

# COPYRIGHT: THE ARCHIVIST AND THE LAW HANDBOOK

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NOT FOR CIRCULATION BEYOND WORKSHOP REGISTRANTS

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APPENDIX A: OCLC Research. *Well-intentioned practice for putting digitized collections of unpublished materials online*

NOT FOR CIRCULATION BEYOND WORKSHOP REGISTRANTS

**DISCLAIMER:** The instructor is not a lawyer, and is not offering legal advice. The materials provided with this workshop are not presented as legal advice but as an outline of key copyright concepts. You should familiarize yourself with copyright laws and recognize that it may be necessary for you to consult with your institutional legal counsel for advice or assistance in specific cases.

1 GENERAL RULES AND GUIDELINES

- GR 1. Salutary example of speeding. Working with copyright as a matter of RISK MANAGEMENT. But remember that archives work with copyright owners as donors who might wonder the following about the archives: “If they are willing to break copyright laws, do you think they will treat you honestly?”
- GR 2. The workshop’s goal is familiarization with the law, but remember that the law is only the DEFAULT TEMPLATE which can be “overwritten” by separate agreements or “licences” in most instances. Copyright law is highly FACT AND CASE SPECIFIC.
- GR 3 Note also that the focus of the workshop will be conditions in the U.S. FEDERAL COPYRIGHT LAW, which functions as the default basis for the field, but that nearly all provisions of the law can be overwritten by separate written agreements or licences or other specific circumstances. Not only are there exceptions to every rule (and we will be focusing on the rules), but there are possibilities for WRITTEN AND UNWRITTEN (IMPLIED) LICENCES to allow deviation from the norm of the law, and no doubt if you take the same questions to other specialists, you might get different answers to the circumstance-dependent questions. The starting point, however, is to understand the law.
- GR 4 The FORMAT of the work and the format for your presentation is generally IMMATERIAL, although there are some special limitations for certain kinds of materials (e.g., § 108(i)), and the pragmatic implications of digital formats can change the risk management equation.
- GR 5 You cannot give what you do not own, you cannot receive what the donor does not own.
- GR 6 Copyright DEFIES FLOW-CHARTING. Decisions on copyright generally involve multiple layers and elements that have to be examined separately. In most cases, the answer to one facet/element will not negate the relevance of all others. Rather in most cases, the composite of facets will provide an image from which you need to do your risk-assessment-based decision. (C.f., handout “Copyright Decisions Subdivided.”)
- GR 7. Copyright is only one of multiple legal structures (means for mediating rights) affecting access and use of archival material. Just because copyright law might not provide a barrier to an action, does not mean that some OTHER SETS OF LAWS define the scope of your action, and vice versa.
- GR 8. All copyright questions can be answered in one of two ways” “Yes, but” or “No, not unless”

## 2. OBJECTIVE:

To familiarize you with core concepts of archival relevance in U.S. federal copyright law, provide a historical background to American copyright law, and encourage a user-centered approach to the administration of copyright in your repositories. At the conclusion of the workshop, you should understand key concepts (e.g., author, work, exclusive rights, fair use, library and archival exemptions, copyright term, and ownership and liabilities), appreciate the distinction from related aspects of law, have the tools to be able TO PURSUE YOUR OWN READING of copyright law to strengthen your ability to communicate with donors, users, and institutional legal counsel about copyright.

“What is copyright and why do we have it?” **or** “What is the purpose of copyright?”  
Which of the following is/are correct answer?

1. To ensure that authors and artists receive compensation for their creative works.
2. To provide the author/artist with the legal means to control how his/her work is presented, performed, and handled.
3. To protect the engine of America's economic survival.
4. To enable persons to secure ownership over ideas and discoveries.
5. To encourage the production of new works.
6. To ensure that one's creation of compilations of facts and other data is not taken and reproduced by others without due compensation.

In the United States the answer comes from the Constitution's grant of authority to 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” To quote Justice O'Connor: “It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” Harper & Row, 471 U.S., at 589 (dissenting opinion). It is, rather, “the essence of copyright,” *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “to promote the Progress of Science and useful Arts.” Art. I, § 8, cl. 8. *Accord*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. Harper & Row, *supra*, at 556-557. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.” *Feist v. Rural Telephone* 499 U.S. 340 at pp. 1289-90]

## 3. CHALLENGES OF COPYRIGHT IN THE GLOBAL INFORMATION AGE

A key characteristic of the information age is that information, in its many formats, has become more than just a means of social and economic operations but an object of value in and of itself. Further, in the post-industrial environment, one form of information, entertainment, has become such a predominant part of the consumer economy that measures for its protection and controlled distribution have been pushed to the front of the public policy agenda. “In the information age, information has passed from being an instrument by which one acquires and manages other assets into being a primary asset in itself.”<sup>1</sup>

“In recent era, we have seen that information previously locked in formats or codes that would prevent duplication and communication can now be quickly gathered and disseminated.”

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<sup>1</sup>Anne Wells Branscomb, *Who Owns Information: From Privacy to Public Access*. New York: Basic Books [Harper Collins], 1994.

Thus economic value now attaches to quite trivial and worthless information because that information can be aggregated, communicated, and associated. The First Amendment proscribes restrictions on Freedom of Speech, but 2 areas of law have imposed limits on the exchange of information in the marketplace--intellectual property and privacy law."<sup>2</sup> Rosemary Coombe argues that culture has become commodified.<sup>3</sup> "The fact is that media become mass and intellectual property becomes available by a regime of protections." (Coombe p. 31) This sets up an inherent legal, intellectual, and cultural tension which inevitably pushes one's consideration of copyright into an economic and political debate.

