



PHOTO John Baird

# It's Cool if I Use This, Right?

The “zombie bunny,” photographed by alumnus John Baird, has been hijacked and repurposed time and time again. The image is a symbol of the clamor over **copyright in the digital age**. Who owns what, and how does that ownership get enforced? Alumni and faculty on all sides of the issue weigh in.

by *Mary Jean Babic*

Whenever Susan Kornfield ('74), an Ann Arbor intellectual property attorney and adjunct professor at U-M, speaks to a group about the area of law in which she practices, she asks her audience this question:

## What's the purpose of U.S. copyright law?

Kornfield kindly makes it multiple choice. Is the purpose of copyright to: **a)** reward authors for their creative effort; **b)** provide an economic incentive to write and publish; **c)** advance public learning; or **d)** provide legal remedies for infringement?

She has asked thousands of people this question. Statistically, they should get the right answer 25 percent of the time. "They get it right," Kornfield says, "less than two percent of the time."

The correct answer is — c) advance public learning.

"I can see the looks in their eyes when I tell them this," Kornfield says. "I say to them, how many of you think I don't know what I'm talking about?"

But Kornfield is drawing straight from the U.S. Constitution. Article I, Section 8, Clause 8, known as the copyright clause, empowers Congress 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 and Discoveries."

Fixed into the nation's founding document at a time when player pianos and filmstrips didn't exist, much less Google and mashups, copyright has always been a much-disputed tug of war between the rights of creators and the needs of the public. In the digital era, the tension and murkiness surrounding copyright have only intensified.

In 1998, Congress extended copyright terms to the life of the author plus 70 years for an individual work, and 120 years from creation for a corporate work or 95 years after publication, whichever is earlier. While this may be good for the heirs of Jay-Z or Stephen King or Walt Disney, it means far fewer works will fall into the public domain in our lifetimes. At the same time, technology has made it unthinkingly easy to violate copyright. Copying and pasting a photo onto your blog, emailing a song to your friend — these are daily activities of modern life, irresistible in their naturalness, yet they are often illegal, or at least prime fodder for lawsuits.

The truths, assumptions, and gray areas in between concerning copyright matter hugely because copyright affects more people than ever. U-M, the average consumer, and big corporations are all tied up in this issue.



## Face the Music

Most people who infringe on copyright probably have no idea that that's what they're doing, says Jesse Walker ('91), managing editor at *Reason* magazine. Rather, they're just doing cool things online. Walker has written regularly on copyright since publishing an essay in 2000 titled "Copy Catfight: How intellectual property laws stifle popular culture," which decried "copyright maximalism." People, he wrote at the time, were using the new technology at their fingertips in innovative, highly personal ways — such as posting transcripts of *Buffy the Vampire Slayer* episodes online (which brought a scolding letter from 20th Century Fox) or posting a 15-minute silent compression of the first *Star Wars* film — and big media companies were only just noticing "this alternate universe of fans, parodists, and collagists."

More than a decade later, Walker says the most significant change is the thousands of lawsuits filed in the interim. Nobody argues that creators shouldn't benefit from their work, but life plus 70 easily could amount to more than a century before a work enters the public domain. "People should be able to create new things from the material that's around them in the culture," says Walker.

But must they use existing works? Can't they just come up with new stuff? Artists, Walker argues, have always built on what came before. "You listen to Bob Dylan's early records — he's borrowing lines from here, lines from there," Walker says. "Very rare is the case where somebody has some romantic genius and something springs out of their mind fully formed, without influences."

The collision of technology and copyright may have been most ruinous in the big-label record industry, now largely a thing of the past. Today, iTunes is the country's leading seller of music. The ease and lure of peer-to-peer file sharing persisted regardless of copious legal action the record industry took against copyright violators. The famous example, of course, is Napster, the music-sharing site that debuted in 1999. In 2001, a federal judge ordered it taken down because of copyright violations. (Today, Napster is owned by Best Buy and is a fee-based music subscription service.)

