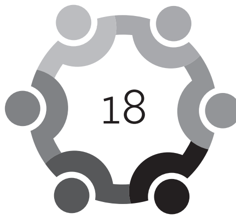

COPYRIGHT AND DIGITAL PRESERVATION

Legal and Administrative Issues

Carla S. Myers

U.S. copyright law permeates many aspects of libraries' preservation services. The well-prepared librarian or archivist will be ready to address these issues and ensure that his or her institution's policies and practices comply with copyright law. Doing so helps to mitigate legal risk. It also helps ensure adherence to the American Library Association's Code of Ethics, which states that librarians will "respect intellectual property rights and advocate balance between the interests of information users and rights holders."[1]

The first step that librarians and archivists can take to effectively address the copyright issues related to digital preservation is to learn about the law. The Copyright Act of 1976 (17 U.S. Code §§ 101–1332) provides the basic framework for current copyright law. Librarians and archivists don't need to become experts on all aspects of this act to make effective applications of it. Rather, they should develop a knowledge of the basics of the copyright law and the exceptions that are relevant to digital preservation issues.

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Basics of U.S. Copyright Law

Securing Copyright Protection

U.S. copyright law states that copyright protection is instantly granted for "original works of authorship fixed in any tangible medium of expression."[2] Only certain types of works are eligible for copyright protection, however. They include

(1) "literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works."[3]

The Scope of Copyright Protection

Once a person creates a work that is eligible for copyright protection, U.S. copyright law grants him or her "exclusive rights to do and to authorize any of the following:"[4]

(1) to make copies of the work;
(2) to make "derivatives" of the original work, which are "work[s] based upon . . . preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted;"[5]
(3) to distribute copies of the works to others;
(4) to publicly perform "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures;"[6]
(5) to publicly display "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works;"[7] or,
(6) "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[8]

With regard to digital preservation, the display of a copyrightable work such as a photograph, manuscript, or painting on a website or the performance of a

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sound recording or audiovisual work on a website could be considered a public display or performance of the work.

The Duration of Copyright Protection

The duration of copyright protection for works created on or after January 1, 1978, depends on the authorship of the work. Works created by a single individual author are protected "for a term consisting of the life of the author and 70 years after the author's death."[9] Works of joint authorship, which is defined in U.S. Copyright law as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,"[10] receive a term of copyright protection that lasts for 70 years after the death of the last surviving author. The copyright in a work published anonymously, under a pseudonym, or as a "work made for hire," which U.S. copyright law defines as "a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire,"[11] lasts for a term of "95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first."[12]

For works created before January 1, 1978, determining the duration of copyright protection can be a complex process. Works created between January 1, 1923, and December 31, 1977, will have copyright protection if the author secured copyright in the work in compliance with the law as it was written at the time. Originally, works published in compliance with the law during this period were granted a 28-year term of protection, with the option for another 28-year term renewal period (56 years total). The term of protection provided to works created during this time was extended to 75 years under the 1976 Copyright Act, and the Sonny Bono Copyright Term Extension Act of 1998 added another 20 years, for a total term of protection of 95 years. None of the works published in compliance with the law during this time will enter the public domain until January 1, 2019.

If the creators of copyrightable works did not comply with the requirements of the law in place during this time, then the work passed into the public domain. The U.S. Copyright Office's (USCO) *Circular 22: How to Investigate the Copyright Status of a Work* (https://www.copyright.gov/circs/circ22.pdf) provides guidance on how to determine the copyright status of a work

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published during this time, as does the document "Copyright Term and the Public Domain in the United States" created by Peter Hirtle (https://copyright.cornell.edu/publicdomain).

For works created before January 1, 1923, the copyright status of a work will depend on its publication status. The USCO states that "the U.S. copyright in any work *published or copyrighted* prior to January 1, 1923, has expired by operation of law, and the work has permanently fallen into the public domain in the United States."[13] For unpublished works created prior to January 1, 1923, the term of copyright protection is generally the same as the term for works created after January 1, 1978. This means that an *unpublished* work created by a single author still has copyright protection if the author passed away less than 70 years ago, whereas the copyright in a *published* work created by the same person may have expired. For example, say an author who passed away in 1950 wrote two book manuscripts in the early 1920s. One of the manuscripts was published in 1922, and another was never published, but was found among his personal papers when he passed away. The book published in 1922 has officially passed into the public domain, but the unpublished work is granted protection for the life of the author plus 70 years, meaning its term of protection will last through 2020 (1950 + 70 = 2020). Hirtle's document "Copyright Term and the Public Domain in the United States" provides specific information for librarians and archivists to consider when determining the copyright status of unpublished works.

