

CHAPTER 3 LEGAL CONSIDERATIONS

This chapter outlines the important legal issues a cultural institution should consider when beginning a Digitization Program, offers suggestions and recommendations for activities you can undertake to ensure compliance with the law, and provides resources for further investigation of this complex topic. Intellectual property rights management is the most pressing legal concern for institutions proposing to digitize their collections. Intellectual property rights include copyright, trademarks, patents, publicity rights, privacy, and trade secrets, but it is copyright that will mostly concern this audience.

Today, copyright protection begins as soon as the original work is fixed in a tangible medium of expression. It is no longer necessary to register or to publish the work to copyright it -- unpublished work is now fully protected by copyright. A copyright holder controls the rights of reproduction, modification, transmission, display, and performance of the copyrighted material, whatever its format. Digitization can involve all of these activities, therefore copyright is an important concern when starting a digitization project. Cultural institutions are primarily interested in two issues surrounding copyright: how they can legally digitize material in which they may not hold the copyright, and how they may ensure that no one else can use the materials they have digitized without their approval (tacit or otherwise).

Definitions of Copyright

The purpose of copyright law, as mandated in the Constitution, is 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" (Article 1, section 8 of the United States Constitution). Copyright protection, which arises automatically when an original work is fixed in a tangible medium of expression, (registration or publication not required) can prohibit or permit certain uses of the work without the permission of the copyright holder. Prohibited use of material is referred to as "infringement" and is actionable.

Because copyright is a property right, the ownership may change many times over the course of the property's life. In addition, physical ownership does not translate to copyright ownership. For instance, just because a collection is in a repository does not mean that repository holds the copyright to the items in that collection. Copyright often still resides with the author, the publisher, the photographer, the artist, and/or a combination of one or more of these to name a few of the possibilities. Because publishing an item on the internet involves at least the rights of reproduction, display, and transmission, copyright ownership must be determined before it should be included in a digitization project. To avoid copyright infringement, permission to digitize and present online should be obtained in writing by the copyright holder for the material that is still protected under copyright law. In order to address these issues, institutions need to determine the copyright owner, the duration (time) of the copyright and the classification of the work. Copyright can vary from format to format and can affect the copyright status and your ability to legally digitize the materials.

To complicate matters, sometimes works may have two or more copyrights. For example, a work of art may be copyrighted and a photograph of the work of art may also be copyrighted AND the book in which the image appears may be copyrighted. Multiple copyrights are often difficult to determine, but, if there is indication that they exist, permission should be obtained from all holders of copyright. Tools exist, though, to help you navigate the various layers of complex rights situations.

For more information about the United States Copyright Law, see:

United States Copyright Office, available at: <http://www.copyright.gov/>

Legal Information Institute, Cornell Law School, available at:
<http://www4.law.cornell.edu/wex/index.php/Copyright>

Library of Congress Copyright Office, *Copyright Basics*, available at:
<http://www.copyright.gov/circs/circ1.html>

What Can Be Copyrighted?

The first challenge to copyright is to understand what can be copyrighted. Any original work, excluding federal documents created by a federal government employee within the scope of their employment, may be copyrighted. This may include any of the following:

- ❖ Art (pictorial, graphic, textual, and sculptural) work
- ❖ Literary works
- ❖ Dramatic works
- ❖ Musical works
- ❖ Sound recordings
- ❖ Motion pictures and other audiovisual works
- ❖ Pantomimes and other choreographic works
- ❖ Architectural works

"Orphan works" is a term for those items that cannot be cleared of copyright but for which there is no recourse for discovering copyright ownership. A good source of current information concerning copyright and "orphan works" is *Copyright and Art Issues* (<http://darkwing.uoregon.edu/~csundt/copyweb/>). Peter Hirtle discusses the real challenges that institutions face with orphan works in "Adopting 'Orphan Works'", available at: http://www.rlg.org/en/page.php?Page_ID=20571#article3

Copyright Term

One of the primary ways copyright of a work is discussed is the work's copyright term. The copyright term refers to the length of time during which the copyright is honored. Copyright terms vary based upon the circumstances in which a work was created, whether the item is published or unpublished and other variables. For example, current federal copyright statutes determine that the copyright term for published works is life of the creator plus 70 years in most cases. For works of hire, anonymous works, or works that cannot be tied to a single creator's life, the copyright term is 95 years from publication or 120 years from creation, whichever is shorter. Variables such as date of creation and copyright statutes make copyright terms more complicated, though, so copyright terms can

be of various lengths. For more details on copyright terms as applied in a digitization project, see below.