#### 4. WHAT IS COPYRIGHT?

Mark Rose has said ". . . copyright is not a transcendent moral idea, but a specifically modern formation produced by printing technology, marketplace economics, and the classical liberal culture of possessive individualism. It is also an institution built on intellectual quicksand: the essentially religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air."<sup>4</sup>

According to Judge Leval, in the United States, "Copyright is not a moral or natural right vested in an artistic creator. It is a pragmatic measure by which society confers monopoly exploitation benefits on the artist or author with the objective of thereby obtaining intellectual enrichment for itself."<sup>5</sup> In essence, copyright is not a right, but a bundle of rights.

#### 5. DEFINITIONS OF COPYRIGHT, PATENTS, TRADEMARKS, AND TRADE SECRETS<sup>6</sup>

Copyright: a federal right owned by every author of original works to protect them from having others do five things with the work: 1) reproduction, 2) adaptation, 3) distribution to the public, 4) performance in public, 5) display in public. . Copyright is a constitutional grant. It continues whether dormant or used.

Patent: A grant by the federal government to an inventor of the right to exclude others from making, using or selling the invention. Utility patents cover the functional aspects of products and processes. Design patents cover ornamental design of a useful object. Plant patents cover new varieties of living plants.

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<sup>2</sup>Branscomb. The relevant text of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

<sup>3</sup>Rosemary J. Coombe, *The Cultural Life of Intellectual Property: Authorship, Appropriation and the Law*. Durham, N.C.: Duke University Press, 1998."The rights bestowed by intellectual property regimes (copyright, trademark, design patents, publicity, etc.) play a constitutive role in the creation of contemporary culture. (p. 6) Intellectual property laws allow the reproduction and replication of cultural forms while also prohibiting as well as inviting their interpretive appropriation in the service of other interests." (p. 6)

<sup>4</sup>Mark Rose, *Authors and Owners: The Invention of Copyright*, Cambridge: 1993, Harvard University Press, p. 142.

<sup>5</sup>Pierre N. Leval "Fair Use or Foul?" *Journal of the Copyright Society of the U.S.A.* 36 (April 1989): 169.

<sup>6</sup>Based on (*McCarthy's Desk Encyclopedia of Intellectual Property and Museum Guide to Copyright and Trademark*).

Trademark: 1. A word, slogan, design, picture, or any other symbol used to identify and distinguish goods. 2. Any identifying symbol, including a word, design, or shape of a product or container, which qualifies for legal status as a trademark, service mark, collective mark, certification mark, trade name, or trade dress. Trademarks perform four functions: identification, source, quality, and/or advertising. That is trademarks must serve a source identifier; trademarks cannot cover functional features of a product; and trademark infringement requires a showing that there is a likelihood of confusion among consumers. Trademark is a statutory provision. It must be used to continue--unlike copyright, trademark is subject to abandonment.<sup>7</sup>

Trade Secret: Business information that is the subject of reasonable efforts to preserve confidentiality and has value because it is not generally known in the trade. Finding infringement requires demonstration that the information is valuable business information and that the defendant used improper means to obtain it. Trade secrets are matters of state, not federal law. "The persistence of the discourse of original genius implicit in the notion of creativity not only obscures the fact that cultural production is always a matter of appropriation and transformation, but also elides [leaves out] the role of the publisher--or, in the case of films, of the studio or producer--in cultural production."<sup>8</sup>

6. HISTORY OF COPYRIGHT-300 B.C.E TO 2012

See Chronology handout:

<http://www.library.illinois.edu/archives/workpap/CHRONOUT.pdf>

7. OVERVIEW OF THE FEDERAL COPYRIGHT LAW, U.S. TITLE 17

Note list of amendments that illustrates how contested copyright is. William Patry has observed that the recent history of Congresses shows that copyright law has become a victim of decreased congressional staffing, with the result that copyright law is written more by lobbyists and interest groups than by knowledgeable staff of the people's representatives.<sup>9</sup>

Constitutional Provision. U.S. copyright law is unique because its purpose is stated in the Constitution, and as such it is a constitutional right, not a natural right (cf. *Wheaton v. Peters*). Note that the constitutional clause contains separate parts which form key tenets of American copyright law: 1) the purpose (progress of science and the useful arts); 2) objects of protection (authors and inventors) and their works (not facts, ideas, or reputations); and 3) limited terms.

SUPREME COURT HAS STATED:

"Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim, is by this incentive, to stimulate artistic creativity for the general public good. 'THE SOLE INTEREST OF THE UNITED STATES AND THE

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<sup>7</sup>Trademarks are now being used not just to identify a product but to enhance, adorn, or per se, create new commodities. They have become separate profit centers. When this happens, they become something different than their original purpose of identifying a product. Alex Kozinski, "Trademarks Unplugged." *New York University Law Review*, 68:4 (1993): 960-978.

<sup>8</sup>Rose, p. 135.

<sup>9</sup>William F. Patry, "Copyright and the Legislative Process: A Personal Perspective," 14 *Cardozo Arts & Entertainment Law Journal* (1996): 139-52.