But that victorious battle did not win the war. The Recording Industry Association of America (RIAA) spent much of the mid-aughts in a litigious frenzy. In 2007, they filed lawsuits against individual students on campuses across the country, asking those who downloaded songs illegally to settle out of court for \$3,000. All told, the RIAA wracked up more than 30,000 lawsuits by 2008, but going after college kids and other private citizens did little to stem the industry's hemorrhaging bank accounts. In the decade since Napster appeared, music sales dropped nearly in half, to \$7.7 billion from \$14.6 billion, according to the RIAA.

Michael Perlstein ('60), a copyright attorney and current president of the Los Angeles Copyright Society, has represented

musicians, songwriters, publishers, and producers for more than 40 years. He's witnessed the monumental changes wrought by digital technology. While he points out that Napster caused "the widespread termination of employees of record labels and music publishing companies," it's also true, he says, that the major labels were too slow to adapt their business models to the changing culture. "They couldn't come to grips with the fact that peer-to-peer file sharing was decimating the industry," he says. "They tried hard to shut the door on that, and basically they couldn't."

Finally, it seems, they're catching on. One example is their cooperation with iTunes, which sells songs for about a buck a pop and pays record companies for every download. Music subscription services that pay labels and publishers for use of the music, such as Rhapsody and Spotify, are proliferating.

"Personally," Perlstein says, "I think the Copyright Act and technology are getting along better than they used to."

As far as the assertion that current copyright law stifles creativity, Perlstein doesn't buy it. He acknowledges that he's spent his career defending copyright owners, but, he says he's never met a garage rock band that didn't want to attract the attention of a music executive and become rich and famous. "I believe copyright protects creators, and that's a good thing."

Copyright and technology may be getting along better than they used to, but copyright and research is another area in which the law gets snarly, and it's playing out in a project near and dear to U-M: Google Books.



## Books, Fair Use, and Orphans

In 2004, when Google announced its intent to scan the collections of the world's libraries and make them available online, the University of Michigan was one of the first institutions to sign on. Its Google-scanned works, in turn, are part of the HathiTrust, a congregation of digitized collections from 52 partners.

"The great promise of mass digitization is that somehow or other we will be able to use digital copies as our regular working copies," says Paul Courant, LSA professor of economics, U-M librarian, and dean of libraries. "And we are very, very far from fulfilling that promise."

The roadblock is how copyright law handles digital copies. Books published before 1923 are in the public domain, so no problem there. But it gets dicey for works published after that. Many are "orphans" whose copyright holders can't be found. Perhaps the owners died and left no estate instructions about the copyright. Perhaps the original publisher went out of business. Whatever the reason, after a diligent search there's simply

no one to ask for permission. And while libraries can lend physical copies of books under the doctrine of first sale provision of copyright law, they could not share a digital version for fear of copyright infringement.

**“The digital version is being treated differently than the physical version, and that is the core of the problem,” Courant says.**

For librarians — information sharers by training and temperament — having resources on hand that they are unable to make available feels like an abrogation of their public duty. Courant and others had hoped that a lawsuit settlement between Google and a coalition of authors and publishers would clear up the issue and permit large-scale sharing of copyrighted material.

In 2005, a group of authors and publishers, the Authors Guild and the Association of American Publishers, filed a class action, copyright infringement lawsuit against Google over its book-scanning effort. Eventually, Google reached a settlement in which it would pay \$125 million for the rights to display previews of books and would offer full digital versions for sale. The agreement included an opt-out measure; authors and publishers could withdraw their works from Google Books if they wished. The agreement also called for Google to display information on where to buy or borrow the physical book — if it was still in print — and created a book rights registry to pay authors and publishers. Under the settlement, Google would sell site licenses to universities, allowing students and faculty digital access to the collections of dozens of the world’s best academic libraries.

“It was very cool and very valuable to universities, a solution to the problem,” says Courant.

Except that a federal judge threw out the settlement, on grounds that the arrangement should be opt-in rather than opt-out.

U-M library officials huddled to decide their next move. Meanwhile, staff members embarked on a massive effort to identify all the orphans in the HathiTrust; it was valuable information to have, regardless of the legal outcome. In short time, however, the library elected to make orphans available to the campus community. It was the first institution to take such a step and to move out from the shadow of the orphan problem, which pervades the copyright world, not just the HathiTrust.

Courant is confident that sharing orphan works falls under fair use, which allows works to be used without permission for certain purposes, such as newsgathering, criticism, and parody. The move aligns with the copyright law’s intent to promote progress, he says. Releasing them does no economic harm to anyone, Courant insists, while holding them back severely restricts scholarship involving 20th-century works.

