

Legal Issues to Consider When Digitizing Collections

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I. Introduction:

Distribution of images and writings over the Internet is a form of publication, therefore, the digitization of materials is subject to the laws of: copyright; privacy and publicity rights; donor restrictions; and licensing or trademarks.

This document is designed to assist and inform organizations about the legal issues to consider when digitizing their collections. Information in this document is not intended as legal advice and does not include all the information necessary for an institution to evaluate a business transaction or legal dispute. Specific legal issues should be address to a qualified attorney.

This document is intended to be a quick reference guide and you are advised to seek legal advice for your specific circumstances.

II. Sources:

A. Copyright

Copyright refers to the rights given to an author to reproduce, prepare derivative works, distribute copies, and publicly perform and display his/her works. For more information on copyright law review the Library of Congress' Copyright office website where you will find Circular #22 on "copyright basics"

<http://www.loc.gov/copyright/circs>

B. The Digital Millennium Copyright Act

In 1998 Congress passed the Digital Millennium Copyright Act which makes changes in U.S. copyright law to address the digitally networked environment. The Association of Research Libraries provides a primer on the Digital Millennium Act on their website:

<http://www.arl.org/info/frn/copy/primer.html>

C. Privacy and Publicity Rights

Issues pertaining to privacy and publicity may arise when an organization contemplates the digitization of letters, diary entries, or photographs found in their collections. Because two or more people are often involved (e.g., letter writer and receiver) photographs and letters represent the types of documents in which issues of privacy and publicity emerge with some frequency.

D. Public Domain

Works are said to be in the public domain when copyright laws no longer protect them. An item will fall into the public domain if it was published before 1923. It is important to remember that items are protected whether they have been published or not. This protection lasts for the life of the author + 70 years. A helpful chart of when works pass into the public domain by Laura N. Gassaway, director of the Law Library & Professor of Law, University of North Carolina, Chapel Hill is available at:

<http://www.unc.edu/~unclnq/public-d.htm>

E. Fair Use

Fair Use provisions of the U.S. copyright law allows people and organizations to reproduce copyrighted materials under certain circumstances without receiving permission from the author or owner of the copyright. Depending on the circumstances, copying may be considered fair for the purpose of criticism, comment, news reporting, teaching, scholarship or research. See the U.S. Copyright office circular 21 "Reproduction of Copyrighted Works by Educators and Librarians"

<http://www.loc.gov/copyright/circs>

F. Sony Bono Copyright Term Extension Act of 1998

This act extends the length of copyright protection afforded by works created by both

individuals and corporate copyright holders by 20 years under the US Copyright Law. Previously life + 50; now life + 70. See the U.S. Copyright office circular #15A "Duration of Copyright: Provisions of the Law dealing with the Length of Copyright Protection"

III. **Questions to Ask Yourself when Digitizing your Collection**

A. **Where do I Start?**

Before digitization begins each item in the collection must be reviewed to determine if you have the right to distribute it. Reviewing each item before you invest in the cost of digitizing will save you any losses associated with having to take the collection down after it has been posted.

- B. Start with materials you know are not protected by copyright. You may already have the right to distribute many of the items in your collection. You will have the right to distribute if you hold the copyright, the items are in the public domain, or the donor has given you the right to distribute them. If you do not have the right to distribute, make every effort to involve any donors who may hold the copyright. By writing a letter to the donor or donor's family you may be able to obtain permission to distribute the item. Copyright may have been passed on from the original creator to heirs who are not identified in the available documentation. You must be able to provide detailed documentation of your effort to contact the holders of the copyright. This documentation is for your protection if you decide to digitize an item after an unsuccessful attempt to contact the copyright holder.

If the donor or donor's family does not hold the copyright, the University of Texas has generated a list of collective rights organizations that can be contacted for assistance in locating copyright holders. The list includes contact information for various formats of materials. <http://www.utsystem.edu/OGC/IntellectualProperty/permisn.htm>
The Library of Congress also provides links to Copyright Internet Resources at: <http://lcweb.loc.gov/copyright/resces.html>

- C. If a well documented search has been performed and the copyright owner still unidentifiable the organization may wish to assume the risk only if the counterbalancing benefit is significant.

Organizations should develop their own comprehensive copyright policies. These policies must state when the organization is willing to assume the risk of digitizing materials in which copyright owners are unidentifiable.

