Copyright

By Andy Bechtel

After a University of Colorado student took a picture of a tranquilized bear falling from a tree, the image quickly went from being a photograph in a campus newspaper to being a photograph everyone wanted. Then as media organizations asked to use the

picture, a dispute erupted between the photographer and the student newspaper: Who owned the picture?

In this situation, the student newspaper had no written agreement clarifying who owned the copyrights to photographs taken by its unpaid staff. Therefore, because the student took the photograph, he owned the rights to sell it to others.[1] The dispute was settled amicably and did not go to court, but it illustrates the way copyright law affects the day-to-day work of journalists. This chapter will provide an overview of copyright law and address copyright law questions that frequently come up in newsrooms.

What is intellectual property?

The World Intellectual Property Organization, a part of the United Nations, defines intellectual property as "creations of the mind." Such creations include novels, poems, news stories and photographs. A piece of intellectual property is unique and eligible for special treatment under U.S. federal law. That means if you use someone else's creative work without permission or without paying for it, you may be violating copyright law.

The concept of intellectual property is grounded in the U.S. Constitution, which gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings

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[1] Brittany Anas, *CU-Boulder: Student Photographer Owns Copyright To "Falling Bear" Photo*, DAILY CAMERA (Apr. 30, 2012), http://www.dailycamera.com/cu-news/ci_20517204/cu-boulder-student-photographer-owns-copyright-falling-bear.

and discoveries."[2] That provision sets out the goals of copyright law as both protecting the rights of authors of original works and fostering creativity by others.

Congress passed the first U.S. copyright law in 1790. The law protected books, maps and charts for a renewable term of 14 years.[3] Later, musical compositions[4] joined the list of protected works. Inventions such as photography also required the government to expand the scope of copyright protection,[5] and technological advances such as the Internet continue to raise new copyright questions and to require changes in the law.

In 1976 Congress adopted the most recent major overhaul of copyright law, the Copyright Act of 1976. The statute grants copyright holders this bundle of rights:

- To reproduce the work
- To prepare derivative works based on the original
- To distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease or lending
- To display the copyrighted work publicly
- To perform the copyrighted work publicly[6]

What is protected by copyright?

Copyright protects "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated."[7] This definition includes books, newspapers, magazines, movies,

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[2] U.S. CONST. art. I, § 8.
[3] 1 Stat. 124 (1790).
[4] 4 Stat. 436 (1831).
[5] 13 Stat. 540 (1865).
[6] 17 U.S.C. § 101 et. seq.
[7] 17 U.S.C. § 102.

screenplays, songs, drawings, graphics, paintings, photographs, sculptures, annual reports, newsletters, computer programs, animations, TV shows, podcasts, blogs and Web pages. The requirement of "originality" does not mean that a work has to be special or groundbreaking. An author need only have independently created the work with some measure of intellectual effort.[8]

Copyright law protects the specific ways in which ideas or facts are expressed, not the facts or ideas themselves. This means that no one can "own" the facts described in a news story or the artistic concept reflected in a photograph. What the copyright holder controls are the words used to communicate the facts or the photograph that communicates the artistic concept.

If a work is copyrighted, you cannot use it unless you either get permission or use the portion of it to which you have the right of "fair use" (more on that later). In order to get proper permission, you will have to locate the owner of the copyright, obtain verbal or written permission and, in most cases, pay whatever license fee the owner demands.

Be aware that the copyright owner might not be the person offering you a work to copy. For example, a person who gives you a book so you can copy text from it probably is not the copyright holder and thus does not have legal authority to grant permission for copying. A person who buys a book or other copyrighted work does not buy the copyright. Similarly, a photograph posted on a Facebook page probably belongs to the person who took the photograph – and that might be a friend or relative of the person on whose Facebook page the photo resides.

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[8] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 23 S. Ct. 298 (1903).

What isn't protected?

Works that are in what is called the public domain are not copyrighted and can be used by anyone for any purpose without permission. As explained previously in this chapter, facts and ideas cannot be copyrighted. Therefore we say they are in the public domain. Also, short phrases, mathematical formulas and most government documents are in the public domain.[9] The public domain also contains works on which the copyrights have expired.

