

OUT OF THE ARCHIVES

Intellectual Property: Basics of Copyright, Fair Use and Creative Commons

IF YOU ARE A PHOTOGRAPHER or if you own other photographers' images, you have likely encountered questions about Copyright, fair use, and Creative Commons. These concepts fit underneath the broader umbrella of intellectual property, which, in the United States, gives creators and owners of photographs the exclusive right to protection. This installment of "Out of the Archives" introduces some of the issues surrounding Copyright and what may concern photographers and the legal right of their property—in this case photographs.

Intellectual property rights are designed to allow creators and owners of trademarks or Copyrighted works to benefit from their hard work and investment in their creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which states, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."

STORY

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PHOTOGRAPHS

Collection of the Center

Archival Terms

Like railroading, archiving has its own language. Some terms used in this column appear below, as defined by the Society of American Archivists (SAA). See a full glossary of archival and records terminology at: www2.archivists.org/glossary

Copyright. A property right that protects the interests of authors or other creators of works in tangible media (or the individual or organization to whom Copyright has been assigned) by giving them the ability to control the reproduction, publication, adaptation, exhibition, or performance of their works.

Fair Use. A provision in Copyright law that allows the limited use of Copyright materials without permission of the Copyright holder for noncommercial teaching, research, scholarship, or news reporting purposes.

Infringement. A violation of intellectual property protected by a patent, Copyright, or trademark.

Intellectual Property. A group of intangible rights that protect creative works, including Copyright, trademarks, patents, publicity rights, performance rights, rights against unfair competition.

Copyright

A Copyright is the legal right created by law that grants the creator of a work to exclusive rights for its use and distribution for a limited time. There are some certain exceptions to Copyright, one being

that Copyright only protects the original way ideas are expressed in a particular creation and not the underlying ideas or facts themselves. This means you are free to copy someone's idea but not the expression in which that idea was originally created. Fair use and Creative Commons also come into play, but a bit more on them later.

You may be wondering, "Once a photograph is taken, who owns it?" and "What does intellectual property protect?" Essentially whenever a camera produces an image, the photographer who pressed the button now potentially owns the Copyright—with the caveat that the photographer is subject to work for hire. (For example, a company may hire a photographer for an assignment where the company would own the Copyright to the photographs created.) Once a photograph is created, the photographer or creator has the right to legally distribute the image and file for infringement if anyone violates his or her exclusive Copyright. In the case of works (1) not protected by a Copyright, (2) when the Copyright has expired, or (3) produced by the U.S. Government, those works are considered to be in the public domain and legal to use without permission.

In regard to Copyright and photographers, the concept can be simplified by identifying a Copyright as ownership. If a photographer owns a Copyright, he or she has the exclusive right to that property and therefore the right to (1) reproduce the photograph, (2) prepare derivative works based on the photograph, (3) distribute copies of the photograph, and (4) display the photograph publicly. These are stated in Copyright Law of the United States (title 17, U.S. Code, December 2011) governed by the Copyright Act of 1976.

With the emergence of the Internet and the great accessibility of images online, you may have noticed in the news an influx of cases regarding Copyright infringement. While photographs are protected by a Copyright at the moment of creation, in order to take any legal action, a Copyright has to be registered. Therefore, if you have any concern over the misuse of your photographs by someone else, it is a good idea to register your Copyright right away by filing out an Original Claim to Copyright form with the U.S. Copyright Office at: www.copyright.gov/eco

If you believe that a photograph you own or to which you hold the Copyright has been used without your permission, you have several options. One of them is to simply do nothing, but in doing so you

Editor's note: While the basics of Copyright and other issues surrounding intellectual property are relatively straightforward, individual cases can be complex. The Center offers the guidelines in this column as a starting point but is not in the position to offer legal opinions. You should always consult with a lawyer for legal guidance.

Registered or published works in the US	
Publication Date	Copyright Term
Unpublished	Life of author + 70 years (works from authors who died before 1946 are in public domain)
Before 1923	None, in public domain
1923 – 1977	95 years after publication date (given work was published with copyright notice and renewed), otherwise in public domain
1978 – 2002	Life of author + 70 years*
After 2002	Life of author + 70 years
Anything from the US Government	None, in public domain
*If work created before 1978 and published in specific period, then copyright is greater of term listed or December 31, 2047	

are potentially allowing your work to be used without your approval. If you wish to get involved, you could contact the infringer and request proper credit (and compensation) for the use of your photograph. Another option is to send a cease and desist letter informing the infringer you want the photograph removed. Finally, your most assertive option is to file for a Copyright infringement lawsuit and take the matter to court. Copyright infringement can lead to civil remedies—with monetary statutory damages and possible criminal penalties including fines and/or imprisonment. But again, you have to have previously registered your work with the U.S. Copyright Office to file a legal claim.

