

FACTS, PHOTOS & FAIR USE — COPYRIGHT LAW FOR GENEALOGISTS



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INTRODUCTION: *Materials and records created by others are the bread-and-butter of genealogy. But whether copyright law allows use of old photographs, reports and articles can be murky at best. Staying out of trouble requires understanding what's copyrighted and what isn't, when and how copyrighted materials can be used, and how to handle issues that arise.*

COPYRIGHT LAW FUNDAMENTALS

A. What copyright means

Copyright is the legal recognition of intellectual property by exclusive rights for a limited time period, including the rights to say who can copy or distribute a work. Copyright is enforced usually by civil courts with injunctions and awards of damages. Protection is international, and can vary from country to country. In the United States, copyright protection stems from the Constitution, and is enforced through Title 17 of the United States Code.

B. What can and can't be copyrighted

Almost any original work can be copyrighted; in the U.S. it has to be in tangible form. Ideas, processes and procedures can't be copyrighted (patents); business names and slogans can't be (trademarks); matters of common knowledge and facts can't be. U.S. government-produced works can't be copyrighted; state and foreign government works can be.

C. How long copyright lasts

Copyright begins the minute the work is created and lasts a specific term of years. In the United States, copyright lasts *at least* 70 years and can last longer depending on statutory factors. Copyright terms can be extended and, in some cases, can be revived after they expire.

D. Who owns the copyright

Under ordinary circumstances, the creator of the work owns the copyright. In some cases, the copyright will belong to an employer or to the entity that contracted for the work (a "work for hire"); in other cases, copyright can be transferred to someone else in writing. Copyright in an oral interview may be joint (interviewer and interviewee). A copyright is considered personal property and can be inherited. If not provided for expressly in the creator's will, it will pass to the heirs under the residuary clause of the will ("all the rest, residue and remainder") or the intestacy laws of the jurisdiction in which the creator's estate is probated.

E. Copyright infringement

Any unauthorized use of copyrighted material is infringement that can result in a lawsuit where damages can be awarded even if the copyright holder wasn't hurt financially, and attorneys' fees can be awarded as well. Not knowing something was copyrighted *isn't* a defense. Copyright infringement is **not** the same thing as plagiarism, so giving credit *isn't* a defense. Liability is personal and individual.

COPYRIGHT ISSUES FOR MATERIALS WE USE

A. What's safe to use

Materials are safe to use (free from copyright concerns) if they're in the public domain or licensed for use. And even those may still have other issues such as privacy concerns.

1. We may freely use any item in the public domain. A work is in the public domain if never copyrighted, after its copyright expires or if its creator dedicates it to the public domain.

2. We may use any item if we have permission to do so, either individually or as a member of a group licensed for that use such as by Creative Commons license.

3. Even for public domain materials, privacy rights may affect usage, and licensing may be an issue due to terms of service.

B. The "fair use" doctrine

Copyright law allows the "fair use" of copyrighted materials "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research." [17 U.S.C. §107]

1. The statutory fair use factors are: (a) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;" (b) "the nature of the copyrighted work;" (c) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" and (d) "the effect of the use upon the potential market for or value of the copyrighted work." [17 U.S.C. §107]

2. Whether or not the use is *transformative* is considered in recent cases. It's transformative when it uses material "in a different manner or for a different purpose from the original." Some courts will consider the user's good faith in deciding if the use was fair.

3. ***Fair use has no hard-and-fast rules.*** It's always a case-by-case balancing act. In some situations, using most of a work will be allowed because, on balance, the fair use factors allow it. In other situations, even using a very small (but vital) portion of a work will constitute infringement. That's why there's no way to say that using, for example, 10 percent of a work or one paragraph or one page will or won't be considered infringement.

COPYRIGHT ISSUES FOR MATERIALS WE CREATE

Materials we create are automatically copyrighted once they're in tangible form. We don't need to mark it or use the © symbol. But use of the symbol prevents others from claiming they did not know the work was copyrighted.

A. Always think usage rights: what uses to allow, what uses to prevent

If our goal is to share our work with others but keep credit for it, we should consider using Creative Commons licenses. If we're concerned about getting credit **and** preventing misuse of the work, we can consider using contract language that expressly recognizes and reserves moral rights (which do **not** exist in U.S. copyright law for anything other than works of visual art).

B. Enforcing copyright

If our work is stolen and put online, we should file a take-down notice under the Digital Millennium Copyright Act (DMCA) if the infringer's ISP is in the U.S. Other than the DMCA take-down process, using a lawyer and going the lawsuit (or threat of lawsuit) route is the only option. Nobody can enforce our copyright for us.

C. Registering copyright

Copyright is automatic and the material doesn't have to be registered with the Copyright Office. But we can't go to court to enforce our copyright unless we register. Registration isn't hard, can be done online and doesn't require a lawyer, but isn't free. Work can be registered in batches to limit costs but that also limits damages.