Documents produced by the federal government are in the public domain upon their creation. Generally the law governing copyright and state and local government documents is less clear. In North Carolina, government documents such as the state constitution, statutes, legislative bills[10] and court rulings[11] are in the public domain. The General Assembly has enacted only two statutes that could be interpreted as allowing state or local government records to be outside the public domain, and one of those statutes governs an agency that is now defunct.[12]

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[9] 17 U.S.C. § 102(b).
[10] Interview by Kristin Simonetti with Jane Basnight, Reference Librarian, N.C. Legislative Library (Oct. 11, 2006).
[11] Op. Att'y Gen., Newkirk (March 16, 1994).
[12] The N.C. Real Estate Commission "may claim the copyright to written materials it creates and may charge fees for publications and programs." N.C. GEN. STAT. §93A-3(f). The Agency for Public Telecommunications, which was shut down in 2012, had "the powers of a body corporate, including the power to sue and be sued, to make contracts, to hold and own copyrights and to adopt and use a common seal and to alter the same as may be deemed expedient." N.C. GEN. STAT. § 143B-426.11.

It's important for journalists to remember that story ideas are not protected by copyright law. That means a rival newspaper, website or broadcast station can use your story idea, the same set of facts and the same sources. What a rival cannot do without violating copyright law is present the story in substantially the same way you did, using your words, your photos or your audio.

When does a work become protected?

A work is protected at the moment it is fixed in a tangible medium of expression from which someone can perceive, communicate or reproduce it, such as on a piece of paper, a hard drive, a CD, the back of a napkin, a memory card, a canvas, an audiotape, a videotape or a piece of photographic film.[13] A work that is just an idea in your head is not copyrighted.

Registration of a copyright is not required in order for a work to be fully protected. Copyright is automatic.

How long is a work protected?

A work created by an individual is protected for the life of the author plus 70 years. Calculating the length of protection gets more complicated for works for hire or works created anonymously or under a pseudonym. The situation gets even more complicated for works created before 1978 because of significant changes to copyright

[13] 17 U.S.C. § 102.

law in the 1970s. Here is a comprehensive chart on the length of copyright protection: http://www.unc.edu/~unclng/public-d.htm.

How do I know whether something is in the public domain?

Determining whether a work is in the public domain isn't always easy. The U.S. Copyright Office does not maintain a searchable list of copyrighted works online, but it will investigate the status of a particular work for you at a cost that varies depending on the scope and complexity of the search.[14] Furthermore, the traditional copyright symbol © is not required for something to be copyrighted, so its absence does not mean a work is in the public domain. The value of placing the copyright symbol on your work is that it serves to remind potential users that your work is copyrighted.

If you are in doubt about whether a song, book or other work is in the public domain, it is best to assume that it is not. In the digital age, you can find a story or news photograph on the Internet and copy it with the click of a mouse, but you should not confuse easy access and instantaneous copying with having permission to copy.

[14] U.S. Copyright Office, *How to Investigate the Copyright Status of a Work*. Circular 22 (2012), *available at* http://www.copyright.gov/circs/.

Are news photographs, graphics and illustrations protected?

Photos, graphics, illustrations and caricatures are protected, but the ideas they embody and the things they illustrate are not. For example, a photographer's image of a lovely sunset at the beach is protected by copyright. That doesn't mean, however, that other photographers can't go to the same site at the same time of day to capture a similar image.

Are advertisements protected?

Although commercial speech is sometimes treated differently from news under the First Amendment, advertising is protected under copyright law. Ad copy and visuals in advertising are protected. Typically, the copyright to an advertisement is owned by the company that paid for the ad.

Can I copyright my catchphrases or the name of my blog?

No, but it may be possible to protect such names under trademark law, another area of intellectual property law. Federal law recognizes trademarks as "any word, name, symbol or device or combination therof, adopted and used by a manufacturer or merchant to identify its goods and distinguish them."[15] Some phrases and names can be trademarked,[16] but generic terms cannot. For example, an Internet service provider may not trademark "buddy list" because it is an everyday term.

