has a role in hiring and paying assistants, he or she may be legally determined to be an independent contractor.

10. If the work created was something usually within the realm of the hiring party's business, this element could help showing that the work was not for hire.

11. When a hiring party does not have an ongoing business, it is harder for him or her to claim to be an employer.

12. Hiring parties who pay benefits to hired parties are more likely not to be employers.

13. Hired parties who are taxed through the hiring party's business are more likely to be employees.

**FIGURE 6.8**

6. When the hiring party assigns additional projects to the hired party, he or she has more control and is more likely working in the status of employer for purposes of work-for-hire.

7. The more discretion the hired party has over when and how long to work, the more likely he or she is an independent contractor and can maintain control over the work.

8. Hired parties who are paid by the hour, week, or month, rather than by the job, are likely to be employees.

9. When a hired party has a role in hiring and paying assistants, he or she may be legally determined to be an independent contractor.

10. If the work created was something usually within the realm of the hiring party's business, this element could help showing that the work was not for hire.

11. When a hiring party does not have an ongoing business, it is harder for him or her to claim to be an employer.

12. Hiring parties who pay benefits to hired parties are more likely not to be employers.

13. Hired parties who are taxed through the hiring party's business are more likely to be employees.

**JOINT AUTHORSHIP**

You will probably want to include in your portfolio one or more pieces that show your ability to work on a project team, knowing that collaborative projects are a fact of life for professional communicators. If you decide to do so, you should get permission from the other creators. Let's assume, for example, that you were part of a project team with three other people who created a multimedia presentation promoting your campus career center. You wrote the script, someone else created the HTML source code, another created the audio, and a different person contributed the graphic. In its final form, the whole is greater than the sum of its parts, and the multimedia presentation is a seamless work whose value is shared by the four authors who created it. To avoid future conflict, each coauthor should sign a permission form granting every other author the right to use the multimedia project for an educational purpose (i.e., a portfolio piece). If the project has potential commercial value, the permission form should note that any use other than an educational one must be agreed on by the four authors in a separate agreement. For jointly authored works, copyright lasts for the life of the last surviving author plus 70 years.

If, for some reason, you don't have written permission to use your collaborative project for an educational purpose, you still may do so. Place the part of your portfolio containing the project with the names of your coauthors and a clear description of your contribution. Using the multimedia project as an example, you would note that you wrote the script for the presentation.

**Deep linking**

Deep linking is a relatively new issue in the ongoing intellectual property rights debate. It is the practice of creating a link to a subsidiary or secondary page on another entity's Web site, thus bypassing that Web site's home page. You may be using it in creating your electronic portfolio. For example, a section of your portfolio may be devoted to medical communication. In that section is an article you wrote that reports on the growing number of children being treated for asthma. When you discuss different medications for treating asthma, you decide to create a link to a subsidiary page within a pharmaceutical company's Web site rather than linking to that company's home page. That subsidiary page describes a popular asthma medication mentioned in your article. What you have done is create a deep link to the only page on that site that pertains to your article.

While deep linking is common today, companies are beginning to challenge this practice. At stake is advertising revenue. Because companies sell advertising space on their Web sites, the risk of losing advertising dollars increases when visitors bypass the home page where advertising appears for more content-specific secondary pages. Since Web sites often log the number of visitors who view the advertisement, the number of visitors who view the site the way it was designed will have a direct bearing on how much advertisers are charged. Most court decisions to date support the ruling that deep linking is not a violation of intellectual property rights. A prominent case involving deep linking was Ticketmaster v. Tickets.com, where Ticketmaster claimed that tickets.com, a competitor, was violating intellectual property laws by deep linking to Ticketmaster's site. A federal judge ruled that there was no copyright infringement since no copying was done (Markel 2002, 78). If you decide to pursue a career as a Web developer, you should stay informed on decisions that affect deep linking.

**THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998**

The Digital Millennium Copyright Act (DMCA) extends the intellectual property rights described in the 1976 Copyright Act to include digital works. The DMCA's purpose is to protect copyright owners in the digital age from digital piracy. It includes the five provisions identified in Figure 6.9. For example, you decide to create a Web-based version of your portfolio and protect access to it with password protection technology. Someone bypasses the technology, views your portfolio, and downloads your copyright@ files. Under the DMCA, that activity is illegal because this person has bypassed a technology designed specifically to protect a digital work.

When the DMCA was signed into law in 1998, the Motion Picture Association of America and the Recording Industry Association of America were very happy about the protection they received from digital piracy because the home video market is so profitable. Librarians and academics, to name two groups, however, are not happy because they see the DMCA as eroding the fair use principle and establishing new barriers to academic research. For example, the wording of the DMCA, broadly interpreted, could make it illegal to view or copy Internet material without prior permission regardless of the intent of the user. The DMCA could also limit scholarship that might involve assembling databases from Internet material (Foster, 2003, 2). The provisions of the DMCA are complex, and it is not the intent of this chapter to discuss this act in detail. You can consult the U.S. Copyright Office, the World Intellectual Property Organization, and the Digital Millennium Copyright Act of 1998, p, 1.

**Figure 6.9**


Title III, "The Computer Maintenance Competition Assurance Act," permits the copying of a computer program if it is being done to re-activate the computer after maintenance or repair.

Title IV has six copyright provisions that pertain to distance learning, library use (copies) of digital materials, "web-casting" of sound recordings on the Internet, and collective bargaining agreement obligations affecting the transfer of rights in motion pictures.

Title V, "The Vessel Hull Protection Act," establishes new protection for the design of vessel hulls.

**CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios**

The Main Provisions of the 1998 Digital Millennium Act

view the entire act by using the search feature on the Copyright Office Web site. The DMCA is likely to be hotly debated for many years, and professional communicators should be familiar with the intellectual property issues covered by the act.

INFORMATION LIABILITY

The term "information liability" (LaPlante 1986, 37), coined in the 1980s, describes how writers can be held accountable for injuries that might be caused by information they have written. Information liability can encompass such works as user documentation, misleading or incorrect graphics, marketing pieces, informational reports (e.g., product descriptions), and safety messages. While you may be creating your portfolio initially as an academic requirement, you will be using it for job interviews and, perhaps, for promotion. As you develop it, make sure that the pieces you include show your understanding of information liability.

The following scenario shows how information liability might work. You may decide to include in your portfolio a section from user documentation that you wrote for a course or on the job. If you decide to include a section from a user manual, check to make sure that your instructions are accurate and clear and that the user is protected from potential harm. If poorly worded instructions or safety messages result in loss or corrupted computer files, that’s unfortunate; however, injuries caused by unclear, inaccurate, or incomplete instructions can have legal repercussions for professional communicators, as described in the scenario in Figure 6.10. Publications like the Product Safety & Liability Recorder are valuable resources with information on topics that pertain to information liability.

PORTFOLIOS AND ETHICAL ISSUES

So far, Chapter 6 has addressed several legal issues that you might face as you build your portfolio. You may also find that a decision may be sound legally but not ethically. This part of the chapter discusses some of the ethical issues that may influence the choices you make. For example, you may be interviewing for a job and an employer is very impressed with the graphics in a team project included in your portfolio. While your overview or introduction to the project may have clearly stated that your contribution consisted of writing the text, the employer has raised this point when reviewing the document. While you are not legally obligated to tell the employer that you didn’t create the graphics, ethically you should say that they were created by another project team member. Building your portfolio provides you with an excellent opportunity to reflect on the values on which you will base your professional career and reputation. In short, your portfolio will help you develop your own professional code of ethics, a code that expresses your personal, religious, cultural, and professional values.

Acknowledging your sources

In discussing intellectual property rights, we noted that you are legally obligated to follow existing copyright laws when borrowing from another source and that written permission is needed to use copyrighted

An injured user sues the party who sold him or her the product; the seller sues the company that made the product; the company sues the employer, in this case the writer, who wrote the user documentation.

