

Personal Historians, Publications and what you should know about U.S. Copyright Law

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Keeping family history is an important part of many world cultures and ours as well. Recent developments in printing and publishing technology make it possible and practical to publish top quality books that have replaced the family scrapbooks. Family historians are doing interesting and important work, and some argue should be free to do whatever they want without generally considering copyright law. There might be some truth to that statement, but it is not prudent to ignore the law. With the ease of creating high quality publications comes the responsibility of doing so. As the quality of the work moves beyond scrapbooks, the publisher, even a publisher of limited distribution, enters the realm of publishing. With the quality of your product increasing, so does your responsibility to use a different set of rules. Often these books could or should be in a library as a public resource, to inform the community of the history of its citizens. As family historians break into publishing, what rules of the publishing world apply and which of those rules should a personal historian be aware?

In my experience as an attorney specializing in working with creative people, there are a few reasons why it is important for even a small publisher to be familiar with the basic principles of law: to know how to protect your work; to control how, if at all, others can use it; and to either know how to use someone's material with permission, or know how much you can use without asking permission. (and how much trouble you can get in if you don't ask)

The basic premise of copyright law – the author of a work which is a creative expression has the exclusive right to control any making of copies, in a variety of forms, of the work.

Copyright protects all original works. The exclusive rights provision gives the artist the right to control the exploitation of their work. Copyright law is a federal law so the law does not vary from state to state. The general rule that one should avoid using the works of others without permission to avoid lawsuits does not apply in the same way when the use is personal and the number of copies is very small. Some copying is considered fair use because its impact is "very small" - you are allowed to make photocopies of newspaper and magazine articles, including photographs, to keep in your private family albums. But when do you cross that line? Does it depend on the number of family members?

The discussion of copyright must take at least two paths. First path - when can one claim a copyright in one's work and what does that mean? Second path - under what circumstances can one take and freely use the work of another without asking permission, and if asking permission how does one do it?

Part One - What Kind of Work is protected by Copyright?

Copyright protection is available for "all original works of authorship in a tangible medium of expression." The Copyright Act states that works of authorship include many types of works.

Copyright Protection – begins when the pen leaves the paper

Copyright protection is easy. Copyright protection is automatic when an “original” work of authorship is “fixed” in a tangible medium of expression. A work is “fixed” when it is made “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” This means that the work a personal historian creates is also eligible for copyright protection.

Copyright Registration - you have a protectable copyright upon creation. But you get bonuses if you register the work with the copyright office - when you fill out a registration form and send it, the fee and your work to the copyright office in Washington, D.C. Registration is very helpful when enforcing your copyright against copyright infringers. Among the benefits of a registration is the presumption that the work is yours, if you register within three months of publication and before an infringement occurs. You can recover your attorney costs in an infringement suit and you are entitled to presumptive damages up to \$150,000 per infringement, instead of only actual damages, which in a poster case might limit you to a few dollars per print.

Types of registration forms available from www.copyright.gov: Text is registered with form TX - Visual artwork with form VA.

How do we know if a work is original enough to enjoy copyright protection? Only minimal creativity is required to meet the originality requirement. No artistic merit is required. Original work can include existing work. A work can incorporate preexisting material and still be original. When preexisting material is incorporated into a new work, the copyright on the new work covers only the original material contributed by the author. The work is considered “derivative” of the original work.

Scope of Protection

The law separates the “idea” from the “expression of the idea”. Copyright protects against “copying” the “expression” of a work but not the “idea” of the work. The difference between “idea” and “expression” is one of the more difficult concepts in copyright law. The most important point to understand is that the protection of the “expression” is not limited to exact copying whether it is the literal words of a novel or the shape of stuffed bear. No one owns the exclusive right to draw a cat. Copyright infringement extends to new works, which are “substantially similar” to a previously copyrighted work. What qualifies as similar is in part on whether the artist saw or had access to the previous work, and if the resemblance is too close, access might be inferred.