You should be aware that the fact that a phrase is a registered trademark does not mean it cannot be used by the media. For example, you can write a story about Starbucks. What you can't do is open coffee shops called Starbucks.

For more on trademark, including a database of registrations, go to the U.S. Patent and Trademark Office site at http://www.uspto.gov.

Who owns the copyright to a reporter's story?

A news organization owns the copyright on all "works for hire" – i.e., works created by its regular staff reporters, photographers and graphic artists within the scope of

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[15] 15 U.S.C. § 1121.

[16] *See, e.g.*, Carson v. Here's Johnny Portable Toilets, 698 F.2d. 831 (6th Cir. 1983).

their employment.[17] Other arrangements are possible if both parties agree, so do not hesitate to negotiate.

Who owns the copyright to a freelancer's work?

Freelance writers and photographers own the copyright to their works unless and until they execute an agreement that assigns the copyright to a newspaper, magazine or other publisher. Such agreements customarily specify whether the copyright agreement is for all rights to the work – the entire bundle set out in the Copyright Act of 1976 – or only some of them, the geographic scope of the assignment and the forms in which the publisher may reproduce the work.

In the absence of an agreement to the contrary, a freelancer who sells a story or other work to an individual or company is selling only the first-publication rights. The creator retains all other rights.

Freelance writers, artists and photographers should exercise care in negotiating copyright agreements. They are binding contracts.

What about freelance work in online databases and archives?

[17] U.S. Copyright Office, *Works Made for Hire Under the 1976 Copyright Act*, Circular 9 (2012), *available at* http://www.copyright.gov/circs.

A publisher who acquires the right to publish a freelancer's work in a newspaper, magazine or on a website may not reproduce the work in an electronic database unless the agreement signed by the author clearly grants permission. In deciding a 2001 case about this issue, the U.S. Supreme Court ruled that including a freelancer's work in electronic databases was not equivalent to including such a work in microfilm or microfiche copies of a newspaper or magazine.[18] In microfilm copies, the work remains in context on the page and as part of a collective work. In a text-only database, however, the freelancer's work is removed from its context within a page layout and is no longer part of a larger collective work. The freelancer retains the copyright in this individual work divorced from its context, unless the freelancer's contract with a publisher provides otherwise.

When is copyright registration necessary? How is it done?

Copyright registration is not required for a work to be protected. A work is protected at the time of its creation, and a copyright symbol is not necessary.[19] Copyright registration, however, is necessary to pursue an infringement case. This can be done

[18] Tasini v. New York Times Co., 533 U.S. 483, 121 S. Ct. 2381 (2001).
[19] U.S. Copyright Office, *Copyright Notice*, Circular 3 (2011), *available at* http://www.copyright.gov/circs.

retroactively through the U.S. Copyright Office. The cost is $35 if done online and $65 on a paper form.[20]

What is copyright infringement?

Infringement is the unlawful use of a copyrighted work without permission. The copyright holder must prove that (1) his or her work is original (show proof of copyright registration, for example) and (2) that the defendant copied the work without permission. [21] Most copyright cases are civil lawsuits, but criminal charges occasionally are brought, such as in cases of DVD piracy. The Copyright Office does not enforce copyright law, but its records can be used as evidence to support an infringement claim. In order to prevail on an infringement claim, the copyright owner does not have to prove that the work in question was copied precisely. Except in "piracy" cases, such direct copying seldom occurs. Infringement most often is shown by proving that the alleged infringer had access to the copyrighted work and that the alleged copy is substantially similar to the copyrighted work.[22]

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[20] U.S. Copyright Office, *Copyright Office Fees*, Circular 4 (2011), *available at* http://www.copyright.gov/circs/circ04.html#fees.
[21] 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[A], at 13-6 (1999).
[22] *Id.* at § 13.01[B], 13-12.

What is fair use?

