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STAYING OUT OF TROUBLE— THE RIGHTS AND RESPONSIBILITIES OF TODAY'S GENEALOGISTS

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INTRODUCTION: As genealogists and researchers, we have to understand today's laws as much as we do yesterday's. Modern law impacts our rights as researchers—rights of access to vital records, to information, and to places where information can be found. And it impacts our responsibilities, particularly the need to respect another's copyright.



RIGHTS — ACCESS TO INFORMATION

A. Public access to records

Challenges to our rights of access to records are common and persistent – and we have lost some major battles in just the last year. We may have a right of access to records through (1) the common law right of access (for any citizen who shows a legal interest in the subject of a public record); and/or (2) federal and state freedom of information acts, under which some records must be disclosed but many records can be withheld for reasons such as privacy.

Where a right of access exists, it exists only as to *public* records, not private records. A right to access records *doesn't* mean the records are free, and there can be restrictions on the time, place and manner of access.

B. Public access to places

Public buildings and public cemeteries usually must be open for public access but access can be limited by reasonable rules as to time and manner. Private property is treated differently. Whether or not we can go onto private property to access a grave in a cemetery is entirely a matter of state law, and those vary from state to state. Some progress is being made on this!

RESPONSIBILITIES — THE BASICS OF COPYRIGHT LAW

A. What copyright means

Copyright is protection the law gives to the creator of intellectual property that guarantees exclusive rights for some 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, but varies from country to country.

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 generally can't be copyrighted; U.S. 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. Exactly how long the term is depends on a number of variables, such as when it was created, whether it was published or not, whether it had a copyright notice on it. Works created today get at least 70 years of protection.

D. Copyright infringement

Using copyrighted material without legal permission is copyright infringement. You can be sued, and the copyright holder can be awarded damages even if he or she wasn't hurt financially. Worse, you might end up paying his or her attorneys' fees. 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 (but **not** giving credit makes it much worse for the infringer and giving credit is **required** outside of the U.S. and under most U.S. licenses).

COPYRIGHT ISSUES FOR USERS

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. A work is in the public domain if it was never copyrighted, after its copyright expires or if its creator dedicates it to the public domain. Once it's in the public domain, it's fair game.

2. A work is licensed if the copyright owner gives permission for the use to a specific person or group of people. There's a new breed of license called creative commons licenses that allows you to use the work if you're careful and stay within what the license allows.

B. The "fair use" doctrine

Copyright isn't unlimited. If the work is copyrighted and permission can't be obtained, it may still be used if it falls into what's called "fair use." The factors set out in 17 U.S.C. §107 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."

If the use is transformative, it may be considered fair use, and some courts will at least think about the user's good faith in deciding if the use was fair.

C. Special concerns

Pinterest and other online linking sites raise real copyright concerns, and their terms of service make you, the individual user, liable for any copyright violation. Use with caution!

Orphan works are those that are clearly still copyrighted but the copyright owner can't be identified or located. Use with caution!

D. Evaluation of risk

All usage questions are balancing acts. There's **no** rule saying it's okay to use 10% or less of a copyrighted work or less than 350 words. No one factor makes a case a guaranteed winner or a guaranteed loser (though copying 100% is pretty much guaranteed to be a loser).

Resources to Learn More

Understanding Public Access Issues

For Genealogists

1. Mass. Genealogical Council Sentinel. http://massgencouncil.org/index.php?option=com_easyblog&view=latest&Itemid=127
2. Records Access and Preservation Committee. <http://www.fgs.org/rpac/>
3. Russell, Judy G. *The Legal Genealogist*. <http://www.legalgenealogist.com/blog>

In General

4. Brophy, Alfred L. "The Ancient Rights of the Graveyard." August 2005. *Social Science Research Network*. Available for download http://papers.ssrn.com/sol3/papers.cfm?abstract_id=777747
5. Citizen Media Law Project. Access to Public Information. An informational guide to issues underlying federal and state records access. <http://www.citmedialaw.org/legal-guide/accessgovernment-information>
6. FOIA Advocates. State Public Records Laws. A guide to public records laws in the states, clickable map for all states and DC. <http://www.foiadvocates.com/records.html>
7. National Freedom of Information Coalition. State and Federal FOI Resources. A guide to state and federal Freedom of Information laws. <http://www.nfoic.org/states>
8. Social Security Administration. Guide to Freedom of Information Act. <http://tinyurl.com/3swy28c>

Understanding Copyright Issues

US Copyright Office

9. U.S. Copyright Office. General Info. <http://www.copyright.gov>
19. —. *Circular 1: Copyright Basics*. Available as a free Kindle download or as a PDF <http://www.copyright.gov/circls/circ01.pdf>
11. —. *Circular 15a: Duration*. <http://www.copyright.gov/circls/circ15a.pdf>