PRIMARY OBJECTIVE IN CONFERRING THE MONOPOLY,' THIS COURT HAS SAID, 'LIE IN THE GENERAL BENEFITS DERIVED BY THE PUBLIC FROM THE LABORS OF AUTHORS.'" [Twentyeth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975), citing Fox Film v. Doyal etc.] In a 1994 unanimous decision, the Supreme Court has echoed Judge Leval's perspective that 'THE GOAL OF COPYRIGHT LAW IS TO STIMULATE THE CREATION AND PUBLICATION OF EDIFYING MATTER.' (Leval quoted in (Campbell v. Acuff-Rose Music, 510 U.S. 575, n. 10)

Further in their dissenting opinion in *New York Times v. Tasini*, Justices Stevens and Breyer wrote: "Copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas. See U.S. Const., Art. I §8, cl. 8 . . . ." (*New York Times Co. Inc. v. Tasini*, 121 S.Ct. 2381, 2403 n. 20 (2001).

To secure the ultimate benefit of creativity for public welfare, copyright attempts to reach a balance of the conflicting interests of owners and users. There are three principal concepts: authorship, originality, and fixation. No aesthetic merit is required (*Bleistein V. Donaldson Lithographing*). Regarding authorship, note historical and political dimensions of the concept: "The new technology has not resulted in any decrease in the rhetorical appeal of the author function."<sup>10</sup>

Regarding originality, the comments of the court in *Bridgeman v. Corel*: "Absent a genuine difference between the underlying work of art and the copy of it for which protection is sought, the public interest in promoting progress in the arts -- indeed, the constitutional demand -- could hardly be served. To extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work." (*Bridgeman v. Corel*, 36 F. Supp. 2d 191 (SDNY) 1999 quoting Second Circuit's en banc decision in *L. Batlin & Son, Inc. v. Snyder* 536 F.2d 486 (2d Cir.) (in banc), cert. denied, 429 U.S. 857 (1976))<sup>11</sup>

Re fixation, noted that a work must be fixed in some physical rendering that is not simply ephemeral, thus a radio or television broadcast of a live event (e.g., demonstration, parade, or sporting event) is not copyrightable unless there is a fixation simultaneous to its transmission. The notion of fixation is intimately tied to the constitutional specification of "writings" which "may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." (*Goldstein v. California* 412 U.S. 546, 561). Further, note that a reporter's recording of an extemporaneous speech is not a copyrighted work unless it is made by or under the authority of the author. "The 'author' is the originator of the intellectual material (e.g., the novel), rather than the individual who fixes it into particular copies (e.g., the stenographer)."<sup>12</sup> A

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<sup>10</sup>"Literature" is a problematic term. Its bourgeois mythology is used and reinforced by intellectual property laws." (Coombe p. 291).

<sup>11</sup>*Bridgeman* has several curious aspects. It was a suit by a British company against a Canadian company in U.S. courts on a matter of U.S. law. Kaplan's opinion stated: "There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. "Elements of originality . . . may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." n39 [\*197] But "slavish copying," although doubtless requiring technical skill and effort, does not qualify. n40 As the Supreme Court indicated in Feist, "sweat of the brow" alone is not the "creative spark" which is the sine qua non of originality." 36 F. Supp. 2d 191 at 197.

<sup>12</sup>Nimmer 2.03[C].

live television broadcast of a baseball game is not statutory copyrightable because neither the game nor the broadcast is a writing. An extemporaneous speech would not be copyrightable unless somehow fixed under the authority of the speaker, but it could be covered by state common law. Under the principle of separability, if the creative element can stand on its own, it can be copyrighted. Thus, a lamp base as an artistic design can be copyrighted, but the lamp not so.

§ 101 Definitions: It is important to refer to this section to understand the scope and effect of much of the rest of the copyright statute. The following terms merit at least an awareness that they have specific definitions which may or may not vary from common parlance.

§ 101 Definitions of Interest	
“Anonymous work”	“Perform” a work
“Architectural work”	“Phonorecords”
“Audiovisual works”	“Pictorial, graphic, and sculptural works”
“Collective work”	“Publication”
“Compilation”	“Publicly perform or display a work”
“Created”	“Registration”
“Derivative work”	“Sound recordings”
“Display”	“Transmit”
“Literary works”	“Useful article”
“Motion pictures”	“Work of visual art”

Other terms of interest: Photographs can be original works, but clearly not all photographs (c.f. *Bridgeman*). Musical works require understanding of distinction between underlying musical work, the performance, and the sound recording of the work which can be a separate copyright. In a derivative work (e.g. sequel or a drawing based on a painting)-the underlying work is recast and adapted to make something new. A compilation is a work formed by the collection and assembly of pre-existing material and arranged so that the resulting work as a whole constitutes a new work.

#### § 102 Subject Matter of Copyright

§ 102 Subject Matter of Copyright
(a) Federal copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, . . . Works of authorship include the following categories: (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.

For sound recordings made after February 14, 1972, the House Report for the 1976 act notes a need for originality as follows:

The copyrightable elements in a sound recording will usually, though not always, involve “authorship” both on the part of the performers whose performance is

captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.<sup>13</sup>

§ 102 Excluded from protection are: facts, ideas, procedures, concepts, principles, processes, systems, methods of operation, or a discovery. Words, phrases, slogans, and titles are not copyrightable, although might be susceptible to trademark.

Ideas cannot be copyrighted, but the expression of it can be. However, the merger doctrine (idea/expression dichotomy) states that when there are very few ways to express an idea, then the expression of that idea cannot be copyrighted.

Until 1978, a work had to be published with a notice to be protected, and if there were no notice, it was in the public domain. Thus, a U.S. work published prior to 1978 without notice is now in the public domain (according to 1909 Act § 21). In fact, works published between 1978 and 1 March 1989 and without notice or subsequent registration also will be in the public domain (see Hirtle chart). But publication was not defined in 1909 Act, and not every disclosure was a publication.<sup>14</sup> See the Copyright Office, *Circular 22. How to Investigate the Copyright Status of a Work*.