Fair use is a legal defense sometimes used in copyright cases. If the use of a copyrighted work is fair, the use does not violate copyright law. A fair use also does not require permission of the copyright owner or the payment of licensing fees. Fair use typically involves copying of limited portions of a copyrighted work for purposes such as criticism, commentary, news reporting, teaching, scholarship or research.

Fair use is important to journalists because it allows them to quote from copyrighted works without obtaining permission from the copyright owners, which can be time consuming, or paying licensing fees, which can be expensive. For example, fair use allows critics to quote from books, songs and movies that they are reviewing without fear of infringement. It allows commentators and columnists to write parodies of a work by conjuring up enough of the original work so readers will understand the humor.[23] It also allows a newspaper, magazine or website to reproduce an image from a television advertisement in a news story about Super Bowl advertising. The idea behind the fair-use defense is to balance the rights of the copyright owner and the rights of others to excerpt and comment on the work in the interest of sharing and discussing it.

The outcome of a legal battle involving the fair-use defense can be hard to predict, however, so don't be overly eager when deciding whether you have a right of fair use. Be careful.

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[23] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S. Ct. 1164 (1994).

To decide whether use of a work qualifies as a fair use, courts consider these four factors set out in the Copyright Act of 1976:

- the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.[24]

Courts resolve fair-use issues by first deciding whether each factor favors a finding of fair use and then making an overall determination whether the use is a fair one. Be clear that applying one factor alone will not tell you whether something is a fair use.

The first fair use factor is the purpose and character of the use. If the use is for a purely commercial purpose, such as copying a photograph onto a T-shirt or a calendar offered for sale, the first factor will weigh against fair use. However, if the use is for a largely educational or informational purpose – such as producing criticism, commentary, news reporting, teaching, scholarship or research to share knowledge – then this factor will weigh in favor of fair use.[25]

Also under the first fair use factor, courts examine whether the use of the copyrighted work is transformative. The least fair purpose is simply reproducing a work without adding any new creative effort. The more transformative the use, the more likely it is to

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[24] 17 U.S.C. § 107.
[25] *See* NIMMER & NIMMER, *supra* note 24, at § 13.05[A], 13-154.

be a fair use. For example, reproducing another person's copyrighted photograph to illustrate a story on your website is not very transformative. However, if you make the photograph part of a collage, that is likely to be deemed transformative. You have used the original work to create something new, and courts approve of that.

The second factor in the fair-use analysis is the nature of the copyrighted work. Courts consider such qualities as whether the work is fictional or factual, how much effort its creation required and how available it is. If the original work is largely creative or imaginative, such as a painting, novel or song, the second factor will tend to weigh against a finding of fair use. On the other hand, if the original work is primarily factual, such as a news story, biography or textbook, this factor will weigh in favor of a fair use.[26] Also, if the original work is as yet unpublished and therefore unavailable, an unauthorized use of it is much less likely to be considered a fair use than a similar use of a work that was published several years ago and is widely available.[27]

The third factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Here courts compare the portion of the work that is used, in terms of both amount and substantiality, to the original work.[28] In terms of the amount, the more you copy from a work, the less likely your use is to be considered a fair use. Quoting a few lines from a 500-page book may be fair. Quoting half the book or even a chapter probably is not fair. Quoting half the lyrics in a pop song probably is not

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[26] *See id.* at § 13.05[A][2][a], 13-169.
[27] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 105 S. Ct. 2218 (1985).
[28] *See* NIMMER & NIMMER, *supra* note 24, at § 13.05[A][3], 13-178.

fair either. Unfortunately, the law provides no clear guidelines on how much copying is too much, so never use more than you absolutely need.

Qualitatively, the rule is that you cannot use the "heart of the work" without permission.[29] The heart of the work might be small in comparison to the entire work, but it is the most memorable part of the work. This does not mean, however, that a journalist should not quote the best passages from books she reviews or the two-paragraph conclusion from a newsworthy report issued by a non-profit organization. News reporting is a use favored by copyright law, so you are not likely to be successfully sued for such practices. Remember, no one factor is decisive in determining fair use.