Given the nature of university libraries, many of these works are arcane, out-of-print academic books that have no commercial

value but strong research value.

The authors, even if they could be found, would almost certainly approve, Courant adds. “These works were written to be read, and we now have the means to increase the chances that they will be read,” he says.

Courant says he hears every day from people who unearth valuable, forgotten works from Google and HathiTrust searches. A history colleague learned about an archive in Europe she never knew existed but that was highly relevant to her work. The archive itself wasn’t digitized, but it was referenced in a 1902 book that was. “That’s the kind of thing that can happen,” he says.

The strangeness of copyright law, he says, is that it lumps the interests of Hollywood filmmakers and J.K. Rowling together with those of, say, an academic researcher of dam construction in the American southwest from 1876 to 1943. Academics make hardly any money from books and articles; they publish in order to secure jobs and get tenure. “I could make the argument that scholarly works should not be in copyright at all,” Courant says. Creative people might stop creating if anyone could come along and pirate their work; the stakes for them are high, so copyright is in their interest. “But academics get their rewards by publishing to advance their reputation and contribute to scholarship,” Courant says. “They don’t need copyright as an incentive to produce academic work.”

Congress has shown no inclination of ever reducing copyright terms, but Courant says he’d love to see a return to the original 14-year term, renewable once. “We’d be living in a much, much sweeter world.”

While the library presses on with its orphan strategy and record companies figure out how to share music in the digital age, regular citizens are caught in the copyright crossfire. One way they’re finding middle ground is through something called Creative Commons.

## Featherbowling, Fair Use, and a Zombie Bunny

In 2001, a group of thinkers took stock of the current legal and social environment surrounding copyright and determined that there must be a way, within the law, to “help people voluntarily manage copyrights that seemed more appropriate to the digital age,” says Molly Van Houweling (’94), a Berkeley law professor. The result was Creative Commons, a nonprofit organization offering licenses that allow creators to retain copyright while permitting varying degrees of use. A “CC BY” license, for example, tells others that it’s okay to use, remix, or build upon a work, even commercially, as long as the creator is credited. It’s the most accommodating of Creative Commons’ six licenses. The most

restrictive is “CC BY-NC-ND,” which allows works to be shared with others but not changed in any way nor used commercially.

As Creative Commons’ first employee, Van Houweling helped draft the licenses; she remains on the board of directors. “We were just a little tiny startup nonprofit,” she says. “We didn’t do focus groups or marketing surveys.”

But the founders had a hunch that many copyright holders were frustrated by prevailing norms. They might *want* their works to be circulated, as well as have greater access to others’ creations. A reasonable middle ground between all-rights-reserved and outright theft could flourish, if given the infrastructure to so.

Today, hardly any conversation about copyright lasts very long before Creative Commons is mentioned. It’s become, it seems, a permanent part of the copyright landscape.