§ 104 and 104 A illustrate the impact of international copyright treaties. Their effect was to restore copyright in foreign works which had failed to meet the formalities required for U.S. copyright and thus had entered the public domain. These sections demonstrate the need to watch for exceptions in every copyright rule (such as in the case of the notion that published without notice before 1978 automatically left material into the public domain).

§ 105 U.S. government works are not subject to copyright but open to the public domain. The U.S. government, however, is not precluded from receiving and owning copyrights transferred to it. Case law has held that the same is true of state and local legislation and judicial

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<sup>13</sup> *Historical and Revision Notes House Report no. 94-1476* Over-the-air broadcasts are not published, but are unpublished. This is based on the definition of publication - which excludes performance as constituting publication in §101. TV and radio are performed, and so they are not published - until the broadcast company sells them on a DVD. Same thing with commercial movies, which for most of the 20th century were leased to commercial theaters for showing, but were not offered for sale. Scripts from radio programs could be registered for copyright, and that is how they got federal protection. Based on §101 definitions of "fixed," a broadcast is not copyrightable until it is fixed: "A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission."

<sup>14</sup> For a review of several of the conditions of exposure of a work which were not deemed to be publication (and the distinction between a limited and a general publication), see the summary of cases in *King v. Mister Maestro* at 106. Decisive statements in the case include: "The 'oral delivery' of his speech by Dr. King, no matter how vast his audience, did not amount to a general publication of his literary work." and "... there was no general publication by Dr. King in making his speech available to the press." (*King v. Mister Maestro, Inc.* 224 F. Supp. 101; 1963 U.S. Dist.)



decisions.<sup>15</sup> Works of state governments may or may not be free from copyright. Thus, in Illinois, while governmental works are copyrightable, no legal action (statute, regulation, and judicial opinion) can be subject to copyright.<sup>16</sup>

§ 106 Exclusive Rights Section defines what privileges copyright holders have and thus what actions others cannot do. Overall § 106 is what is meant by copyright as “a bundle of rights.”

§ 106. Exclusive rights in copyrighted works
Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

§ 106(4) Exclusive right to perform publicly would not prevent an institution sponsoring a lecture series from owning the rights of the audiotapes of those lectures, although it could not publish the text which belongs to the speaker.<sup>17</sup>

§106 A Visual Artists Rights Act or 1990 (VARA) provides “moral rights” covering attribution and integrity for a specific category of works, including a very narrow range of post 1990 photographs.

§ 107 Limitations: Fair Use provisions were built from common law and judicial decisions (starting with Judge Story). These were inserted into the law by Congress to codify a growing case law that the author's property rights should not hinder creative endeavors of

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<sup>15</sup>Howard B. Abrams, *The Law of Copyright*, (Thomson/West: 2003) 1:26 text at n. 3.

<sup>16</sup>At a hearing for the 1909 law, there was discussion of extending the ban (from a 1895 printing act which had barred copyright in government publications) to state and local publications, but the speakers all agreed that case law was already settled that judicial opinions and statutes were not copyrightable. The 1961 Registrar of Copyright report noted that “judicially established rule” prevented copyright in laws, ordinances, court decisions, and similar official documents, but that state publications with “historical, technical, educational, and other informational material” could be copyrighted. Becky Dale, “Can the Government Copyright Public Records,” *Virginia Lawyers Weekly*, 30 July 2004.

<sup>17</sup> Abrams 4:41.

society. Fair use is a principal way in which copyright mediates “between private and public. . .” Thinking about 106/107 (exclusive rights vs. fair use) “. . . also helps . . . explain why the public/private dichotomy reappears with uncanny regularity. . . .”<sup>18</sup>

§ 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-

- (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.

Fair use is a notoriously slippery concept to explain, and Congress is of little help. In creating this provision of the statute, it said: Fair use is an “EQUITABLE RULE OF REASON,” FOR WHICH “NO GENERALLY APPLICABLE DEFINITION IS POSSIBLE.”<sup>19</sup> The Supreme Court (Justice Souter) has noted: “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose 'to promote the Progress of Science and the Useful Arts. . . .' For as Justice Story explained, 'in truth, in literature, in science and in art, there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much that was well known and used before.’”<sup>20</sup>

A case-by-case analysis is necessary to determine whether a particular use is fair. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577) “Congress meant § 107 to restate the existing judicial doctrine of fair use, not to change, narrow, or enlarge the doctrine in any way, and intended that courts continue the common law tradition of fair-use adjudication.” “The fair use doctrine contained in 17 USCS 107 permits and requires courts to avoid rigid application of the copyright statute when, on occasion, such application would stifle the very creativity which that law is designed to foster.” (*Campbell v. Acuff-Rose Music*, 510 U.S. 577) This case reads very much like a corrective to the *Salinger* and *New Era* cases.

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<sup>18</sup>Rose, p. 140

<sup>19</sup>H.R. Rep. No. 94-1476, at 65 (1976).

<sup>20</sup> (*Campbell v. Acuff-Rose Music*, 510 U.S. 575)

“Re *Sony v. Universal Studios* (1984), Supreme Court decision conferred fair use privileges on something rather different than historical interpretation of “fair use”—private enjoyment of information rather than simply comment, research, or study.

The four factors are not exclusive. They may not be “treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purpose of copying.” (*Campbell v. Acuff-Rose Music*, 510 U.S. at 578.)