Expiration of Copyright Terms

The copyright in a work "run[s] to the end of the calendar year in which they would otherwise expire."[14] For example, the copyright in a work whose author passed away on March 1, 1990, will not end on March 1, 2060. Rather, it will extend through December 31 of that year and pass into the public domain on January 1, 2061.

Works That Are Not Eligible for Copyright Protection

Certain works, often referred to as "public domain" works, don't have copyright protection due to the date of their creation, the nature of their authorship, or their content.

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Date of Creation

As previously stated, works published or copyrighted in the United States prior to January 1, 1923, no longer have copyright protection because their copyright term has expired. Barring any new legislation from Congress extending the term of copyright protection, this date should begin to advance yearly, starting in 2019, when works published in 1923 will pass into the public domain. In 2020, works published in 1924 will pass into the public domain, and so forth. Additionally, works created by authors who passed away more than 70 years ago have also passed into the public domain. For example, at the time this chapter was written (2017), works published by authors who passed away before 1947 (2017 – 70 = 1947) have passed into the public domain.

Nature of Authorship

Under Section 105 of U.S. copyright law, works created by "an officer or employee of the United States Government as part of that person's official duties"[15] are not eligible for copyright protection. Examples of these types of works provided by Kenneth D. Crews include "reports written by members of Congress and employees of federal agencies, presidential speeches, pamphlets from the National Parks Service, and websites developed by federal agencies."[16]

Composition

Section 17 U.S.C. § 102(b) of U.S copyright law tells us that ideas and discoveries as well as procedures, methods, and processes are not eligible for copyright protection, As such, works comprised solely of these types of works are also in the public domain.

Copyright Exceptions

Black's Law Dictionary states that a "statutory exception" is "a provision in a statute exempting certain persons or conduct from the statute's operation."[17] Sections 107–122 of U.S. copyright law provide exceptions to the rights granted to the creators of copyrightable works in Section 106 of the law. Not all of these exceptions are applicable to digital preservation practices. The ones that librarians and archivists involved with digital preservation should be most familiar with are Section 107—Limitations on Exclusive Rights: Fair Use; Section 108—Limitations on Exclusive Rights: Reproduction by Libraries and Archives; Section 117—Limitations on Exclusive Rights: Computer Programs; and Section § 1201—Circumvention of Copyright Protection Systems.

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Section 107—Limitations on Exclusive Rights: Fair Use

The fair use statute reads as follows:

> 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 . . . , 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—
>
> 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; and
> 4. 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.

Several recent court cases can provide librarians and archivists with guidance on applying the fair use exception for preservation purposes, including *Authors Guild v. Hathi Trust* (755 F.3d 87 [2d Cir. 2014]) and *Authors Guild v. Google* (804 F.3d 202 [2d. Cir. 2015]). Guidance on applying fair use for digitization projects can also be found in the "Code of Best Practices in Fair Use for Academic and Research Libraries" (the Code) put forward by the Association of Research Libraries. The Code "identifies . . . the library community's current consensus about acceptable practices for the fair use of copyrighted materials"[18] and explores specific situations where libraries may need to consider fair use when providing services and resources to patrons. Situation Four of the Code specifically addresses "Creating Digital Collections of Archival and Special Collections Materials." Here the Code states, "It is fair use to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts."[19] Pages 20–21 of the Code identify "enhancements," which are steps libraries and archives can take to strengthen their claim of fair use, and "limitations" that librarians and archivists should consider when utilizing fair use for digitization projects.

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While the Code does not hold the force of law, it does outline applications of fair use that are generally seen as acceptable and reasonable within the library community. As such, it can provide valuable guidance on the application of fair use in these situations.

Fair Use Tools and Resources

Tools have been developed by the library community to help with fair use determinations, including:

Fair Use Evaluator: http://librarycopyright.net/resources/fairuse/index.php. Developed by Michael Brewer and the Copyright Advisory Subcommittee of the ALA's Office for Information Technology Policy, the Evaluator can help users work through fair use determinations and "collect, organize, and document the information they may need to support a fair use claim."[20]

Fair Use Checklists: Fair use checklists help users work through the four factors of fair use by checking off common examples of situations that favor fair use and oppose fair use. The original Fair Use Checklist developed by Kenneth Crews can be found online at https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf. Completed copies of the checklist should be retained as documentation of the decision that was made at the time.