FIGURE 6.10 Information Liability Scenario


CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios

Avoiding plagiarism

Ever since grade school, you have probably been told never to plagiarize, or present someone else’s published or unpublished ideas or words as your own. As you build your portfolio, make sure that you follow the guidelines your school or university has published on how to avoid plagiarism. Never lift documents from the Internet and present them as your own work. Remember that even unintentionally presenting someone else’s work as your own is still plagiarism. In short, plagiarism is a form of copyright infringement.

Professional organizations and ethical codes

As a professional communicator, you may be a member of one or more professional associations. Almost all professional associations have published codes of ethics that their members follow. The Code of Ethics for the Society for Technical Communication (STC), for example, is presented in Figure 6.11. The STC Code of Ethics, like many ethical codes, echoes values that are thousands of years old. Perhaps you read The Republic of Plato in a college philosophy course and remember Plato describing a virtuous person as someone having the qualities of justice, reason, wisdom, and temperance or self-control. You may also remember Plato’s famous allegory of the cave, where the cave serves as a metaphor for human nature. In the cave are prisoners (the unenlightened) and puppeteers (the enlightened). The prisoners are forced to watch shadows and images on the cave walls that are projected there by the puppeteers. In the dimly lit cave, these shadows and images distort the real objects they represent: today we could interpret Plato’s cave allegory as an early admonition against deceptive advertising, a topic addressed in the section on “Honesty” in the STC Code of Ethics.

In discussing ethics and technical communication, Herrington identifies three popular approaches for testing ethical behavior: universalization, common practice, and the utilitarian test (Herrington 2003, 7). "Universalization" is a central principle in Immanuel Kant’s ethical thought system, for he believed that certain actions were by their nature absolutely right or wrong. Kant (1724-1804) referred to this principle of universalization as the "categorical imperative." While the comments made here are a great oversimplification of his philosophy, for Kant categorical imperatives are universal and always ethical, and they require you to do the right thing (take the right action) (Kant, 1764, 70). In very broad terms, the STC’s descriptions of the ethical principles of honesty and quality (as well as the ethical principles of honesty and quality) in particular, have much in common with Kant’s categorical imperative. For example, placing graphics in your portfolio that you didn’t create or whose ownership you didn’t acknowledge would be a violation of Kant’s ethical system.

Very briefly, the “common practice test” for ethical conduct treats activities or behavior as ethical if they are common to the profession. This view is very different from Kant’s categorical imperative. For example, it is common practice in advertising to let the consumer know that a physician in a television commercial is not a real physician but an actor playing the part. If your company decides to mislead the consumer into thinking that the actor is a physician in real life, then the company is not following the common practice test for your industry. The principle behind the common practice test can be seen in the section on "Honesty" in Figure 6.11. For example, if you exaggerate or misrepresent the contributions you made to a group project in your portfolio, you would not be following the common practice test of the technical communication profession.

The "utilitarian test" for ethics weighs the good or benefit to be gained from taking an action against the harm or detriment that could result from that action. One proponent of utilitarianism is the English philosopher John Stuart Mill (1806–1873), in "Utilitarianism" (1998). Mill measures the rightness or wrongness of an act by the degree of happiness the act brings to the greatest number of people. Herrington uses the following example to information if the fair use doctrine does not apply. Even when you don’t quote directly from that source, you are ethically obligated to credit it for any information that is paraphrased or summarized unless that information is common knowledge or in the public domain.
Ethical Principles for Technical Communicators

As technical communicators, we observe the following ethical principles in our professional activities.

Legality
We observe the laws and regulations governing our profession. We meet the terms of contracts we undertake. We ensure that all terms are consistent with laws and regulations locally and globally, as applicable, and with STC ethical principles.

