

Copyright Fundamentals for Genealogy

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Since genealogical research inevitably involves copying of information, questions involving copyright often crop up. When an answer is given, it may be less than satisfactory. Sometimes the answer is wrong, sometimes there is little or no explanation, and sometimes the answer isn't an answer, but a policy statement. In other instances, the answer is right, but it isn't what the questioner wanted to hear.

While copyright can be very complex and confusing, the parts of copyright law that usually apply to genealogy are really pretty basic. There are a few fundamentals that can help deal with just about any genealogy copyright situation.

Copyright means copy right

Literally, the term copyright means the right to make copies of some product. By law, the right belongs to its creator. In copyright law, the product that's copyrighted is referred to as a "work" and the creator of the work is its author. From that, we can say:

Making a copy of a work or a portion of a work is its author's copy right.

In the U.S., the right to make a copy of a protected work is a constitutional, exclusive right of the work's author, *except* that some limited copying is allowed by provisions of the copyright law. (see fair use)

Is it copyrighted?

If it's created today by the original expression of the author and it can be viewed or copied, then it is protected under copyright. The law says:

Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

For works created before today, there are a few basic durations and conditions for determining copyright status:

- If an original work of authorship was created after 1977, it's copyrighted and it's going to be for a very long time. The earliest that any work created after that will lose its copyright will be about 2049 - that's assuming that the author died right after he authored the work.

- If it was created before 1923, there is no copyright on it any more, so long as it was published. If it wasn't published, it may still be protected by copyright.
- Works published before March 1, 1989 without proper copyright notice are almost always in the public domain because, under the law that existed before that, a proper copyright notice was required for copyright protection.
- Works published from 1923 to 1963 had to be renewed after an initial copyright term for protection to continue. The U.S. Copyright Office estimates that over 90% of works eligible for renewal were never renewed.

For other situations there are many good copyright duration references online (including one on my web site).

Only original expression protected

All that's protected under copyright is the author's original expression. The protected material must have been independently created by the author with at least some minimal amount of creativity. Anything in a work that isn't the author's original expression isn't protected by his copyright.

Facts can't be original expression

No one can claim originality in a fact. At best, a person may discover a fact. If he discovers it and documents it, he has not created it. He has only reported it. There is no originality.

Census takers, for instance, don't create the data that result from their work. They write down the facts that they discover. Census data, therefore, can't be copyrighted because it's not original.

Since facts can't be original expression, the copyright of any work doesn't extend to the facts contained within it. This is a very important fundamental concept in genealogy, since genealogy so very much involves the pursuit, discovery, and collection of facts.

While copyright doesn't extend to facts, the facts may be expressed in an original fashion. When this occurs, the original expression used to convey the facts is protected, but the underlying facts are not.

Pre-existing material not protected

Any pre-existing material in a work that's not the original expression of the author isn't protected by the author's copyright. Facts, which exist before the work is created, can't be protected by copyright, as previously discussed. Other examples of pre-existing material that might be used in a work include the work of others, public domain material, and U.S. government material.

The copyright status of already existing material doesn't change when used in a new work. If an author uses material from the work of someone else, the copyright for the material still belongs to the original author. If something from the public domain is used, its copyright status is that it's still in the public domain, available for anyone to use.

U.S. government developed material, by law, cannot be copyrighted. However, material created by non-government authors and used by the government is usually covered by the author's copyright. In either case, though, use in a new work does not change the copyright status for U.S. government materials.

Compilations

A compilation is a collection of pre-existing material. It can be a collection of short stories, poems, or other narrative material. In genealogy, compilations are usually some kind of collection of facts or factual material.

Many genealogy compilations aren't sufficiently original to be protected by copyright. Since facts can't be copyrighted, to be eligible for copyright protection, a factual compilation must have some amount of originality in either the selection of the facts, the arrangement of the facts or both. And, then, the only part of the compilation that's protected will be that which has originality.

Example:

Joe records the names, dates and inscriptions of all of the headstones in the Farnham East Cemetery. He arranges them in three tables. The first is alphabetical by last name, the second chronological by date of death, and the third arranged by the relationship of the location of the headstone to a large oak tree in the middle of the cemetery. As well, in the third, he only includes the headstones of people who died in even numbered years.

Of the three tables, the first two used all of the names and dates and arranged them in standard formats, alphabetical and chronological. If "all" of an available quantity of facts is used, there is no originality of selection. If a standard format is used for the arrangement and ordering of facts, then there is no originality of arrangement.