Copyright Issues for Digitization

There are three issues that dominate copyright questions for cultural institutions embarking upon a digitization project:

- Is the work in the Public Domain?
- Does my action fall under Fair Use?
- Am I respecting the Moral Rights of the creator?

The Public Domain

The Public Domain is defined as “all entities, information, and creative works that are available for use by anyone for any reason without restriction.”¹ A public domain work is a creative work that is not protected by copyright and which may be freely used by everyone. Reasons that a work is in the public domain and not protected include:

- (1) the work is a work of the U.S. Government employee in the course of their duties;
- (2) the work was created before copyright laws were established;
- (3) the author failed to satisfy statutory formalities to establish the copyright; or
- (4) the term of copyright for the work has expired.

Works in the public domain may be used freely by anyone. It is assumed that many of the materials in special collections are old and in the public domain, but often this is not the case. Determining if the material you wish to digitize is free of copyright restrictions is a critical first step in the digitization process and linked to the selection process. In general, works published in the United States prior to 1923 are in the public domain. Works published later may be in the public domain but will require some research first. Generally, the copyright holder is the person who created the work. Since registration is not currently required to document this ownership, it can be difficult to determine copyright ownership. If, however, ownership of copyright is transferred to another party, as in published or film companies, there must be a written assignment. This type of copyright is then easier to trace. When the copyright term expires, the work is in the public domain.

There are several resources available to track the various changes in copyright law, and to use as a tool in trying to assess the copyright status of an item. Laura Gasaway, Director of the Law Library and Professor of Law at the University of North Carolina, Chapel Hill, has created a chart to help determine whether or not any material in question is in the public domain. The chart can be found at <http://www.unc.edu/~uncclng/public-d.htm>, and it is reproduced here as it existed in March 2007.

¹ Zorich, D. “Why the Public Domain is Not Just a Mickey Mouse Issue,” NINCH Copyright Town Meeting, Chicago Historical Society, January 11, 2000.
<http://www.ninch.org/copyright/2000/chicagozorich.html>

WHEN U.S. WORKS PASS INTO THE PUBLIC DOMAIN

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years ¹ (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ²)
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice ³	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

¹ Term of joint works is measured by life of the longest-lived author.

² Works for hire, anonymous and pseudonymous works also have this term. 17 U.S.C. § 302(c).

³ Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if efforts to correct the accidental omission of notice was made within five years, such as by placing notice on unsold copies. 17 U.S.C. § 405. (Notes courtesy of Professor Tom Field, Franklin Pierce Law Center and Lolly Gasaway)

Another resource created by Peter Hirtle at Cornell University, "Copyright Term and the Public Domain, 1 January 2007" is available at:

http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm

Misunderstandings often take place when the copyright of manuscript material comes under consideration. For example, would the 1862 diary of a Civil War soldier who died in 1863 still be protected by copyright? To most researchers' surprise before January 1, 2002, the answer was yes. Unpublished works created before 1978 did not enter into the public domain until January 1, 2003 at the earliest. For most manuscripts, the term of protection is life of the author plus 70 years with January 1, 2003 being the earliest expiration date. This meant that works created by an author who died in 1933 and before would enter the public domain on January 1, 2003. If the death date of the soldier was unknown, the expiration of copyright would remain the same. Unpublished works where the death date is unknown are protected for 120 years from the date of creation or until December 31, 2002, whichever was later.

Fair Use

Cultural institutions may wish to digitize materials that are not in the public domain and whose copyright they do not own. In this case, they should examine whether the material and the way they wish to use it may be covered by fair use. Fair use is an exemption under U.S. copyright law that allows one to legally use copyrighted material without explicit permission of the copyright owner.