1) Character and purpose of use. The statute specifically mentions categories of use that would be deemed “fair”—criticism, comment, news reporting, teaching, scholarship, or research. For example, are the quotations from a literary work taken in order to provide a criticism or analysis of the content of the writing? a) Character needs to consider whether the new work merely ‘supersedes the objects’ of the original work or instead adds something new with a further purpose or different character, altering the first with new expression, meaning, or message. That is, to what extent is the new use **transformative**—the use adds new material, new aesthetics, and new understanding. Transformative use is not absolutely necessary for a finding of fair use, but it is close to the constitutionally stated purpose of copyright.<sup>21</sup>

b) Purpose. Noncommercial use of a work is more likely to be accepted as fair, but note that some cases have claimed that there is a mix of commercial and scholarly interest on the part of alleged infringers. The mere prospect of commercial benefit to the user cannot of itself insulate against a finding of fair use. The Supreme Court has said: “If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship and research, since these activities are generally conducted for profit in this country.” (*Campbell v. Acuff-Rose Music*, 510 U.S. at 584.)<sup>22</sup> It is not just a matter of commercial use, but more a matter of whether the use is exploitative, that is, that the function of the copy is to be a market substitute for the original.<sup>23</sup> Copying for use in an advertisement by a competitor can be non-infringing.

A subsidiary enquiry of the commercial/non-commercial purpose is whether the use “supplants the copyright holder’s commercially valuable right of first publication.” (*Harper & Row*, 471 U.S. at 562). One needs to remember that in *Harper & Row*, the

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<sup>21</sup>Nimmer (13.05[A][1][b]n. 82 indicates that in *Campbell*, the Supreme Court derived the “transformative” terminology from Leval’s “Toward a Fair Use Standard.” Nimmer goes on to note the potential ambiguity the idea of transformativeness because the definition of a ‘derivative works’ talks about them as having “transformed” the underlying work.

<sup>22</sup>The importance of the *Campbell v. Acuff Rose* decision can be seen in the way in which it is cited by later courts. For example, in *Kelly v. Arriba Soft Corporation* (2003), the Appeals Court for the Ninth Circuit stated: “The Supreme Court has rejected the proposition that a commercial use of the copyrighted material ends the inquiry under this [character and purpose] factor.” The Ninth Circuit extensively quoted *Campbell v. Acuff Rose* to support this analysis.

<sup>23</sup>“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” (*Harper & Row v. Nation*, 471 U.S. at 562) Further, public benefit from the use must also be considered. So, one must ask, does the use serve the public benefit and support the “progress of science and the useful arts?”

issue was that the *Nation Magazine* sought to publish excerpts from a memoir the publication of which was imminent. In the case of the vast quantity of modern textual documentary material, it is doubtful that there is much of a commercial value in the right of first publication, but such may not apply so strongly with any literary work or a photograph.

2) Nature of the work. “This factor calls for recognition that some works are closer to the core of intended protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” (*Campbell v. Acuff-Rose Music*, 510 U.S. at 586.) Creative works and unpublished works are closer to the core of works protected. “The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy . . . [and] the scope of fair use is also narrower with respect to unpublished works.” (*Harper & Row v. Nation Magazine*, 471 U.S. at 563, 564). Furthermore, in most cases oral history tapes and transcripts would be considered as unpublished materials.<sup>24</sup> However, note that courts have found, and Congress has stated that the Supreme Court’s ruling in *Harper & Row* does not require a finding of unfair use if the material is unpublished, but it merely militated against a finding of fair use in that case. For those archivists who have worried about “the consequences of *Salinger*” should review the chronology of cases that have arisen since 1992.

Overall, facts are more susceptible to fair use and unpublished works are less so if issues of control over the right of first publication are at stake, (cf. *Harper & Row*, *Salinger*, *Hubbard*). However, note subsequent change in *Wright* decision and in Congressional 1992 passage of an amendment to §107 which specifically rejected the Second Appeals Court’s rules and declared that the unpublished nature of material could not be used as a *per se* basis to find against fair use. At the same time, the Congress accepted the Supreme Court’s 1985 ruling in *Harper & Row v. Nation* as a proper balance between encouragement of broad public dissemination and safeguarding the right of first publication. Interestingly, in the *Seajay* case, the Appeals Court for the Fourth Circuit decision retrospectively applied the Congressional interpretation to make a finding of fair use on behalf of a collecting society involved in photocopying [a complete work for deposit in the University of Florida library] and a scholar involved in research use, and reporting at a scholarly conference of an entire [photocopying] literary work of Marjorie Kinnan Rawlings.<sup>25</sup> Cases such as *Seajay* and *Campbell v. Acuff Rose*, have offered correctives to references to *Salinger v. Random House*. For example, the Seventh Circuit of Appeals ruled in December 2003 on the appeal of an infringement case in which the defendant claimed his publication of 6 “secure tests” copyrighted by the Chicago Board of Education was a “fair use.” While the court found against the defendant (especially because of quantity of direct copying 6 tests in their entirety), it provided commentary on the nature of fair use that supports the kind of use that archivists and scholars wish to make of unpublished works. “. . . one office of the fair use defense is to facilitate criticism of copyrighted works by enabling the critic to quote enough of the criticized work to make his criticisms intelligible. Copyright should not be a means by which

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<sup>24</sup>John A. Neuenschwander, *Oral History and the Law*, (Oral History Association, 2002), 34.