Section 108—Limitations on Exclusive Rights: Reproduction by Libraries and Archives

Section 108 allows libraries and archives to make copies of works for, among other things, preservation purposes. To be able to take advantage of the exceptions found in Section 108, a library or archive must first meet several requirements that are outlined in Section (a):

1. Copies of works that are made and distributed to others are done so "without any purpose of direct or indirect commercial advantage."[21] Generally, it is considered acceptable by the library and archive community to recover costs associated with copying, including materials, operational costs, and staff time. A direct commercial advantage could come from charging fees that amount to more than these costs.
2. The library or archive makes its collections "open to the public, or . . . available not only to researchers affiliated with the library or archives

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or with the institution of which it is a part, but also to other persons doing research in a specialized field."[22]

3. If the original copy of the work carries a copyright notice, that notice is included on any reproductions made by the library, or "if no such notice can be found on the copy,"[23] a notice is affixed to the work stating that it "may be protected by copyright."[24]

Section 108 sets forth different rules for making copies of works depending on their publication status.

Making Copies of Unpublished Works

Subsection (b) of Section 108 outlines options for making copies of *unpublished* works. It states that a library or archive can make "three copies . . . of an unpublished work . . . for purposes of preservation and security or for deposit for research use in another library or archive"[25] so long as

- the unpublished work being reproduced is currently held in the collections of the library or archives that is making the copy, and
- digital copies of the work are not being "distributed in that format"[26] and are not being "made available to the public in that format outside the premises of the library or archives."[27]

There is much debate within the library and archival community regarding the definition of this term "premises." Some institutions adopt a strict interpretation and only make digital copies of works made under Section 108(b) and 108(c) available to users who are working within the same building where the digital copy was made. Other institutions choose to make digital copies available to users (often using IP identification) at any "premises" affiliated with them; for example, branch campuses and libraries. Other libraries and archives, taking a global view of their "premises" based upon the location of their users (especially in distance education situations), will make works digitized under Section 108 available online to users who are affiliated with their institution, though often they require these users to log in to view the works using a user name and password issued to them by the library or archive. Libraries and archives wishing to utilize the provisions of Section 108 for digitization projects will need to make a thoughtful risk-management decision, preferably in conjunction with legal counsel representing their institution, regarding how they wish to define the word "premises."

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Making Copies of Published Works

Subsection (c) of Section 108 applies to the preservation of *published* works. It states that a library or archive can make "three copies . . . of a published work . . . for the purpose of [replacing] . . . a copy . . . that is damaged, deteriorating, lost, or stolen."[28] Up to three copies of a published work can also be made "if the . . . format in which the work [exists] has become obsolete"[29] so long as

> (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and[30]
>
> (2) any such copy . . . that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.[31]

The law tells us that "a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."[32]

When making copies of works for preservation purposes under Section 108(b) and Section 108(c), there are no restrictions on the types of copyrighted works that can be copied. This is in contrast to copies made under Section 108 for private study (Section 108[d]) or interlibrary loan (Section 108[e]), where certain types of works are excluded. See Section 108(i) for more information.

Digitization during the Last Twenty Years of Any Copyright Term

Subsection (h) of Section 108 deserves special attention because it allows libraries, archives, and "nonprofit educational institution[s] that functions as such"[33] to "reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord"[34] of a *published* work "or portions thereof, for purposes of preservation, scholarship, or research . . . during the last 20 years of any term of copyright of [the] work"[35] so long as the "library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs [below] apply":[36]

> (A) the work is subject to normal commercial exploitation;
>
> (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
>
> (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.[37]

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Section 108 Tools and Resources

The "Section 108 Spinner" developed by Michael Brewer and the Copyright Advisory Subcommittee of the ALA's Office for Information Technology Policy provides users with information about how Section 108 can be utilized by libraries and archives when making copies of works for certain purposes, including preservation: http://librarycopyright.net/resources/spinner/index.html. It also provides users with a form outlining the requirements of Section 108 that they can complete and save "that could be useful in supporting [his or her] use of Section 108, should it ever be called into question [by the rights holder]."[38]

The "Copyright Checklist for Libraries: Copies for Preservation or Replacement" created by Kenneth Crews can also help librarians and educators work through the requirements of Sections 108(b) and (c) to help ensure compliance with the law: https://web.archive.org/web/20131210220529/http:/copyright.columbia.edu/copyright/files/2009/10/copyrightchecklist108preservation.pdf. As with the Fair Use Checklist, completed copies of this checklist should be retained as documentation of the decision that was made at the time.