Only in the third table is the selection and arrangement of the material original enough to be protected by copyright. Defining and describing the location of a headstone by relationship to something else applies originality in the arrangement of the facts. Selecting only those that died in even numbered years is a nonstandard way to select the information that will be included.

However, the copyright protection for the compilation of facts in the third table applies only to the selection and the arrangement of the facts. To copy the selection and arrangement of the facts would be to infringe upon the right of copy belonging to the

author. However, the facts that are included in the compilation aren't protected and may be used by anyone.

Industrious collection and sweat of the brow

It's natural that someone who works very hard at researching, collecting, and arranging facts into a compilation would want to protect their efforts.

And they can.

So long as they don't make it available to others, so long as they don't publish it.

But that's the only way that it can be protected. Once it's made available to others, such a work will have little or no copyright protection in most instances.

Under copyright, the effort and work put into a project means nothing. Copyright only protects an author's "original expression."

In the past, lower courts have made "sweat of the brow" and "industrious collection" rulings, where the work and effort that went into the research, collecting and arranging counted in the copyright protection of a work. However, such rulings were invariably overturned by higher courts. The Supreme Court has reaffirmed and further defined the requirement for the author's original expression in a word being all that's protected.

Fair use (and some application of what we've read so far)

The constitutional purpose of copyright is to further the progress of science and the useful arts, which today is understood to mean scholarly growth. Since building upon the advances of others is often necessary for further advancement in most endeavors, this purpose is in apparent direct conflict to the rights of authors to control or even prevent the copying of their original expression.

The principle of fair use, which allows limited copying without consent, limits the conflict. Its limits intentionally ill-defined, fair use is very applicable to scholarship and research, important aspects of genealogy. Four factors are considered:

- Purpose of the use, including non-profit educational use
- Nature of the copyrighted work
- Amount of copying
- Effect of the copying on the potential market for, or value of, the original work

Examples:

Joe is doing research at the Mid America Library in Independence, Missouri. He finds transcripts of four 18th century wills on pages 21, 23, and 87 of a book of deeds and

wills from Virginia that is copyrighted 1979. He makes a copy of each of the pages that has the information he needs. He subsequently posts the text of each of the four wills online.

He also finds a little narrative family history book that was published in 1955 on the family of his great, great, great, granduncle. He copies the entire book and publishes it online.

In a third book, copyrighted in 1934, he finds several pages narrating the life of one his wife's ancestors. He copies the pages and posts small, significant portions from them online.

Which of the three examples was fair use?

Only the third.

In the first one, there is no potential for copyright infringement. While the book is copyrighted 1979, at best the copyright applies to the selection and arrangement of the information. If the book is sequenced the same as the original will book or covered time period and all of the documents available are included, then there is no originality.

A true transcript of a will is no more than a printed copy of an existing document. While knowledge and interpretation may be needed to be able to read the old handwriting, there is no creative expression involved... and therefore no copyright involved.

In the second example, the book had no copyright date. It was published in 1955 without proper copyright notice. Therefore, the book is in the public domain and Joe can do anything with it he wants to.

If, however, the book included a proper copyright notice, it might still have been under copyright protection if the author had renewed the copyright. In that case, copying the book would probably not have been a fair use and posting the entire work online definitely would not have been.

Joe copied several pages out of a book, in the third example, that were applicable to his research. Assuming the book is still under copyright:

- copying the pages for personal research is a good example of fair use.
- Using small significant portions of the narrative from them in his online web page would also likely be fair use.
- Posting the entire narrative from the pages he copied would not be fair use and would be copyright infringement.
- Posting the factual information from the narrative would not be fair use because there is no copyright issue. Factual information abstracted from an author's original expression is not protected by copyright.

In conclusion

I could go on and on writing about copyright issues that apply to genealogy. For example:

- A pedigree, descendant chart, GEDCOM, or any other standard genealogy form or format that contains nothing but facts is not copyright protected. There is no originality of selection or arrangement and facts can't be copyrighted.
- Plagiarism and copyright are not the same. Plagiarism is the failure to properly document the source of the information or material that you use and is considered by many to be unethical.
- When material you submitted is used by a commercial company in their product, you retain the copyright for any of the material that is a product of your original expression.

Copyright infringement and piracy of copyrighted material are common on the internet. The online genealogy community is less exposed to it than other interests. An understanding of some of the concepts associated with copyright can be useful in both online and offline genealogy research.

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Additional information, in more depth and detail, may be found on the author's web site at <http://stellar-one.com/copyright.htm>.

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