§107. Limitations on Exclusive Rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- the purpose and character of the use, including whether such use is of a 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
- the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Educational use alone is not enough to constitute fair use. In today's fast moving digital environment many of the "fair uses" are under debate. What is "fair"? As long as the use is "fair," i.e. does not infringe on the rights of the holder of the copyright, the user is not likely to be in violation of copyright; however, continuous use, selling the item or any portion of it, and/or charging for use, is most likely beyond "fair use."

Fair use guidelines that exist on the web include:

- North Carolina State University's Scholarly Communication Center's Copyright Tutorial Series on Fair Use, available at: <http://www.lib.ncsu.edu/scc/tutorial/copyuse/fairuse1.html>
- Stanford University Libraries' Copyright and Fair Use, available at: http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html

These sites should be consulted when analyzing material proposed to be digitized that may fall under the fair use category.

Moral Rights

Works of art and photographs may also enjoy moral rights. Although an institution may own copyright to a piece of literature or art, the creator of that work may retain a moral right to the work. These moral rights grant protection from derogatory treatment of the work. These rights are granted only to the original author (and cannot be transferred, although they can be waived) and are applicable only to works of visual art which exist in single copies or in multiples up to 200. The two statutory moral rights are:

- (1) the right of attribution, meaning the right to have the author's name attached to or deleted from the work;
- (2) the right of integrity, meaning the right to prevent mutilation or distortion of the work which would prejudice the author's honor or reputation.

For cultural institutions this means that it is essential to make sure the original artist's name is linked with his or her creation (appropriate metadata use can help a great deal with this) and that works be used in their entirety where possible and not be amended (digital copies should not be significantly cropped or edited). It is also important to remember that not all moral rights fall within U.S. copyright laws. In other countries such as France, moral rights may survive even after copyright expires. Moral rights require that in digitization as in other activities, the creative work being reproduced be treated in a manner so as not to compromise the artistic integrity beyond recognition or used in a context that may be objectionable to the creator or the creator's estate.

Permission to use Copyrighted Material

To use non-public domain material legally and when that use is not a fair use, you must obtain permission from the rights holder(s). If you do not know who holds the rights to the material in question, you may find the answer online through one of the following resources.

- The Getting Permission Page by Georgia Harper, Office of General Counsel, University of Texas System, available at: <http://www.utsystem.edu/OGC/IntellectualProperty/PERMISSN.HTM>
- The Copyright Clearance Center, available at: <http://www.copyright.com>
- U.S. Copyright Office, available at: <http://www.copyright.gov>

When asking for permission to use copyrighted material, you should describe clearly:

- the work you want to use (with a copy if possible);
- the scope of the project;
- where and how you intend to use the work (e.g., names of key contributors, approximate size of the project, URL, anticipated life of the project, how many users may access it, and how it is going to be distributed);
- any future use you envision; and
- the specific rights you seek (e.g., presentation, publication, general use, etc.).

In addition, you should ask the copyright owner for instructions on the wording of credit lines, the copyright notice related to their material, any other conditions they might have, and any fees that might apply. You should also ask for confirmation that they have the authority to grant permission. If they cannot confirm their authority, request that they direct you to the appropriate rights-holders. You may request them to assure in writing that your use will not, to their knowledge, infringe the rights of any other third party.

The McCain Library and Archives at the University of Southern Mississippi, in creating their digital archive "Civil Rights in Mississippi" have created an excellent toolkit for pursuing copyright permissions, available at: <http://www.lib.usm.edu/~spcol/crda/ipp/index.html>. This toolkit includes sample letters, check lists, workflow information, and a model framework for digitization of material that will necessitate extensive copyright permissions. If you are contemplating a collection that consists of materials which necessitate copyright permissions, this site will be an invaluable resource.

It is important to address copyright in the planning phase of your digitization project. It will affect the timeline of the project if permissions need to be sought and may have a strong impact on selection. Devise a system for determining copyright from the beginning of your digitization project. Make sure to document all your efforts to trace the rights-holders, since if they prove to be untraceable or unresponsive and you decide to go ahead with the project, your documentation can help to prove "good faith best efforts," or "due diligence" if original rights-holders appear and initiate legal proceedings at a later date.