<sup>25</sup>JOHN SUNDEMAN, Successor Personal Representative of the Estate of Marjorie Kinnan Rawlings Baskin; FLORIDA FOUNDATION, Plaintiffs-Appellants, v. THE SEAJAY SOCIETY, INC., Defendant Appellee. 142 F.3d 194 (1998) [*Sundeman v. Seajay*] Appealed from District Court for the District of South Carolina. Actually, Blythe, the scholar in question only quote 2,464 words or 4 percent of the work in her conference papers. Note that plaintiff in case sought injunction against Seajay doing activity otherwise supportable under §108

criticism is stifled with the backing of the courts. And since doubts that fair use could ever be a defense to infringement of a copyright on an unpublished work (see e.g., *Salinger v. Random House, Inc. supra*, 811 F.2d at 97) have now been stilled (see 17 U.S.C. § 108; *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 204-05 (4<sup>th</sup> Cir. 1988); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991)), the fact that the CASE tests were quasi-secret does not exclude the possibility of a fair use defense.”<sup>26</sup> Still Despite the help of the 1992 amendment, and court opinions such as *Wright* and *Sundeman*, courts in cases not about manuscripts frequently mouth the notion of right of first publication in fair use cases, meaning that the factor cannot be totally discounted (e.g. see analysis in *Arriba Soft*).

### 3) Amount and substantiality.

**a) Quality** Copying what would be considered to be the “heart of the work” would weigh against a finding of fair use. However, “If all quoted material were deemed significant enough to preclude a fair use just because it was significant enough to be quoted, no one could ever quote copyrighted material without fear of being sued for infringement.” (*Sundeman v. Seajay*, 142 F. 3d 194).

**b) Quantity** “There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.” (*Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986), cert. denied, 481 U.S. 1059).<sup>27</sup> Copying an entire work weighs against a finding of fair use, but it does not preclude a finding of fair use. The extent of permissible copying varies with the purpose and character of the use.” (*Campbell*, 510 U.S. at 586-87). Note that the more material copied from the work tends to show the lack of a transformative use and thus can revert to a consideration of the first factor.

For archivists, this factor requires some sensitivity to what is the totality of the work, but assessment of the fairness of the amount taken will depend on the nature of the use, e.g., if an entire letter is printed when all that is being referred to in the using text is a reference in one of the paragraphs to a date and location for a romantic rendez-vous between the parties, it could be argued that the use exceeded a fair use.

4) Effect on the market. Note that the effect on the market can be the potential market as well as the actual. There are three components of market effect **(a) impaired marketability.** “A use that does not materially impair the marketability of the copyrighted work generally will be deemed fair.” (*Sundeman v. Seajay*, 142 F. 3d 194). **b) market substitute. c) derivative markets.** But notice that the Supreme Court has said “there is no protectible derivative market for criticism.” (*Campbell v. Acuff-Rose Music*, 510 U.S. at 592.) (I.e., the original author cannot prove loss of a derivative market by asserting that he/she would have licensed criticism or parody.) and this argument is what the Atlanta court cited in the *Wind Done Gone* case (*Suntrust Bank v.*

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<sup>26</sup>*Chicago Board of Education v. Substance, Inc. And George N. Schmidt* No. 03-1479 (USCA 7<sup>th</sup> Cir 2003).

<sup>27</sup>)Katrina Maxtone-Graham acquired the (c) of interviews of women she conducted about unplanned pregnancies which Burtchaell sought to use in a book opposing abortion. Burtchaell sought and was denied permission, but he went ahead and used direct quotations, using 7,000 words or 4.3 percent of the book. 2<sup>nd</sup> Circuit Court found for fair use and dismissed case. *Maxtone-Graham v. Burtchaell* 803 F.2d 1253 (2<sup>nd</sup> Cir. 1986).

*Houghton Mifflin Co.*) case.<sup>28</sup> Note that in the case of the Gerald Ford memoirs, *Time* magazine absorbed at \$12,500 loss rather than expending an additional \$12,500 for first serial rights.<sup>29</sup>

Georgia Harper treats Factor Four as follows: She notes that the key question is “If this kind of use were widespread, what effect would it have on the market for the original or for permissions?” If after evaluation of the first three factors, the proposed use is tipping towards fair use, and the original is out of print or otherwise unavailable, or no ready market for permission, or copyright owner is unidentifiable, then factor four would lean towards fair use. But it would not if the use would compete with (take away sales from) the original or avoid payment for permission (royalties) in an established permissions market. An example of a case where the presence of a licencing mechanism through the Copyright Clearance Center worked against a claim of fair use is *American Geophysical Union v. Texaco Inc.* United States Court of Appeals for the Second Circuit 60 F.3d 913; 1994 U.S. App.

Overall in regard to the fourth factor, Pierre Leval has written convincingly of his disagreement with the Supreme Court statement in *Sony v. Universal Studios* (1985) which had suggested that effect on the market was the most important. Not long after Leval wrote, the Supreme Court, in *Campbell v. Acuff-Rose Music* (1994), revised its advice and stated that all four factors have to be weighed together to make fair use determination<sup>30</sup>. It said, the four statutory factors should not “be treated in isolation, one from the other. All are to be explored, and the results weighed together, in light of the purposes of copyright.” (*Campbell*, 510 U.S. at 578) This, is also consistent with Congress's 1992 passage of the Fair Use of Copyrighted Works Act.