Section 117—Limitations on Exclusive Rights: Computer Programs

Section (a) of this exception addresses the "Making of Additional Copy or Adaptation by Owner of Copy" of a computer program and states:

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Under this exception, libraries and archives can make archival copies of computer programs they legally own, as well as make adaptations of those programs to allow them to run on a machine. This exception can prove useful for libraries that are looking to make archival copies of software, as well as adapt

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older software to run on modern machines. However, the statute is somewhat limiting in that the new copies or adapted copies can be used for archival purposes only and cannot be shared with others.

Section 1201—Circumvention of Copyright Protection Systems

Section 1201 of U.S. copyright law is part of the Digital Millennium Copyright Act (DMCA). It was passed by Congress in 1998, and Section 1201 (1)(A) states that "no person shall circumvent a technological measure that effectively controls access to a work protected under this title." As such, the application of the DMCA must be considered when libraries and archives are looking to make copies of digital works that are protected by technology controls such as digital rights management software.

Much debate surrounds the application of the DMCA in conjunction with the exceptions found in U.S. copyright law. Taken at its face value, it would seem that libraries and archives would be violating the DMCA if they circumvented the technological measures put into place by the rights holder to protect the digital work. However, arguments have been made (see *Chamberlin Group Inc. v. Skylink Technologies, Inc.,* 381 F.3d. 1178 [Fed. Cir. 2004]) that the provisions found in the DMCA only apply when unauthorized copies of works are being made, and that if a work is being copied in compliance with the law (e.g., under one of the exceptions found in U.S. copyright law), a violation of the DMCA will not occur. The courts have been somewhat divided on this issue. As such, how a library or archive decides to proceed under the DMCA will be a risk-management issue that must be carefully considered. The DMCA does include a provision that requires the librarian of Congress, working closely with the Register of Copyrights, to consider if there are groups "adversely affected by the prohibition"[39] found in Section 1201(1)(A) that limits their ability "to make noninfringing uses [of] . . . a particular class of copyrighted works."[40] Every three years the librarian of Congress puts forward regulatory exceptions to Section 1201(A) that, "pursuant to the rulemaking conducted under subparagraph (C), . . . shall not apply to such users with respect to such class of works for the ensuing 3-year period."[41] Essentially, this means that for a period of three years, certain groups of users that have been determined to be negatively impacted by the anti-circumvention provision found in the DMCA are given an exception in regard to certain types of uses of certain types of works. For example, in the past, exceptions have been granted for educators wishing to break the encryption found on motion pictures in order to use portions of those works in film studies courses or as part of massive open

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online courses (MOOCs). At this time of writing (2017), no such exception exists for libraries and archives wishing to make digital preservation copies of works. Librarians and archivists should consider getting involved in future rule-making processes in order to advocate for such an exception in the future.

A Special Note Regarding Sound Recordings and Copyright Law

Sound recordings became eligible for federal copyright protection on February 15, 1972. Sound recordings created before this date may be protected under state law and common law copyright. Hirtle, Hudson, and Kenyon tell us that "common law copyright is a mishmash of state-based law deriving in some cases from formal state copyright statutes, in other cases from related laws (such as antibootlegging legislation), and from judicial decisions. It can vary from state to state."[42] As such, when digitizing pre-1972 works, librarians and archivists may first need to check state and common copyright law to determine the scope of protection the work may hold. More information about pre-1972 sound recordings can be found in the document "Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis," which was prepared for the National Recording Preservation Board of the Library of Congress in 2009 by Peter Jaszi and Nicholas B. Lewis (https://www.loc.gov/programs/static/national-recording-preservation-plan/publications-and-reports/documents/pub146.pdf).

Working through Copyright Issues— A Workflow for Digitization Projects

For digital preservation projects, a variation of the "Framework for Analyzing Any U.S. Copyright Problem" (http://hdl.handle.net/1808/22723) that was developed by Kevin L. Smith and Lisa Macklin can be used to work through copyright issues. Called "A Framework for Analyzing Copyright and Digitization Questions," the five primary questions this checklist asks are:

1. Is the work protected by copyright?
2. Who holds the copyright?
3. Is there a license that covers the use?
4. Is there a specific exemption in copyright law that covers the use?
5. Can permission be obtained from the copyright owner for the use?

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Each question contains sub-questions that will aid users in analyzing the copyright issues related to their digitization project. A copy of this checklist can be found in appendix A of this book.