A common practice among photographers and collectors is to trade photographs. While on the surface this is an enjoyable and educational tradition, you should be aware of the Copyright issues. Unless the Copyright has expired or been transferred, the original photographer or his or her heir retains the Copyright. Simply purchasing a print or slide does not imply that you also acquire the Copyright. While a verbal agreement can be an adequate transfer of Copyright, having a written agreement signed by the owner will hold up better legally than a possible “he said, she said” argument. If no Copyright transfer was made, it is always safer to check the Copyright terms (see the table above) or contact the creator of a photograph before any usage. The Copyright Law of the United States lays out the laws of Copyright ownership and transfer in Chapter 2. Owners of Copyrights may also bequeath ownership by will or pass on as personal property.

Protecting your photographs from infringement online can be managed in many ways. Mentioned previously but ever so important is to register the

Copyrights to all of your photographs before posting them to the Internet. Copyright notices contain three primary parts. First is the Copyright symbol, ©, and/or the word “Copyright.” Second is the year when the work was first published. Third is the name of the Copyright owner (not necessarily the creator). The full Copyright notice would look something like: “© 2016, Center for Railroad Photography and Art.” When the Center adds metadata to our images, we include metadata fields for work rights, credit line, usage terms, and any contact information for the Center including our address, phone number, email, and website URL.

Copyrighted photographs can be managed fairly easily by using the title of the work, the name of the author of the work, or the name of the Copyright holder of the work, in connection with any physical or digital copies of the photograph (see table on next page). Any of the latter information is considered Copyright Management Information (CMI) and there are additional laws in the U.S. Copyright Act that protect CMI from being removed. Before putting anything online, carefully read any terms or conditions of websites to ensure you are not giving up any rights to your photographs. Going through these steps will help safeguard you and your photographs against any possible infringement.

Fair Use and Creative Commons

Two standards intended to balance the interest of Copyrights and public use of creative works are the concepts of fair use and Creative Commons.

Fair use offers the right to use a Copyrighted material without the owner’s permission. Basically, fair use is a U.S. legal doctrine that permits certain and limited uses without explicit permission from the owner. Uses considered “fair” typically pertain to criticism, comment, news, teaching, or research. A number of factors can be used to determine whether



This slide, part of the Center’s John F. Bjorklund Collection, was created by a different photographer, Thomas J. Post, who traded it to Bjorklund. The Center acquired the slide itself as part of the Bjorklund Collection, but we do not own the Copyright to the photograph. Post passed away in 2012; by law the Copyright will remain with his heirs for another seventy years, until 2082.

	A	B	C	D	E
1	Work Repository	Image Credit Line	Image Copyright URL	Image Usage Terms	Image Copyright Notice
2	Center for Railroad Photography and Art	Photograph by John Bjorklund, Collection of Center for Railroad Photography and Art	http://www.railphoto-art.org/	For educational use only, please contact the center for other usage requests	© 2015, Center for Railroad Photography and Art

Spreadsheet showing Copyright Management Information (CMI) that the Center uses for our collections. For all of our images, we include *Image Credit Line*, *Image Copyright URL*, *Image Usage Terms*, and *Image Copyright Notice*.

a given use is “fair,” as stated in Section 107 of the Copyright Act:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the Copyrighted work;
3. The amount and substantiality of the portion used in relation to the Copyrighted work as a whole (is it long or short in length, that is, are you copying the entire work, as you might with an image, or just part as you might with a long novel); and
4. The effect of the use upon the potential market for or value of the Copyrighted work.

Creative Commons is a nonprofit organization devoted to increasing the availability and use of creative works in a legal and sharable way. Creative Commons (CC) offers various types of licensing that Copyright holders can put in place to allow the free use of their work as long as the user meets the conditions of the CC license. Some types of licenses include *Attribution*, *Noncommercial*, *NoDerivative*, and *ShareAlike*. CC defines each license as:

- *Attribution (by)*: “All CC licenses require that others who use your work in any way must give you credit the way you request, but not in a way that suggests you endorse them or their use. If they want to use your work without giving you credit or for endorsement purposes, they must get your permission first.”
- *Noncommercial (nc)*: “You let others copy, distribute, display, perform, and (unless you have chosen NoDerivatives) modify and use your work for any purpose other than commercially unless they get your permission first.”
- *NoDerivative (nd)*: “You let others copy, distribute, display and perform only original copies of your work. If they want to modify your work, they must get your permission first.”
- *ShareAlike (sa)*: “You let others copy, distribute, display, perform, and modify your work, as long as they distribute any modified work on the same terms. If they want to distribute modified works under other terms, they must get your permission first.”