The fourth fair use factor is the effect of the use upon the potential market for or value of the copyrighted work. If the use harms the value of or potential market for the original — for example, publishing excerpts from an upcoming tell-all book without permission — the fourth factor will not favor fair use[30] because the publisher will have lost the ability to sell those excerpts to a magazine of its choice.[31] If there is little or no risk of harm to the potential market for the original work, a court is more likely to allow the use. For example, when an artist complained that use of images of his artwork in a political pamphlet was not a fair use, a court rejected his claim, largely on the grounds that the pamphlet posed no threat to his ability to sell his artwork.[32]

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[29] 471 U.S. 539 (1985).
[30] *See* NIMMER & NIMMER, *supra* note 24, at § 13.05[A][4], 13-179.
[31] 471 U.S. 539 (1985).
[32] Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130, 145 (S.D.N.Y. 1990).

Incidental or "fortuitous" uses are also permissible. For example, a copyrighted work of art may appear in the background of a photograph of a news event. In such situations, there is no copyright violation.[33]

So just how much copying is too much under fair use?

No quick and easy answer exists. "There is no specific number of words, lines, or notes that may safely be taken without permission," the Copyright Office says.[34] You have to compare the amount you want to use against the whole work; using a large proportion may be unfair. You also have to consider whether you want to use the key part of the work; doing so may be unfair. The Copyright Office does not offer advice on individual fair use cases.

If something is on the Internet, is it in the public domain?

Probably not. Because it is so easy to copy and post information on the Internet, many websites contain copyrighted material even though they do not have permission to do so. For example, a Google search will easily turn up the famous photograph of murder

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[33] U.S. Copyright Office, *Fair Use*, FL-102 (2009), *available at* http://www.copyright.gov/fls/fl102.html.
[34] *Id.*

victim JonBenet Ramsey in a pink sweater. But the photo agency that controlled the rights to the image objected when newspapers and websites published it in 2006 without asking permission. The objection prompted The Associated Press and other wire services to stop using the Ramsey photo.[35]

On the other hand, some sites such as Creative Commons (creativecommons.org) allow creators to share their work under conditions more liberal than those dictated by copyright law. Such "sharing sites" can be useful if you are, for example, looking for an image of the Empire State Building that you can use without permission and without violating copyright law.

What is the Digital Millennium Copyright Act?

The DMCA[36] was passed by Congress in 1998 and signed into law by President Bill Clinton. The law is a response to the explosive growth of the Internet in the 1990s, and it includes provisions that affect all websites that invite users to post content.

An important part of the DMCA shields interactive websites from liability for copyright infringement that occurs when third parties post copyright-infringing materials on the sites. For example, a broadcast station's website is not liable for copyright infringement when someone not associated with the website – a third party – posts a clip of a copyrighted movie or song on the website. In that case, only the third-party poster is

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[35] Al Tompkins, *Story Behind the Picture: Who Owns JonBenet Photos?*, POYNTER ONLINE (Aug. 28, 2006), http://www.poynter.org/content/content_view.asp?id=106490.
[36] 17 U.S.C. § 512 (1998).

legally responsible. The website is legally responsible only for copyright-infringing materials it posts on the site.

The DMCA also provides a simple way for copyright holders to request the takedown of their copyrighted materials and encourages websites to respond to those takedown requests.

For a website to take advantage of the DMCA's protection against copyright-infringement liability, the website must follow the rules set out in the statute. These are the basic steps:

- Designate a person to receive DMCA takedown notices and register that person – your agent – with the U.S. Copyright Office. You'll have to pay a $105 filing fee. The Copyright Office keeps a list of designated agents to help those who think their copyrights have been violated to know to whom to send a takedown notice.
- Post on your site your DMCA agent's contact information and your policies regarding copyright infringement and the consequences of repeated copyright infringement. You should say you respond quickly to takedown notices and do not tolerate repeat infringement and follow through on those promises. This information can appear in your website's terms of service or elsewhere on the site, but display it prominently.
- Respond expeditiously to takedown notices.