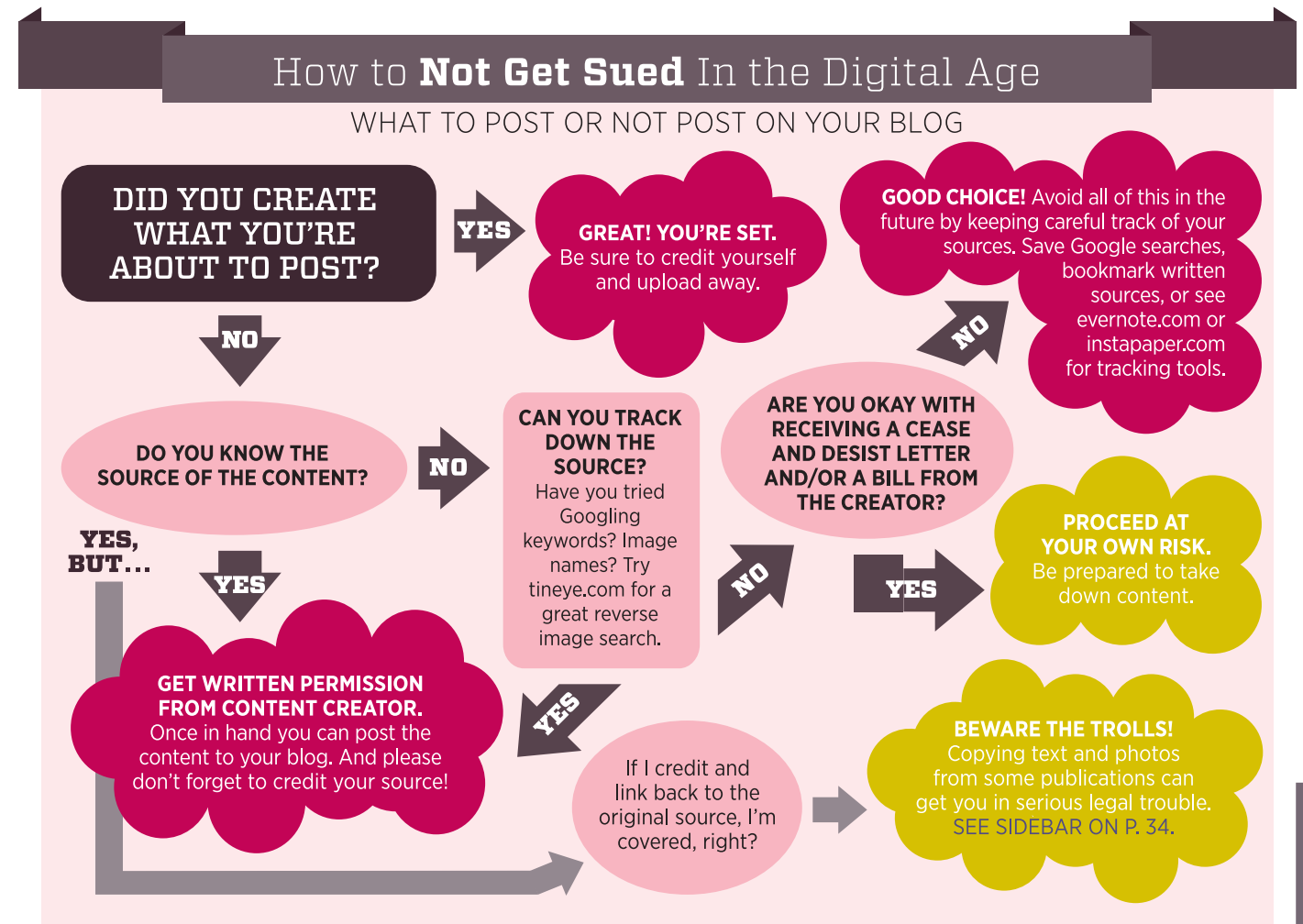
John Baird (’85 B.F.A.) doesn’t earn his living as a photographer, but as a tech-y, arty guy — he designs and builds furniture at his studio in Dexter,

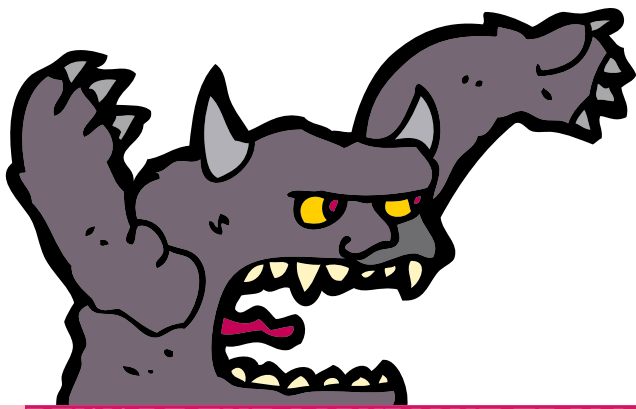
Michigan, and is a lecturer in the School of Art and Design — he’s avid about making good photographs and was an early adherent of Flickr. At first, he used the Creative Commons license for no commercial use, no changes to the image.

“I was fine with that for a long time,” he says, but as his photography improved, he discovered he didn’t want his images used for just anything, especially not something commercial. **On several occasions, his photos have been swiped, even though he protects them with full, all-rights-reserved copyright.**

“I’m jaded in a way, because I perceive that some of my images have value,” Baird says. “I’m not putting stuff out there that I don’t care about. I think that’s a transition with a lot of Flickr users, because they become better photographers.”