In some cases, adverse criticism has been claimed to argue against a finding of fair use based on the fourth criteria. However, the higher courts have not accepted this logic. The “role of the court in determining fair use is to distinguish between 'biting criticism [that merely] suppresses demand [and] copyright infringement [, which] usurps it.’” (*Campbell*, 510 U.S. at 592 (quoting *Fisher v. Dees*, 794 F. 2d 432, 438 (9th Cir. 1986))<sup>31</sup>

Pierre Leval cautions that concerns beyond the four articulated in § 107 should not be allowed to determine whether a use is or is not a “fair use.” These “false factors” include: A) “Moral” factors: [N.B. this use of “moral” is different from the concept of “moral rights” as in the *droits d'auteur*] a) good faith of the user does not make an infringing use fair; b) good faith of the copyright owner is not needed to prove that the user infringed if a four factor analysis

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<sup>28</sup>On the other hand, consider *Dr. Seuss Enterprises v. Penguin Books* (U.S. Court of Appeals for Ninth Circuit, ca. 1997/98) [Penguin’s “The Cat NOT in the Hat!” retelling of O.J. Simpson story in manner of Dr. Seuss found to be infringing because as satire it commented not on Seuss but on O.J.] relied on a distinction it found supportable in the Supreme Court opinion in *Campbell* that while parody was defensible as fair use, satire was not.

<sup>29</sup>Nimmer 13.05 [B] [2].

<sup>30</sup>The Supreme Court also said: “No 'presumption' or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.” (*Campbell v. Acuff-Rose*, 510 U.S. at 591.

<sup>31</sup>“If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weight against a finding of fair use” (*Campbell*, 510 U.S. n18 at 586 (quoting *Fisher v. Dees*, 794 F. 2d 432, 437 (CA9 1986)

fails. B) Privacy. Distortions will emerge if the law intersperses privacy with copyright--it will destroy the delicate balance achieved in privacy law (e.g., privacy ends at death, not death plus 70 years; privacy is not allowed to public figure). Copyright does not protect facts or their revelation, only the expression of facts and ideas.<sup>32</sup>

In regard to how much effort needs to be done to show a good faith effort at pursuing owners for orphaned works, the Glushko-Samuelsan Intellectual Property Law Clinic at the American University provided the following list for comment. Note that many of us in attendance felt that the steps became quite burdensome after the first few, in most cases of scholarly use for deceased authors. Participants suggested placing examples of what constitutes a best efforts search in the legislative history if an orphan works bill can ever be advanced.

- Searching the Copyright Office Registry;
- Web searches using standard search engines (especially WATCH);
- Contacting publishing houses (if applicable);
- Contacting applicable libraries/museums/universities;
- Searching inheritance records or contact the estate administrator in cases where the copyright may have been inherited;
- Checking telephone directories for the author in the area where the author is likely to reside;
- Checking directories of artists, authors, etc.;
- Advertising in trade journals or national newspapers that are well-calculated to reach potential copyright holders;

A more intensive outline of what might be a “good faith” effort for orphaned works, at least in the case of photographs and graphical works is that contained in its 2010 *Best Practices: Locating Copyright Owners of Photographic and Visual Art Work* issued by the American Society of Picture Professionals (PPP)<sup>33</sup>

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<sup>32</sup>A relevant court citation: “The protection of privacy is not a function of the copyright law; to the contrary, the copyright law offers a limited monopoly to encourage ultimate public access to the creative work of the author.” Citing *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), cert. denied, 124 S. Ct. 103, 157 L. Ed. 2d 38 (U.S. 2003). -- 18 Am Jur 2d Copyright and Literary Property §2.

<sup>33</sup>[http://www.aspp.com/images/stories/documents/ASPP\\_BestPractices\\_LocatingCopyrightOwners\\_Web.pdf](http://www.aspp.com/images/stories/documents/ASPP_BestPractices_LocatingCopyrightOwners_Web.pdf)

**Fair Use Checklist**

<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

Copyright Advisory Office  
Columbia University Libraries  
Kenneth D. Crews, Director  
<http://copyright.columbia.edu>

Name: _____
Institution: _____
Project: _____
Date: _____
Prepared by: _____

**Purpose**

**Favoring Fair Use**

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Transformative or productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Parody

**Opposing Fair Use**

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

**Nature**

**Favoring Fair Use**

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

**Opposing Fair Use**

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

**Amount**

**Favoring Fair Use**

- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose

**Opposing Fair Use**

- Large portion or whole work used
- Portion used is central to or "heart of the work"

**Effect**

**Favoring Fair Use**

- User owns lawfully purchased or acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market for copyrighted work
- No similar product marketed by the copyright holder
- Lack of licensing mechanism

**Opposing Fair Use**

- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of the copyrighted work
- Affordable permission available for using work
- Numerous copies made
- You made it accessible on the Web or in other public forum
- Repeated or long-term use



### **§ 108 Limitations: Library and Archives Reproductions**

This important section is much more complex than §101-107 and a foreshadowing of the confusion to come, but it can be understood if examined sub-section by sub-section.

**§ 108 (a)** Allows library or archives to copy (except as provided in subsections (b) and (c)), or to distribute such copy, under certain definitional limits—it must be:

- (1) non-commercial copying;
- (2) the library or archives is open to the public (thus would not apply to a closed business archives); and
- (3) a notice of copyright is required;

**§ 108 (b)** preservation or deposit copying of unpublished works allows up to three copies of unpublished works. Provided that:

- (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
- (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

**§108 (c)** preservation copying also applies to published works if the original is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, provided that:

- (1) no unused replacement can be found
- (2) any digital copy is not made available to the public in that format outside the premises of the library or archives.

In regard to § 108 b 2 and c 2, note that while the 1998 DMCA allowed the use of digital formats for the library preservation and replacement copying of copyrighted works, the digital copy cannot be made available outside the premises of the library or archives. This poses the fundamental note the curatorial problem of waiting until a technology is obsolete before you copy material in that format.