A copyright owner has many exclusive rights in the copyrighted work:

Reproduction Right. The reproduction right is the right to copy, in any format, duplicate, transcribe, or imitate the work in fixed form.

Modification Right. The modification right (also known as the derivative works right) is the right to modify the work to create a new work. A new work that is based on a preexisting work is known as a “derivative work.”

Distribution Right. The distribution right is the right to distribute copies of the work to the public by sale, rental, lease, or lending.

Public Display Right. The public display right is the right to show a copy of the work directly or by means of a film, slide, or television image at a public place or to transmit it to the public including on the Internet. In the case of a motion picture or other audiovisual work, showing the work's images out of sequence is a “display.”

Another benefit to copyright registration: A copyright owner can recover actual damages or, in some cases if the work was registered before it was infringed and within three months of publication, attorney costs and statutory damages (which can be as high as \$150,000 per infringement) from an infringer. In addition, courts have the power to issue injunctions (court enforced orders) to prevent further infringement and to order the destruction of infringing copies. This action is not automatic but it is available to prevent damages especially damages that cannot be remedied by cash, if the harm would be irreparable.

How long does copyright protection Last?

The term of copyright protection depends on three factors: who created the work, when the work was created, and when it was first distributed commercially. For copyrightable works created on and after January 1, 1978, the copyright term for work created by individuals is the life of the author plus 70 years. The copyright term for “works made for hire” (see below) is 95 years from the date of first “publication” (distribution of copies to the general public) or 100 years from the date of creation, whichever expires first.

What is a “work for hire”? The general rule is that the person who creates the work owns the copyright. The work can belong to whoever is agreed to be the owner in a written agreement. Ownership is important because with ownership comes all the rights discussed above – making copies, revisions even the decision to sell the work commercially. If the work is created by employee, within the scope of his or her employment, the employer owns the copyright because it is the work of an employee. The copyright law also includes another form of “work for hire”: it applies only to certain types of works, which are specially commissioned works. These works include supplemental work like illustrations and contributions to works, which will include most illustration and design projects. In these cases there should be a written document clarifying this relationship to make it binding.

Part Two. Using work without permission: copyright infringement.

Anyone who violates any of the exclusive rights of a copyright owner is infringing or interfering with those exclusive rights reserved to the author.

Example: Artist scanned Photographer's copyrighted photograph, altered the image by using digital editing software, and included the altered version of the photograph in a printed work. If Artist used Photographer's photograph without permission, Artist infringed Photographer's copyright by violating the reproduction rights the photograph (making the copy), the distribution right (selling the altered photograph in his work) and the right to create derivative works (the altered work is derivative of the original), three infringements.

Copyright infringement occurs when someone uses a work, which is under copyright protection, without permission and without a recognized defense for using the work without permission. It is a legal claim under federal law because copyright is a federal statute. To succeed on a copyright

infringement claim, plaintiff must show: 1) ownership of a valid copyright and 2) the unauthorized copying of a work that is original.

It is easy to make the mistake - how to avoid problems

Current technology, computers and the Internet make it easy to combine material created by others - film and television clips, magazine images, graphics, photographs, and text - into a project. *The technical ease of copying these works does not give you the legal right to do so.* If you use copyrighted material owned by others without getting permission you can incur liability for hundreds of thousands of dollars in damages.

Most of the third-party material you will want to use in your work is likely protected by copyright and likely belongs to someone else. Using copyrighted material without getting permission, by not obtaining an “assignment” or a “license”, can have disastrous consequences. The owner of the copyright can prevent the distribution of your work and obtain damages from you for infringement, even if you did not intentionally include his or her material. They could seize and have your work destroyed. In addition, you might also be held liable to pay for other party's legal fees.

One solution is to get permission to use the material. Permission to use material is called a license. A license is typically limited in scope, amount and/or duration. An assignment, which must be written, is generally understood to transfer all of the intellectual property rights in a particular work, although an assignment can be more limited. (If I let you use my photograph that is a license - if I give you all rights to the photograph – that is an assignment of rights. With the license, the author maintains the rights to the work.)