D. **Is the work protected by copyright?**

There are several ways to investigate whether a work is under copyright protection and, if so, the facts of the copyright. The U.S. copyright office circular #22 "How to Investigate the Copyright Status of a Work" is a good reference tool on how to search the Copyright Office catalogs and other records. <http://www.loc.gov/copyright/circs>
The use of a copyright notice is no longer required under the U.S. law. The use of the notice is still relevant on older works. The U.S. circular #3 "Copyright Notice" describes the proper form and placement of the copyright notice.

<http://www.loc.gov/copyright/circs>

E. **Does the work fall into the public domain?**

An item will fall into the public domain if it was published before 1923. It is important to remember that items are protected whether they have been published or not. This protection lasts for the life of the author + 70 years. A helpful chart of when works pass into the public domain by Laura N. Gassaway, director of the Law Library & Professor of Law, University of North Carolina, Chapel Hill is available at: <http://www.unc.edu/~unclng/public-d.htm>

F. **Is the work a product of the U.S. government?**

Work that is produced by employees of the federal government as part of their job is in the public domain and therefore not protected by copyright.

G. **Is the work a product of your state, county, or local government?**

For works produced by state and local government employees' check with your attorney general, county attorney, or city attorney's office.

H. **Does digitization of the work constitute Fair Use?**

Library's Special Rights:

Libraries are authorized to exercise special rights in addition to fair use; for purposes of archiving lost, stolen, damaged or deteriorating works; making copies for library patrons; and making copies for interlibrary loan. For information on these topics visit the University of Texas website at:

<http://www.utsystem.edu/OGC/IntellectualProperty/l-108abc.htm>

<http://www.utsystem.edu/OGC/IntellectualProperty/l-108de.htm>

<http://www.utsystem.edu/OGC/IntellectualProperty/l-108g.htm>

Distance Education:

Guidance is provided on the application of fair use principles by educational institutions, educators, scholars, and students who wish to use copyrighted works for distance education at the University of Texas website:

<http://www.utsystem.edu/OGC/IntellectualProperty/distguid.htm>

See the U.S. Copyright office circular 21 "Reproduction of Copyrighted Works by Educators and Librarians" <http://www.loc.gov/copyright/circs>

I. **If the material is protected by copyright you will need to obtain permission to distribute the work.**

University of Texas has generated a list of collective rights organizations that can be contacted for assistance in locating copyright holders. The list includes contact information for various formats of materials.

<http://www.utsystem.edu/OGC/IntellectualProperty/permisn.htm>

The Library of Congress also provides links to Copyright Internet Resources at:

<http://lcweb.loc.gov/copyright/resces.html>

If after conducting a thorough search for the copyright owner one isn't found this does not eliminate the liability for copyright infringement.

Remember that a work is protected by copyright unless it can be shown that it is not. If a well documented search has been performed and the copyright owner is still unidentifiable the institution may wish to assume the risk only if the counterbalancing benefit is significant.

J. **Was a deed of gift drawn up when the collection was acquired?**

If so, did the donor give and assign the library all rights of copyright?

- If yes, the collection can be digitized without further approval.
- If no, you will need to contact the donor or donor's family to receive permission to distribute.

Did the donor give permission to the library to make copies for users of materials?

- If yes, the collection can be digitized without further approval.
- If no, you will need to contact the donor or donor's family to receive permission to distribute.

If a deed of gift was not acquired at the time of acquisition can the donor, or donor's family be contacted to receive permission?

K. **If I have the rights to make photocopies does that mean I have rights to distribute the work on the Internet?**

You may have permission to make copies for users of materials but the copyright owner may not have transferred the actual copyright to the institution.

L. **Special Situations-Photographs**

Have you received permission from the photographer to distribute the photograph?

If yes, did the photographer receive the rights from the subjects to distribute their image?

- If yes, the photograph can be digitized without further approval.
- If no, you will need to make an effort to contact the subjects in the photograph for approval.

If no, you will need to contact the photographer to obtain permission.

Do you have permission from the subjects in the photograph to distribute their

image?

If yes, do you have permission from the photographer to distribute the photograph?

- If yes, the photograph can be digitized without further approval.
- If no, you will need to contact the photographer to obtain permission.

If no, you will need to make an effort to contact the subjects in the photograph for approval.