In addition to assuring that they have not infringed copyright, many institutions have agreements to protect both the donors of collections and the collections themselves from users of materials who may abuse copyright. A user agreement serves to remind patrons of copyright ownership and describe the specific use of the collection or the item. Rights management statements in metadata help institutions keep track of copyright for items and collections as well.

Other Intellectual Property Rights Concerns

Copyright is the single most important property rights issue a cultural institution will face when planning their digitization project, but other rights do exist and need to be considered. These less noticeable intellectual property rights include rights of privacy, rights of publicity, and certain laws governing patents, trademarks, and trade secrets.

Rights of privacy and publicity on the Internet are largely self-regulated in the United States. Patents and trademarks for digitized material, manipulations of digitized material, and the creation of databases are controversial topics presently being debated in courts and boardrooms all over the country and may become increasingly important to cultural institutions involved in digitization as time passes.

For a comprehensive treatment of these rights management issues, consult *The NINCH Guide to Good Practice in the Digital Representation and Management of Cultural Heritage Materials* (<http://www.nyu.edu/its/humanities/ninchguide/IV/>), which is updated as events unfold in this arena. If there is any question regarding the use of a particular item, do not publish it digitally until all rights issues have been resolved and all inquiry has been exhausted.

Conclusion

Publishing your institution's materials on the Internet and hoping for the best is not a good idea. Repositories seeking to digitize materials will want to remain sensitive to copyright restrictions and to provide digital images of only those materials in the public domain and materials for which they either hold copyright, have permission from the copyright holder to use, or have exhausted all avenues possible to find the rights-holders (in which case large disclaimers stating that copyright information is not known should be affixed to all images of the material in question). Additional other property rights should be taken into account and fully scrutinized as well. When considering public access, strive to make sure that all digitized material is handled with responsibility, sensitivity, and sensibility with respect to intellectual property rights.

Further Reading

Bolinski, Dorissa, Christopher Mautner, and Timothy McLain. *Creating Acceptable Use Policies*. California: Classroom Connect, 1998.

Copyright and Art Issues <http://darkwing.uoregon.edu/~csundt/copyweb/>

Copyright Clearance Center <http://www.copyright.com>

Cornell University Legal Information Institute, *Copyright Law Materials* <http://www.law.cornell.edu/topics/copyright.html>

Franklin Pierce Law Center. "The IP Mall" <http://www.ipmall.fplc.edu/>

Gassaway, Laura N. "When U.S. Works Pass into the Public Domain." <http://www.unc.edu/~unclng/public-d.htm>

Harper, Georgia. Copyright Crash Course <http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm>

Hoon, Peggy. "Scholarly Communication at NC State" <http://www.lib.ncsu.edu/scc/main.html>

Indiana University, *Copyright Management Center* <http://www.copyright.iupui.edu/>,
Bloomington. Indiana.

McCain Library and Archives, University of Southern Mississippi, "Civil Rights in Mississippi: Intellectual Property and Privacy Information" <http://www.lib.usm.edu/%7Espcol/crda/ipp/index.html>.

McCord Hoffman, Gretchen. *Copyright in Cyberspace: Questions & Answers for Librarians*. Neal-Schuman Publishers, 2001

Minow, Mary. "Library Digitization Projects and Copyright" available at:
<http://www.llrx.com/features/digitization.htm>

Nebraska Library Commission. "Copyright Handbook: Issues for libraries and schools"
<http://www.nlc.state.ne.us/libdev/copyright/copyright1.html>.

PDInfo, *Copyright and the Public Domain*, <http://www.pdinfo.com/copyrt.htm>

Simpson, Carol Mann. *Copyright for Schools: A Practical Guide*, Third Edition. (Professional Growth Series). Ohio: Linworth, 2001.

Society of American Archivists. "Basic Principles for Managing Intellectual Property In the Digital Environment: An Archival Perspective"
<http://www.archivists.org/statements/managing-intproperty.asp>

Stanford University Libraries. *Copyright and Fair Use*
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html

Templeton, Brad. "10 Big Myths about copyright explained"
<http://www.templetons.com/brad/copymyths.html>

U.S. Copyright Office Home Page <http://www.copyright.gov/>