For more detail on how to meet the requirements for DMCA protection and to learn how to prepare a proper DMCA takedown notice, visit the website of the Citizen Media Law Project at

http://www.citmedialaw.org/legal-guide/protecting-yourself-against-copyright-claims-based-user-content.

What are terms of service and how can they affect copyright law?

Terms of service are rules that users of services such as Facebook, Flickr and Twitter agree to when they create accounts with those services. Users of news websites also often are required to agree to terms of service, which also are called user agreements. These terms of service generally are held by courts to be legally binding contracts, even if the person agreeing to the terms has not read the terms, which often is the case. The terms of service override the law that would apply otherwise. For example, if you post your multi-media presentations on a website and require website users to agree to terms of service that say they forfeit all their fair use rights regarding your work, your copyright protection is stronger than the law generally allows. Also, your website user's fair use rights are diminished because they have signed away those rights.

Terms of service often include references to copyright and use of intellectual property. They often say that the sites can reuse content posted by users for purposes such as marketing and promotion. Terms of service may also limit how content posted on sites can be used elsewhere.

Companies may change their terms of service at any time. The photo service Twitpic, for example, caused a controversy in 2011 when it revised its terms of service in a way that caused users to believe that Twitpic was claiming ownership of all photos posted there. In a blog post, the company's founder, Noah Everett, assured users that was not the case. "To clarify our ToS regarding ownership, you the user retain all copyrights to your photos and videos; it's your content. Our terms state by uploading content to Twitpic you allow us to distribute that content on twitpic.com and our affiliated partners."[37] Everett explained that the changes in the terms of service were intended to stop news organizations from using images posted on Twitpic without permission of the original copyright owners, Twitpic's users.

Facebook has used its terms of service to threaten news organizations that republished images that were posted by Facebook users. In 2008, the website Gawker published photos taken from the Facebook account of a New York socialite. Facebook objected, saying that Gawker's editor had violated the site's terms of service and that the editor's Facebook account would be terminated if he did so again.[38]

Read the terms of use on websites you use. If you don't like the terms, don't agree to them and don't use the site.

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[37] Noah Everett, *Your Content, Your Copyrights* (May 10, 2011), http://blog.twitpic.com/2011/05/your-content-your-copyrights/.
[38] Carolyn McCarthy, *Facebook Threatens To Ban Gawker's Denton*, CNET (Jan. 16, 2008), http://news.cnet.com/8301-13577_3-9851664-36.html.

How is plagiarism different from copyright infringement?

Plagiarism and copyright infringement are similar, but plagiarism raises ethical concerns, rather than legal ones. Plagiarism is taking someone's work – their idea, opinion or theory – and claiming it as your own. The solution is proper attribution or citation. In other words, give credit where credit is due. Plagiarism is a significant violation of newsroom ethics that usually results in dismissal and often ends the offender's journalism career.

Accusations of plagiarism can become legal matters when the person who objects to the use of his or her work sues for copyright infringement. This happens when someone not only takes someone else's idea, opinion or theory but also copies the way the idea, opinion or theory was expressed.

Be clear that attributing copyrighted material to the author or creator protects you against charges of plagiarism. However, it does not protect you against a copyright infringement lawsuit.

WHERE TO GET HELP

SITE: U.S. Copyright Office Home Page

ADDRESS: www.copyright.gov

WHAT'S THERE: The U.S. Copyright Office site offers a wealth of information about copyright, including forms, .pdf files on copyright law and links to current legislation.

SITE: Nolo

ADDRESS: www.nolo.com

WHAT'S THERE: This legal-help site includes a deep section on copyright, and it's written in a straightforward way. Nolo also publishes relevant books such as The Copyright Handbook: What Every Writer Needs To Know.

SITE: Creative Commons

ADDRESS: creativecommons.org

WHAT'S THERE: This site enables the sharing of text, images and audio. Visitors can search for works they would like to use, and creators can share their work while still retaining some of their bundle of rights.