Did the photographer receive the rights from the subjects to distribute their image?

- If yes, the photograph can be digitized without further approval.
- If no, you will need to make an effort to contact the subjects in the photograph for approval.

It may be difficult to trace the subjects in group photographs, if the subjects are unidentifiable it will probably be okay to distribute the image. You must be able to provide detailed documentation of your effort to contact the holders of the copyright. This documentation is for your protection if you decide to digitize an item after an unsuccessful attempt to contact the copyright holder(s).

The more famous the person the less right they have to privacy. Often times the photograph may be distributed without approval.

M. Special Situations-Personal Letters**Do you have permission from the author of the letter to distribute the document?**

If yes, do you have permission from the addressee of the letter to distribute?

- If yes, the letter can be digitized without further approval.
- If no, you will have to make an effort to contact the addressee.

If no, you will need to make an effort to contact the author for permission.

Do you have permission from the addressee of the letter to distribute the document?

If yes, do you have permission from the author of the letter to distribute?

- If yes, the letter can be digitized without further approval.
- If no, you will have to make an effort to contact the author for approval.

If no, you will need to receive permission from both the author and the addressee.

Is there any personal or sensitive information in the letter?

It is best to contact legal council with questions concerning sensitive content in the letter.

You must be able to provide detailed documentation of your effort to contact the holders of the copyright. This documentation is for your protection if you decide to digitize an item after an unsuccessful attempt to contact the copyright holder(s).

N. Special Situations-Diaries**Do you have permission from the owner of the diary to distribute the work?**

If yes, does the owner have permission from the author to distribute?

- If yes, the diary may be digitized without further approval.
- If no, you will have to make an effort to contact the author for approval.

If no, you must make an effort to contact the owner for approval.

Do you have permission from the author of the diary to distribute the work?

- If yes, the diary may be digitized as long as the author still holds the rights to distribute. If the author no longer holds the rights the owner will need to be contacted.
- If no, you will have to make an effort to contact the author for approval.

Is there any personal or sensitive information that may be harmful to distribute in the diary?

It is best to contact legal council with questions concerning sensitive content in the diary.

- O. **Special Situations-Music**
Almost anything to do with music is protected by intellectual property rights in one form or another. Distribution of music must have the artist's permission and if requested by the artist a royalty payment may be required. The artists and/or their rights organizations may grant permission to distribute their music. "A Guide to Copyright for Music Librarians" is available at <http://www.lib.jmu.edu/org/mla/>

IV. **Frequently Asked Questions:**

- A. **Can I make digital preservation copies of archived materials?**
Yes, under certain circumstances up to three copies may be made for preservation purposes. The article "New Law for Preservation of Library Materials: *Copyright Legislation Clarifies Digital Preservation Activities*" from Indiana University-Purdue University Indianapolis gives a thorough review of the law.
<http://www.copyright.iupui.edu/digpreserv.html>
- B. **If there is no copyright notice, does that mean there is no copyright?**
The use of a copyright notice is no longer required under the U.S. law. The use of the notice is still relevant on older works. The U.S. circular #3 "Copyright Notice" describes the proper form and placement of the copyright notice.
<http://www.loc.gov/copyright/circs>
- C. **Does copyright give the owner an absolute monopoly?**
Copyright is an exclusive right but it is limited in various areas. Authors control only rights specified under the copyright law. Duration and fair use limit copyright.
- D. **If I receive permission to distribute the work does that mean I have the copyright?**
Donors hold the copyright for any donated material unless otherwise specified.
- E. **What are Cultural Property Rights?**
Cultural property is the "real property," which is comprised of the land, the bones and ceremonial burial items of a culture which have been recovered in the exploration of its history. Cultural property is also the intellectual property, the ideas, practices, languages, music and the writings of a culture. Cultural property belongs to the group rather than to an individual. For more information on cultural property
<http://www.hanksville.org/sand/>
- F. **What is NAGPRA?**
Native American Graves Protection and Repatriation Act of November 16, 1990 is a statute that requires federal agencies and museums that receive federal funds to consult with Indian tribes, Native Alaskan entities, and Native Hawaiian organizations regarding the proper care and disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The act defines cultural patrimony as an object having an ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American.
Before digitizing any of the above mentioned items determine if the proper entities have been notified regarding their disposition. Many Native American groups consider their cultural artifacts to be communal property.