12. —. *Circular 22: How to Investigate the Copyright Status of a Work*. <http://www.copyright.gov/circls/circ22.pdf>
13. —. *Report on Orphan Works*. 2006. <http://tinyurl.com/rmcfl>

Copyright Law for Genealogists

14. California State Genealogical Alliance. *csgacopyright: Copyright Issues for the 21st Century Genealogical Community*. <http://csgacopyright.wordpress.com/>
15. Carmack, Sharon DeBartolo. *Carmack's Guide to Copyright & Contracts*. Baltimore, Md. : Genealogical Pub. Co., 2005.
16. —. "Playing Fair - Fair Use of Copyrighted Material." *Association of Professional Genealogists Quarterly* (APGQ) 20 (Mar 2005): 33.
17. *Cyndi's List*. "Copyright Issues." Overview of copyright law for genealogists with many links to sites around the web. <http://www.cyndislist.com/copyrite.htm/>
18. Moody, Sharon Tate. "Genealogists must take care not to become pirates." *Tampa Bay Online*, 12 Feb 2012. <http://www2.tbo.com/lifestyles/life/2012/feb/12/banewso6-genealogists-must-take-care-not-to-become-ar-357522/>
19. Russell, Judy G. *The Legal Genealogist*. <http://www.legalgenealogist.com/blog>
20. Tanner, James. "Using Creative Commons Licenses for Sharing your Genealogy," *FamilySearch TechTips*, posted 19 Apr 2012. <http://tinyurl.com/7dg5c9s>

Copyright Law in General

21. Cornell University, *Copyright Information Center*. <http://copyright.cornell.edu/>
22. Fishman, Stephen. *The Copyright Handbook: What Every Writer Needs to Know*. 11th ed. Berkeley, Cal.: Nolo Press, 2011.
23. —. *The Public Domain : How to Find & Use Copyright-Free Writings, Music, Art & More*. 6th ed. Berkeley, Cal. : Nolo Press, 2012.

Copyright Duration

24. Gasaway, Lolly (Prof. at UNC). *When U.S. Works Pass Into the Public Domain*. Good easy to read chart on duration of copyright <http://www.unc.edu/~uncnlg/public-d.htm>
25. 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 <http://copyright.cornell.edu/resources/publicdomain.cfm>.
26. *Public Domain Sherpa*. "The copyright term calculator." Question-driven calculator. Available on the internet at <http://www.publicdomainsherpa.com/calculator.html>

Creative Commons

27. *Creativecommons.org*. Founded 2001. to make it easier for content producers to license access to creative works. <http://creativecommons.org/> and wiki with FAQs <http://wiki.creativecommons.org>

Fair Use

28. O'Mahoney, Benedict. "Fair use visualizer." *The Copyright Website*. Online tool. <http://www.copyrightwebsite.com/Info/FairUse/Visualizer/Visualizer.aspx>
29. Stanford University Libraries, *Copyright & Fair Use*. <http://fairuse.stanford.edu/>

Public Domain Resources

30. Central Intelligence Agency. *World Fact Book*. Contains public domain maps, graphics of flags and much more. <https://www.cia.gov/library/publications/the-world-factbook/index.html>
31. *David Rumsey Maps*. All historical maps, free of copyright for non-commercial use; permission may be sought by email for commercial use or republication. <http://www.davidrumsey.com/>

32. *Google Books*, free ebooks. [Note: **only** pre-1923 books are copyright-free and only editions published before 1923.] <http://books.google.com/>
33. *Hathitrust*. [Note: **only** pre-1923 books are copyright-free and only editions published before 1923.] <http://www.hathitrust.org/>
33. *Internet Archive*. [Note: **only** pre-1923 books are copyright-free and only editions published before 1923.] <http://archive.org/>
34. *Library of Congress's Flickr Photostream*. [Caution: check listed status of each image.] <http://tinyurl.com/2wukhe>
35. *National Archives' Flickr Photostream*. [Caution: check listed status of each image.] <http://tinyurl.com/ngtl7p>
36. *Prelinger Archives* on Internet Archive. Creative Commons licensed films and clips. <http://www.archive.org/details/prelinger>
37. *Project Gutenberg*, free ebooks. http://www.gutenberg.org/wiki/Main_Page
38. *Smithsonian Institution's Flickr Photostream*. [Caution: check listed status of each image.] <http://tinyurl.com/3kbc77>

Risk Assessment

39. Hirtle, Peter B. *Learning to Live with Risk*. (2011, Creative Commons Attribution 3.0 license). <http://tinyurl.com/77mo9rq>
40. 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." http://www.loc.gov/rr/print/195_copr.html

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All URLs valid as of 1 March 2014.