Honesty
We seek to promote the public good in our activities. To the best of our ability, we provide truthful and accurate communications. We also dedicate ourselves to conscientious, clarifying, cohesive, and creative writing to meet the needs of those who use our products and services. We alert our clients and employers when we believe that material is ambiguous. Before using another person's work, we obtain permission. We attribute authorship of ideas only to those who make an original and substantive contribution. We do not perform work outside our job scope during hours compensated by clients, or employers except with their permission; nor do we use their facilities, equipment or supplies without their approval. When we advertise our services, we do so truthfully.

Confidentiality
We respect the confidentiality of our clients, employers, and professional organizations. We disclose business-sensitive information only with their consent or when legally required to do so. We obtain releases from clients and employers before including any business-sensitive material in our portfolios or commercial demonstrations or before using such material for another client or employer.

Quality
We endeavor to produce excellence in our communication products. We negotiate realistic agreements with clients and employers on schedules, budgets, and deadlines during planning. Then we strive to fulfill our obligations in a timely, responsible manner.

Fairness
We respect cultural variety and other aspects of diversity in our clients, employees, development teams, and audiences. We serve the business interests of our clients and employers as long as they are consistent with the public good. Whenever possible, we avoid conflicts of interest in fulfilling our professional responsibilities and activities. If we discover a conflict of interest, we disclose it to those concerned and obtain their approval before proceeding.

Professionalism
We evaluate communication products and services constructively and tactfully, and seek definitive assessments of our own professional performance. We advance technical communication through our integrity and excellence in performing each task we undertake. Additionally, we assist other persons in our profession through mentoring, networking, and instruction. We also pursue professional self-improvement, especially through courses and conferences.

FIGURE 6.11
Code of Ethics of the Society for Technical Communication
Source: Used with permission from the Society for Technical Communication, Alexandria, VA, U.S.A.

illustrate the utilitarian test. If a technical communicator working for a chemical company printed a brochure with inaccurate information, he or she would be applying the utilitarian test to decide whether or not to mail the brochures by weighing the potential harm that the inaccurate information might cause against the cost of reprinting an error-free version of the brochure (Herrington, 2003, 9). For a more detailed discussion of these three ethical tests see Herrington (2003, Chapter 2). In closing, the decisions you make in creating your portfolio provide an excellent opportunity to examine the ethical code upon which you will build your professional reputation.

CHAPTER 6 | Legal and Ethical Issues Affecting Portfolios

SUMMARY
As a professional communicator, you will face a range of legal and ethical issues as you design your paper and electronic portfolios. Chapter 6 discusses such key areas as intellectual property rights, work for hire, joint work, agency and intellectual property, information liability, and ethical issues. As you begin building your portfolio, you will discover that most or all of these areas will influence the decisions you make regarding the content, design, and presentation of your portfolios. Knowing this information will help you make wise and legally defensible decisions.

Chapter 6 also encourages you to reexamine your own code of ethics as you move through the portfolio-building process. One way to start is to become familiar with the ethical codes of the professional organizations to which technical and professional communicators belong.

ASSIGNMENTS
Assignment 1: Checking Your Portfolios for Copyrighted Materials
Review the graphics and/or digital images in your portfolio, either as stand-alone works or as works that you have brought into a written document, PowerPoint presentation, or multimedia presentation. How many of them are protected by copyright? Select some sample graphics and do a Google search using keywords such as "graphics and public domain" or other phrases, some general and others more specific, that will allow you to locate graphics in the public domain. Evaluate these graphics to see if you can use any of them in place of graphics in your portfolios that are protected by copyright.

Assignment 2: Evaluating Ethical Codes
Search the Internet for the Web sites of two professional communication associations and examine their codes of ethics. You might begin your search by reviewing the Web sites of the professional associations listed in Table 8.5 in Chapter 8. Compare the two codes of ethics for the general principles they espouse. Write a short analysis noting how these codes are similar and different.