Getting Permission: There are a number of myths out there concerning the necessity of getting a license. Do not make the mistake of believing them:

Misconception #1: “The work I want to use doesn't have a copyright notice on it, so it's not copyrighted. I'm free to use it.”

Many published works contain a copyright notice - the C in a circle, date and name. However, for works published after 1989 use of copyright notice is optional. The fact that a work does not have a copyright notice does not mean that the work is not protected by copyright.

Misconception #2: “I don't need a license because I'm using only a small amount of the copyrighted work.”

It may be true that *de minimis* copying (copying a small amount) is not copyright infringement. Unfortunately, it is rarely possible to tell where *de minimis* copying ends and copyright infringement begins. There are no “bright line” rules.

Copying a small amount of a copyrighted work is infringement if what is copied is a qualitatively substantial portion of the copied work. Copying any part of a copyrighted work is risky. You cannot escape liability for infringement by showing how much of the protected work you did not take.

Misconception #3: “Since I’m planning to give credit to all authors whose works I copy, I don’t need to get licenses.”

If you give credit to a work’s author, you are not a plagiarist (you are not pretending that you authored the copied work). However, attribution is not a defense to copyright infringement.

Misconception #4: “My project will be a wonderful showcase for the copyright owner’s work, so I’m sure the owner will not object to my use of the work.”

You can not assume that a copyright owner will be happy to have you use his or her work. Even if the owner is willing to let you use the work, the owner may want to charge you a license fee. Content owners view the various forms as new markets for licensing their material. There are clearance agencies and stock houses to obtain rights and permissions to use work. Explore those avenues before using someone’s work without permission.

Misconception #5: “I don’t need a license because I’m going to alter the work I copy.”

Generally, you cannot escape liability for copyright infringement by altering or modifying the work you copy. If you copy and modify protected elements of a copyrighted work, you will be infringing the copyright owner’s modification right as well as the right to control the copies.

When You Do Not Need a License

You do not need a license to use a copyrighted work in three general circumstances: (1) if the work you use is in the public domain; or (2) if the material you use is factual or an idea; or (3) if your use is “fair use”. Fair Use is a concept that came from case law and became part of the Copyright Law revision in 1978. The term has come to mean an unauthorized use of copyrighted material from which no infringement action would survive considering what work was used, how it was used, how much it was used and the final effect of the use on the market for the original.

Public Domain

You do not need a license to use a public domain work. Public domain works are works that were never or are no longer protected by copyright because the work is outside the scope or term of copyright protection and therefore in such cases no one can claim the exclusive rights of copyright for the work. Often private photographs were never published (as defined by the law). When work is unpublished is an interesting copyright question for copyright scholars because the copyright protection can not toll in the case of unpublished work. This presents an interesting question for copyright lawyers; when would an old photograph be published and when is it no longer eligible for copyright protection? This discussion is irrelevant if the owner of the photograph or the successor to the rights in the work gives you permission to reproduce it. Under the current law original published works older than 1923 are no longer eligible for protection. The civil war daguerreotypes are in the public domain. Most likely old postcards are in the public domain. A careful historian will want to know things about an artifact’s provenance. Works enter the public domain in several ways: the term of the copyright may have expired, the copyright owner may have failed to “renew” his copyright which was required under the Copyright Act of 1909, or the copyright owner may have failed to properly use copyright notice (which was of importance only for works created before March 1, 1989, at which time copyright notice became optional). The rules regarding what works are in the public domain are too complex for this primer, and they vary from country to country. The rule of thumb is if the work you are using is older than 1923 it is likely in the public domain.

There is no copyright protection for Facts

You do not need a license to copy facts from a protected work. The copyright on a work does not extend to the work's facts. This is because copyright protection is limited to original works of authorship, and no one can claim originality or authorship for facts.