RESOURCES FOR FURTHER RESEARCH

US Copyright Office—General

1. U.S. Copyright Office. General Info. <https://www.copyright.gov>
2. —. *Circular 1: Copyright Basics*. Available as a free Kindle download or as a PDF <https://www.copyright.gov/circs/circ01.pdf>
3. —. *Circular 15a: Duration*. <https://www.copyright.gov/circs/circ15a.pdf>
4. —. *Circular 22: How to Investigate the Copyright Status of a Work*. <https://www.copyright.gov/circs/circ22.pdf>
5. —. *Circular 30: Work Made for Hire*. <https://www.copyright.gov/circs/circ30.pdf>
6. Post-1978 copyrights: U.S. Copyright Office catalog. <http://cocatalog.loc.gov>
7. —. *Report on Orphan Works and Mass Digitization*. June 2015. <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>

Copyright Law for Genealogists

7. California State Genealogical Alliance. *csgacopyright: Copyright Issues for the 21st Century Genealogical Community* (last updated 2015). <https://csgacopyright.wordpress.com/>
8. Carmack, Sharon DeBartolo. *Carmack's Guide to Copyright & Contracts*. Baltimore, Md. : Genealogical Pub. Co., 2005.
9. —. "Playing Fair - Fair Use of Copyrighted Material." *Association of Professional Genealogists Quarterly* (APGQ) 20 (Mar 2005): 33.
10. *Cyndi's List*. "Copyright Issues." Overview of copyright law for genealogists with many links to sites around the web. <https://www.cyndislist.com/copyright/>
11. Mills, Elizabeth Shown and Gary B. Mills. "Problems in Eden: Privacy and Copyright in the Web." *National Genealogical Society Quarterly* 87 (Jun 1999): 83.
12. Moody, Sharon Tate. "Genealogists must take care not to become pirates." *Tampa Bay Online*, 12 Feb 2012. <http://tbo.com/lifestyle/genealogists-must-take-care-not-to-become-pirates-357524>
13. Russell, Judy G. *The Legal Genealogist*. <http://www.legalgenealogist.com/category/copyright/>

Copyright Law in General

14. Cornell University, *Copyright Information Center*. <https://copyright.cornell.edu/>
15. Fishman, Stephen. *The Copyright Handbook: What Every Writer Needs to Know*. 13th ed. Berkeley, Cal.: Nolo Press, 2017.
16. —. *The Public Domain : How to Find & Use Copyright-Free Writings, Music, Art & More*. 8th ed. Berkeley, Cal. : Nolo Press, 2017.
17. Kozak, Ellen M. *Every Writer's Guide to Copyright and Publishing Law*. 3d ed. New York : H. Holt, 2004.
18. Patry, William F. *Copyright Law and Practice* (Washington, D.C. : Bureau of National Affairs, 2000); online reprint, <http://digital-law-online.info/patry/index.html>

Copyright Duration

19. Gasaway, Lolly (Professor at UNC). *When U.S. Works Pass Into the Public Domain*. Good easy to read chart on duration of copyright. <http://www.unc.edu/~unclng/public-d.htm>
20. Hirtle, Peter B. (Cornell Copyright Information Center). *Copyright Term and the Public Domain in the United States*. Thorough review of copyright term versus when item becomes public domain in U.S. Accessed in chart form on the internet with a downloadable PDF file available at <https://copyright.cornell.edu/publicdomain>

21. *Public Domain Sherpa*. “The copyright term calculator.” Question-driven calculator, requires Flash. Available on the internet at <http://www.publicdomainsherpa.com/calculator.html>

Creative Commons

22. *Creativecommons.org*. Founded 2001 to make it easier for content producers to license access to creative works. <https://creativecommons.org/> and frequently asked questions, <https://creativecommons.org/faq/>

Digital Millennium Copyright Act

23. MacEntee, Thomas. “Blog Content Theft – How To Deal With Splogs,” Geneabloggers (2009). Now archived at *Internet Archive Wayback Machine*, <https://goo.gl/yKK6tB>
24. —. “Resources on Blog Copyright and Content Theft,” Geneabloggers (2010). Now archived at *Internet Archive Wayback Machine*, <https://goo.gl/VeYMd5>

Fair Use

25. American Library Association & Michael Brewer. Fair Use Evaluator (tool for analyzing statutory fair use factors). <http://librarycopyright.net/resources/fairuse/>
26. American University School of Communication Center for Social Media. *Fair Use, Free Speech & Intellectual Property*. <http://cmsimpact.org/program/fair-use/>
27. Electronic Frontier Foundation. “Copyright: Fair Use.” Internet Law Treatise. https://ilt.eff.org/Copyright_Fair_Use.html
28. Stanford University Libraries, *Copyright & Fair Use*. <https://fairuse.stanford.edu/>
29. U.S. Copyright Office. “Fair Use Index.” <https://www.copyright.gov/fair-use/>

Public Domain Resources

30. Duke University, Center for the Study of the Public Domain. Website with news, events and resources on public domain issues. <https://www.law.duke.edu/cspd/>
31. Open Knowledge Foundation, “Finding Interesting Public Domain Works Online.” <http://publicdomainreview.org/guide-to-finding-interesting-public-domain-works-online/>
32. Public Domain Sherpa. By an attorney. <http://www.publicdomainsherpa.com/>

Registration

33. U.S. Copyright Office. “Registration Portal.” <https://www.copyright.gov/registration/> See also Circular 7d, Mandatory Deposit. <https://www.copyright.gov/circs/circ07d.pdf>

Risk Assessment

34. Hirtle, Peter B. *Learning to Live with Risk*. (2011, Creative Commons Attribution 3.0 license). <https://ecommons.cornell.edu/bitstream/handle/1813/24519/ARLIS%20UK%20final.pdf>
35. Library of Congress, *Prints & Photographs Division*. “Copyright and Other Restrictions That Apply to Publication/Distribution of Images: Assessing the Risk of Using a P&P Image.” https://www.loc.gov/rr/print/195_copr.html

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