In December 2005, Baird attended a sort of Christmas-of-the-undead procession through downtown Ann Arbor and took a photo of a guy dressed





## BEWARE THE COPYRIGHT TROLLS

In 2010, a Nevada blogger named Michael Nelson posted eight sentences of a 30-sentence article from the *Las Vegas Review-Journal*. He cited the source. He linked to the article. And he got hit with a lawsuit. The company suing him, Righthaven LLC, claimed Nelson should have gotten permission first.

Righthaven is a “copyright enforcement” company that obtains copyrights to newspaper content in order to sue for infringement. As of July 2011 it had filed more than 270 lawsuits. Typically, it demands payment and shutdown of the site; usually, the startled bloggers settle out of court. In the blogosphere, Righthaven is reviled as a scare-mongering troll, but its services are apparently in high demand. It has agreements with media groups that represent more than 100 newspapers, including the *Los Angeles Daily News*, the *Denver Post*, and the *San Jose Mercury News*.

Nelson didn’t settle, and a federal judge agreed that his post was allowed under fair use, posing “little to no” harm to the *Review-Journal*. Still, fighting an unforeseen lawsuit is a hassle no blogger — professional or hobbyist — wants to deal with.

If not a lawsuit, a wrist-slap could come in the form of a Digital Millennium Copyright Act (DMCA) take-down notice. The DMCA holds online service providers (OSP) harmless for copyright violations on sites they host — the “safe harbor” provision — but requires them to remove the material upon notification. If bloggers feel the material is not infringing, they can file a “put back” motion with their OSP.

Bloggers can also invoke DMCA safe harbor protection themselves by designating an agent to receive infringement notices. Another suggestion is to install a browser plug-in that blocks content from Righthaven clients. Instructions for both are at [righthavenvictims.blogspot.com](http://righthavenvictims.blogspot.com).

Best is to simply avoid posting copyrighted material without permission, but that’s easier said than done. One user, “Christina,” who maintains a photo-heavy blog, recently expressed fatigue at the idea of securing permission for each photo and uncertainty about the necessity of permissions if she included proper attribution. She left this comment on the popular blog Design Sponge: **“Why is it that this law of copyright and fair use seems to have so many interpretations? How is a little person like me supposed to know who to listen to?”**

as a zombie bunny. “That picture has been stolen so many times that people don’t even know the original source anymore,” says Baird. “Some people are stealing from people who stole it.” The use is rarely commercial, so mostly he doesn’t mind.

What really infuriated him was finding a photo he took of the Cadieux Café — an emporium of Belgian food, beer, and feather-bowling (a Belgian pastime, akin to horseshoes) on Detroit’s east side — on the website of a Detroit TV station, accompanying a restaurant review. Even worse, he says, at the bottom of the page was a copyright symbol. The station, he fumed, copyrighted its own stuff while stealing his. “They should totally know better,” he says. He fired off an angry email, and a day or two later the image disappeared.

Among the Flickr crowd, Baird says, copyright is a hot topic. One photographer friend sends off an invoice, with no warning, if he sees one of his photos somewhere. Others favor a high degree of openness, but Baird is not in the “information should be free” camp. “A lot of people can’t afford to give stuff away for free,” he says. “That is such a spurious argument, for hipsters who don’t want to pay for anything to tell other people how to earn a living.” He refuses to take part in crowdsourcing — the use of amateurs’ photographs in newspapers or magazines, often for a token payment — because “then someone who makes a living as a news photographer has gotten screwed, and that’s in the evil category.”

Baird’s experience shows that it’s not only the legal departments of Google and Disney that get worked up about copyright. As Van Houweling points out, the same technology that makes everyone a potential copyright violator also makes everyone a potential copyright holder. But the Internet is here to stay, and copyright terms aren’t going to get any shorter. As with Creative Commons or U-M’s decision to make orphan works available, it seems that the way through the morass will arise from the very quality for which copyright exists: human ingenuity.

Mary Jean Babic is a freelance writer in Brooklyn, New York.

**Editor’s note:** Since we wrapped up this story, the Author’s Guild has filed an amended complaint to its lawsuit, and the University is reinvestigating its process for identifying orphan works.



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