It is important to note that CC licensing is *not* implicit. The photographer or Copyright holder must explicitly state the appropriate CC licensing terms with their work, typically as part of the Copyright notice.

Takeaways of intellectual property

- The Copyright Act of 1976 states that photographs are protected by Copyright from the moment of creation by the creator
- Copyright is a property right and purchasing a print or slide does not mean you acquired the

Copyright, unless a transfer of Copyright has been approved by the creator or Copyright holder

- Copyright infringements such as reproducing photographs without permission can lead to civil and criminal penalties, but the Copyright has to be registered in order to take legal action
- Fair use and Creative Commons are avenues to use Copyrighted works as long as the proper conditions have been satisfied

For additional information and resources:

- Intellectual property: www.wipo.int/portal/en
- Copyright: www.Copyright.gov
- Fair Use: www.Copyright.gov/fair-use
- Creative Commons: www.creativecommons.org

Railroad Heritage Visual Archive updates

In our Madison office, Jordan Radke has completed digitizing all 55,221 slides in the John F. Bjorklund Collection. Aviva Gellman and John Kelly are busy digitizing metadata from the collection so we can post more of it online. Radke continues to work closely with J. Parker Lamb on the transfer of his remarkable black-and-white photography collection to the Center. We recently uploaded selections of his fifth batch and just received his sixth batch, featuring Texas.

We say goodbye to Maddie Shovers, graduate archival intern, who has taken a full-time position as a city records clerk. We say hello to Megan Edgecombe, graduate archival intern, who joined us in October and is processing a newly acquired collection.

At Lake Forest College, intern Colleen O’Keefe is finishing up metadata entry and scanning for the Wallace W. Abbey Collection, with assistance on metadata from former intern Jim Cascino.

Highlights from many of our collections can be viewed at www.railphoto-art.org, while we post selections weekly to our social media accounts on Facebook, Twitter, and Flickr.

About this column and our collection

“Out of the Archives” brings to light the world of professional archiving, providing a regular forum to share selections from the Center’s collections and tips for maintaining your own photographs. Whether you are a photographer, collector, or avid fan, it is important to organize and preserve the materials you create or collect. Please get in touch with Jordan Radke, jordan@railphoto-art.org, if there are any topics you would like us to cover in the future.

The Center’s Railroad Heritage Visual Archive includes some 200,000 photographs. The team in Madison, Wisconsin, consists of Jordan Radke, archives manager, graduate archival intern Megan Edgecombe, intern Aviva Gellman, and volunteer



John Kelly. We also partner with Lake Forest College, working with Anne Thomason, archivist, along with graduate archival intern Colleen O'Keefe, to process and maintain Center materials housed in the college's Archives & Special Collections in the Donnelley and Lee Library. Scott Lothes, Center president and executive director, and the Collections & Acquisitions Committee of the board of directors provide oversight.

In keeping with the Center's mission of preserving and presenting significant images of railroading, with the Railroad Heritage Visual Archive we seek to securely house collections and make their contents accessible. We adhere to established archival principles to ensure both safety and accuracy. Our work as archivists includes:

Preservation. One of the Center's main objectives is properly preserving our collections. This includes appropriately caring for and handling our materials by using archival-safe supplies, and providing a con-

trolled environment where our collections are housed.

Processing. Processing materials is a long, tedious, and detailed endeavor. Organizing a collection appropriately sets up the rest of the processing work that includes any digitization and metadata entry. This work is essential to the long-term care and future accessibility of a collection.

Arrangement and Description. To maintain quick and easy retrieval of our materials, we organize every collection down to its individual items, if possible, given the time and resources available to us.

Accessibility. Finally, the Center will make sure that users have access to our processed collections. We create detailed finding aids to describe each collection and its contents and share images electronically through our websites and many social media outlets.

Missouri Pacific's *Aztec Eagle* passenger train departs San Antonio, Texas, for Laredo in July of 1966 as the northbound *Texas Eagle* is being prepared for departure. ©2016, Center for Railroad Photography and Art. Photograph by J. Parker Lamb and part of his newly-arrived sixth batch of negatives, featuring 439 images of railroading in and around Texas.