REFERENCES
APPENDIX A: SUMMARY INFORMATION SHEET ON LEGAL AND ETHICAL ISSUES COVERED IN THIS CHAPTER

1. What main categories of intellectual property are protected by the 1976 Copyright Act?
   Answer: The 1976 Copyright Act protects the following major categories of original authorship:
   - Literary works
   - Musical works
   - Dramatic works
   - Sound recordings
   - Motion pictures
   - Architectural works
   - Graphic works
   - Works of art
   - Computer programs
   - Sound recordings
   - Nondramatic literary works
   - Motion pictures and other audiovisual works
   -沥青 painting, sculpture, photographs, and other works of fine art
   - Performing arts works
   - High energy works
   - Brighton works
   - Computer programs

2. What works are not protected by the 1976 Copyright Act?
   Answer: This act does not protect the following categories of work:
   - Works that are not original
   - Works that are in the public domain
   - Works that are in the public domain
   - Works that are for hire
   - Works that are not works of the United States
   - Works that are in the public domain
   - Works that are not works of the United States
   - Works that are in the public domain
   - Works that are in the public domain

3. What is public domain?
   Answer: The term “public domain” refers to works that are no longer protected by copyright laws or works that do not meet copyright requirements. All work produced by the U.S. government is considered to be in the public domain.

4. Must you register your intellectual property with the U.S. Copyright Office to have it protected by copyright laws?
   Answer: No, but registering your work does provide certain benefits, such as defending yourself more easily from copyright infringement.

5. Should I register my portfolio(s) with the U.S. Copyright Office?
   Answer: Probably not, since your portfolios are evolving documents and are not a fixed form of expression. You may want to copyright protect individual artifacts within your portfolio.

6. What is fair use, and what are its limitations?
   Answer: The fair use doctrine of the Copyright Act of 1976 is one of the more important and one of the more complex areas of intellectual property law. Each use is different and is governed in part by the type of copyrighted work, the purpose or use of that work, the amount borrowed, and the impact that the use has on the market value of the original. Using a limited amount of copyrighted material without written permission for educational purposes is normally considered fair use. For example, you may use a limited amount of copyrighted material in your portfolio if your portfolio is being developed for a class assignment. In all other cases, you will need written permission to use this material. How extensively the Digital Millennium Copyright Act of 1998 will affect fair use remains to be determined.

7. How are the works of foreign authors protected under the 1976 Copyright Act?
   Answer: Under the 1976 Copyright Act, foreign works are protected as if they were works created by U.S. citizens. However, a foreign work must be fixed in a tangible medium of expression in the United States or another country where the work is being published to be protected by U.S. copyright law.

8. Can I include work in my portfolio that is jointly authored? What safeguards should I use?
   Answer: Yes. To avoid future conflicts regarding authorship, you should get written permission from the other author. That permission should clearly identify the authors, describe the contribution of each, and specify the conditions under which the portfolio piece can be used. All authors should sign the permission agreement. If this is done, then each author can use the jointly created work in his or her own portfolio.

9. Is there such a thing as international copyright law for intellectual property?
   Answer: No. Copyright laws differ from country to country. While many countries offer some protection to foreign works under guidelines established by international copyright treaties and copyright conventions (e.g., the Berne Convention) for more information, consult the International Copyright Relations of the United States (Circulars 38a and 38b), found on the U.S. Copyright Office Web site (www.copyright.gov).

10. What publications will help me keep current on product liability issues?
    Answer: There are many publications that you can consult. A few of the major publications are listed below and are found in most libraries:
        - Product Liability Desk Reference
        - Product Safety and Liability Reporter
        - United States Code
        - United States Code

11. What are some of the ethical issues that professional communicators should be aware of?
    Answer: As a professional communicator, you should be aware of the following ethical issues:
        - Responsibility to society
        - Responsibility to employers
        - Responsibility to clients
        - Responsibility to the public

12. What is the Digital Millennium Copyright Act of 1998, and how will it affect what I include in my portfolios?
    Answer: The Digital Millennium Copyright Act (DMCA) is designed to protect copyright owners from copyright infringement. It is intended to prevent the unauthorized reproduction of copyrighted material, and it provides remedies for copyright infringement. The DMCA includes provisions that are designed to prevent the unauthorized reproduction of copyrighted material, and it provides remedies for copyright infringement.