Breaking through Layers of Protection

There may be situations where certain works have several different layers of copyright protection. For example, in a sound recording of a musical work being performed at a recital, or a video recording of a dramatic work such as a play that was performed by students in an acting class, there may be copyright protection in the sound or video recording, as well as copyright protection in the musical work that was recorded or the dramatic work that was performed. In these situations, the person making the determination regarding copyright may need to work through the questions on Smith and Macklin's checklist for each of these works separately.

Special Considerations

Copyright considerations are just one small part of digitization projects. Actions taken at other stages can help make copyright decisions easier. They include the following ones.

Donation Agreements/Deeds of Gift

When works are being donated to a library or archive, an agreement should be entered into with the donor outlining if any transfer of copyright is taking place and, if so, what rights are being transferred and in what capacity (e.g., exclusive or nonexclusive rights). When a transfer of rights is occurring, the library or archive should ensure that the person donating the materials is the copyright holder or is authorized to transfer rights. If the person donating the materials is unwilling or unable to transfer all of the rights, the library or archive should see if, at the time of donation, they can obtain permission for digitization of the materials later. The Society of American Archivists provides an excellent overview of the components of donation agreements and deeds of gift that can help guide librarians and archivists through this process at https://www2.archivists.org/publications/brochures/deeds-of-gift.

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Rights Statements

As digitized works are made available to users, it is important to convey to them the copyright status of the works and the ways in which they can be reused by them. This can be accomplished by attaching rights statements to the works. RightsStatements.org, a joint initiative of Europeana and the Digital Public Library of America, is a valuable resource that libraries and archives can consult to learn more about rights statements. The initiative also provides "institutions with simple and standardized terms to summarize the copyright status of Works in their collection and how those Works may be used."[43]

Working with Legal Counsel

Libraries and archives should view their institution's legal counsel as partners who can provide valuable advice and guidance at all stages of the digitization process. Attorneys can help with drafting donation agreements and deeds of gift, assist institutions in determining which exceptions are best suited to digitization projects based on the types of works to be digitized, and help draft copyright policies for digitization projects that will enable libraries and archives to accomplish their goals while at the same time ensuring minimal legal risk for the institution.

Perhaps one of the areas where legal counsel can be most helpful in assisting librarians and archivists is in making risk-assessment decisions regarding how digitized works are made available to the public or shared with other institutions. The decisions to make digitized works freely available to the public online, to provide restricted access based on affiliation with the library or archive, or to restrict access to works may need to be made on a case-by-case basis, taking into consideration both the type of work being digitized and, for those works still protected by copyright, the exception utilized in making the digital copy. Attorneys can help librarians and archivists decide what type of access may be most appropriate, and they can provide advice and guidance on practices that can help mitigate claims of infringement, should these arise.

Risk Management Practices

Any time one of the exceptions found in U.S. copyright law is used to digitize works protected by copyright, the institution performing the digitization will be at risk of claims of copyright infringement. Specific steps that libraries and archives can take to mitigate risk include the following ones.

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Have a Digitization Copyright Policy

Libraries and archives may wish to consider developing a copyright policy for large-scale digitization projects. These policies should be tailored to the specific types of works being digitized as part of a project, and they should help those performing the digitization to make thoughtful determinations regarding the law for each work being digitized. The copyright policy developed by the University of California at Santa Cruz for the materials held in the Grateful Dead Archives is an example of a high-quality copyright digitization policy: https://www.gdao.org/policies.

Identify Those Most Likely to Object to the Digitization of the Works

People are likely to object to the digitization and online distribution of works for two reasons: they are the rights holder and feel that the digitization is infringing upon them, or they have privacy concerns regarding the availability of the works. Kevin Smith states that "ask[ing] permission from the people or organization that would be most likely to object to the digital display"[44] of the work can help mitigate risk. He emphasizes that "it will usually be impossible or impractical to identify every rights holder and ask permission, and no project need depend on meeting such an impossible standard."[45] Rather, seeking permission to digitize works, when possible, can help to "reduce the number of likely plaintiffs and . . . head off those who seem most likely to object as part of an overall risk-management strategy."[46]

Be Prepared to Respond to Takedown Notices

A takedown notice is a request to remove an item from a website or a digital collection. Libraries and archives should make readily available the online contact information (name, phone number, and e-mail) of an employee who can field these requests and be prepared to respond to them. Libraries and archives should be prepared to honor takedown requests put forward by rights holders, but they can always decide later to make the work openly available to the public online after deciding that the person who brought the complaint is likely not the rights holder or that other concerns that prompted the takedown request are not necessarily valid. Taking down the work from a publicly available website at the onset of the conversation can demonstrate to the complainant that the library or archive respects his or her concerns and is willing to discuss them in good faith.