There is no protection for Government Works

The copyright law specifies that works of the federal government are not eligible for copyright protections. For example, you are free to use the photographs taken of the earth from the moon. However, in this modern world be careful because not all work that appears to be work of the government is really the works of the government, it could be merely licensed to the government.

Read the license information on any reference material or clip art and you will learn how it can be used. You might be able to make preliminary inquiries directly from the copyright office about the ownership of work you find.

Fair Use – When it is fair to use work without permission.

Many authors of limited editions small press run books rely on factors such as the very small number of copies, extremely limited distribution and general “scrapbook” mentality when it comes to using material that belongs to someone - for some that may be a reasonable plan of action. If there are only thirty copies distributed to thirty family members, no one will complain that work was used without permission. Under even the most conservative reading of the law, that should not rise to the level of an actionable infringement. But where is the line – how many copies are too many? What if a thousand copies are made? It is not always an advisable or comfortable way to work and be prepared to defend your artistic statement if you are called on it. Under §107 of the copyright law, you do not need a license to use a copyrighted work if your use is “fair use.” Unfortunately, it is difficult to tell whether a particular use of a work is fair or unfair. Determinations in court are made on a case-by-case basis by considering four factors. There have been no cases decided on very limited press runs, or very limited distributions of a book. You would be wise to consider these factors while you are helping yourself to other published material

- **Purpose and character of use.** The courts are likely to find fairer use where the use is for noncommercial purposes. Commentary is fair use, news reporting is fair use, scholarly work is fair use, use in a classroom is fair use, but be careful about passing around copies to the students. That alone is not considered fair. The case *Basic Books v. Kinko's* has shown that course packs, copies made from various sources and sold to students for use, as a course book substitute, may not be fair use. Consider the scope of your book and the purpose for its creation in considering this factor.
- **Nature of the copyrighted work.** The courts are most likely to find fair use where the copied work is a factual work rather than a creative one. This can be tricky; a book of photographs about a migrating bird, while factually recording the activity of the bird, does not vitiate the copyright interest in the original photographer. While facts are not

protectable, original expression is. The expression captured on film by a professional photographer is her stock and trade. Your use of the images should relate to your critical purpose and should never be considered because that image merely looked good on your book or because more people would read it if it had that image on the cover. The fact that you used a popular image in your book with an edition of 50 might figure into the project being more of a “non-profit” venture. Educational projects receive even greater protection and the use is more likely to be fair.

- **Amount and substantiality of the portion used.** The courts are most likely to find fair use where only a small amount of the protected work is used - as a rule use only as much as is needed for a discernable purpose and no more. Remember that the law will balance free speech issues against content ownership issues. If what is used is small in amount but substantial in terms of importance and a substitute for buying the original a finding of fair use is unlikely. If you use the original work, not a copy, in each copy of your book the doctrine of “first sale”, (the publisher gets the profit only the first time a copy of a book is sold) once you pay for something you can do what you want with it. Be careful because while this will likely protect the first use it will not protect the use in photocopies because those are derivatives of the original.
- **Effect on the potential market for or value of the protected work.** The courts are most likely to find fair use where the new work is not a substitute for the copyrighted work. However, if the public is not only confusing your work with the original, but also buying yours instead, you have a problem.

Conclusion – final thoughts.

It was not my intention to alarm you or cause a loss of sleep wondering if what you have done will expose you to litigation for copyright infringement. Most of what is done in the name of Personal History is a fair use because most of the uses are sufficiently minimal. The purpose of this paper is to inform about this area of law to give the personal historian a better idea of where you stand. A lot of the ambiguity can be cured with agreements. Rights to reproduce work can be secured with a simple license - oral agreements and email licenses are binding. Ultimate ownership of the work and who has the right to reproduce the work is an important conversation to have. Is this a work for hire or a “ghost writer” agreement where all rights are transferred to the hirer or will the author retain any interest in the work? Will there be any issues of acknowledgement of authorship? The work you do is valuable and interesting. Take it seriously.