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Orphan works can pose a special problem for digitization projects. David Hansen states that "an orphan work has two properties: It is under copyright, and diligent effort cannot identify the copyright holder."[47] If the digitization of an orphan work falls within the scope of one of the exceptions found in U.S. copyright law, then it can be digitized. However, the rights holder of the work may later come forward and identify himself after finding his work being made available online. Providing rights holders an opportunity to start a dialogue regarding the digitization and open availability of the work online could allow the library or archive to foster a relationship with the individual that would allow the work to continue to exist as part of the digital collection. The library may also be able to get meaningful information from the rights holder that allows it to add quality metadata to the work (e.g., the creator's name, the date of creation), as well as help the rights holder identify license terms (e.g., a Creative Commons license) that can be attached to the work that permit its reuse by the library, as well as by third-party users.

Privacy Rights

Libraries and archives may get takedown requests for reasons not pertaining to copyright. Takedown notices may also come from people who identify with a digitized work and have privacy concerns; for example, a person whose image has been captured as part of a photograph, or whose private information is included in written correspondence. Libraries and archives should have a plan in place for how they will respond to these requests in a way that shows respect for the concerns brought forward by those impacted by the sharing of sensitive works, while at the same time balancing the public benefits of making works available for research, scholarship, and sharing.

Cultural Considerations

Some countries provide intellectual property protection for their cultural heritage. A report published by the World Intellectual Property Organization (WIPO) states that:

> Indigenous cultural and intellectual property rights include the right for Indigenous people to:
>
> - Own and control Indigenous cultural and intellectual property
> - Be recognized as the primary guardians and interpreters of their cultures

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- The right to authorize or refuse the use of Indigenous cultural and intellectual property according to Indigenous customary law
- Maintain the secrecy of Indigenous knowledge and other cultural practices
- To be given full and proper attribution for sharing their heritage.[48]

While the United States does not have formal laws recognizing indigenous cultural and intellectual property rights, librarians and archivists may wish to consider them as a matter of ethics when they are digitizing works related to the culture of an indigenous people. This could include reaching out to members of the culture to seek their input on the project.

FERPA Protections

"The Family Educational Rights and Privacy Act (FERPA) is a federal privacy law that gives . . . certain protections with regard to . . . education records."[49] FERPA protection can extend to student assignments. If a library or archive is considering digitizing work that was created by students as part of class assignments, including but not limited to research papers, artistic works, recital recordings, and photography, the library should work with its legal counsel to determine if a FERPA waiver should first be obtained from the students who created it.

Other Intellectual Property Considerations

Patent law, trademark law, and even trade secret law are other areas of intellectual property law that may also need to be considered as part of digitization projects. If librarians or archivists feel that works they are interested in digitizing may fall into one of these categories, they should consult with their institution's legal counsel for advice on how best to proceed.

Opportunities for Relief

Should a library or archive be sued for copyright infringement as a result of digitizing protected works, U.S. copyright law does state that "the court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was

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a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords."[50] This provision may be enough to encourage libraries and archives to rely exclusively on fair use when undertaking digitization projects, and while this provision does not free libraries and archives from all legal liability, it can provide increased confidence in moving forward with digitization projects that can create some legal risk for the institution.

Remembering the Mission

In its statement on "Copyright: An Interpretation of the Code of Ethics," the American Library Association (2014) states:

> Copyright law provides a copyright holder the rights to make copies of the work, create derivatives, distribute the work to the public, and perform or display the work in public. Copyright law also provides numerous specific exceptions for libraries, archives, and nonprofit educational institutions. Depending on the nature of the institution, these exceptions may include the ability to make copies for users, preserve and replace copies of works, and perform or display works in the course of teaching. Libraries and their parent institutions have a responsibility to promote and maintain policies and procedures that are consistent with their ethical obligations, their institutional missions, and the law, including copyright law. Such policies and procedures should respect both the rights of copyright holders and the rights of users of copyrighted works.

There will always be a certain degree of legal risk associated with making copyright decisions as part of digitization projects, but this risk can be mitigated by making thoughtful applications of the exceptions found in U.S. copyright law. Libraries and archives should not ignore copyright considerations when undertaking digitization projects, nor should they let their fear of being sued prevent them from undertaking digitization projects that can preserve important cultural works and provide a valuable resource for society.

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NOTES

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