**§ 108 (d)** Interlibrary loan/reference copying of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, provided that

- (1) the copy becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays a notice prominently

**§ 108 (e)** An entire work can be copied if the copyrighted work cannot be obtained at a fair price, provided that:

- (1) the copy becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays a notice prominently

Subsection (e) is what supports much correspondence-based archival reference, including that for post-1971 sound-recordings, but not for music and pictorial materials.

**§ 108 (f)** Nothing in this section-

- (1) IMPOSES LIABILITY on library or archives for the unsupervised use of reproducing equipment located on its premises provided there is a notice on the machine.
- (2) excuses a person who uses copying equipment beyond the limits of fair use (§107).
- (3) limits lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
- (4) in any way affects the right of fair use.

(g) The rights of copying under section 108 extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives

- (1) is aware or has reason to believe that it is engaging in related or concerted copying; or

(2) engages in the systematic reproduction or distribution of single or multiple copies of material described in subsection (d) [articles for ILL]: Provided, the copying is not done in a systematic way to avoid buying a subscription.<sup>34</sup>

**§ 108 (h)** (1) Preservation copying allowable in the last 20 years of any term of copyright of a published work after verifying absence of restrictive conditions that have been characterized as the equivalent of threading a moving needle.

- (2) No reproduction, distribution, display, or performance is authorized under this subsection if-
- (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 that either of the conditions set forth in subparagraphs (A) and (B) applies.
- (3) The exemption provided in this subsection applies only to the library or archives.

Re § 108 (h), the provision for copying in the last 20 years of the term of a published work was added as a compromise concession to the library community during the debate leading to CTEA.<sup>35</sup> The Section 108 (h) is very limited value to archivists because it applies only to published material and its requirements for implementation are complex and unrealistic. Indeed, it took the Copyright Office a very long time to come to an agreement for rules on how 108h would be applied (see ARL *amicus* in *Eldred v. Ashcroft*, p.28)<sup>36</sup> Presently, the Copyright Office has *Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price* (<http://www.copyright.gov/docs/nla.html>) (referring to *Code of Federal Regulations* 37 CFR 201.39), but basically the Office does seem to be responsible for much more than providing a form for the use by those owners who want to make an affirmation that a work is still “subject to normal commercial exploitation.”

Amending 108 (h) to eliminate the limitation to “published works” is one of a series of proposals that have been considered by some of Peter Jaszi’s students American University College of Law Copyright Clearance Initiative as part of a broader effort to expand the usability of “orphaned works.” Other options being considered are an expansion of the exemption from statutory damages

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<sup>34</sup>Howard B. Abrams (15:81) notes that despite the provisions of 108 in general and 108(g) in particular, “Although a library probably could not now provide systematic photocopying of medical articles as was done in *Williams v. [sic, should be &] Wilkins*, the fair use issue would now concern the individual medical researcher or doctor who made a photocopy of an article for use in her research or practice. Under the authority of *Williams & Wilkins*, this would be fair use, and there is nothing in the 1976 Copyright Act that would overrule this aspect of *Williams & Wilkins*.”

<sup>35</sup>E-mail from Susan Fox (30 October 1997) to SAA Council cited wording from a September 25, 1997 memo from Prue Adler of the ARL to the ARL’s board: “H.R. 604 includes an exemption (under certain circumstances) for libraries and archives during the last 20 years of any term of copyright. The library exemption, Section 3, seeks to address the concerns of libraries and archives. . . .” “Section 3 as drafted is a step in the right direction but needs additional work if libraries and archives are to have meaningful access to copyrighted works without commercial value during the proposed 20 year extension protection.” Fox’s e-mail goes on to include a “redraft” of Section 3 of H.R. 604 which limits the 108 (h) exemption to published works, and further to say: “Prue said the library community chose to push for the exemption because of the fact that those who are pushing for the extension include heavy-hitters such as Disney, Time-Warner, Viacom, . . . .¶She said while she thought it would be highly unlikely to successfully combat the extension, if we chose to do so we would have to do a huge amount of work. . . .” Note that William Maher’s SAA Presidential File on the Copyright Term Extension also includes text from an e-mail from Adam Eisgrau at ALA-Washington Office indicating that the DFC was not going to push against term extension, and one might presume given his position that neither would ALA. It is not unreasonable to assume that all were thinking along the lines articulated by Adler.

<sup>36</sup> [http://www.arl.org/bm~doc/amici5\\_20\\_02.pdf](http://www.arl.org/bm~doc/amici5_20_02.pdf)

(similar to the existing 504 (c) 2), creating a licencing fee scheme, or other means of reducing users' liability if they had made a good faith effort to find owners for the orphaned works.

**§ 108 (i)** The 108 rights do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work (except news), but 108 i limits do not apply for rights granted by subsections (b), (c), and (h) [the preservation exceptions], or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

The New York State Archives has useful language in the request form they utilize for 108 (i) type works:  
"CERTIFICATION: Please check one box; sign and date application; and provide U.S. Mail address. If possible, provide a telephone number and e-mail address to facilitate communication.  
I certify that:  I am or I represent the owner of copyright for each filmscript requested.  
OR  The owner of copyright for each filmscript is (please give name of copyright owner and U.S. Mail address): \_\_\_\_\_ and I have attached documentation of the owner's permission to obtain the requested copies;  
OR  This request is made under Section 107 of the U.S. Copyright Law (Limitations on Exclusive Rights; Fair Use) and the requested copy will be used only for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. The specific purpose for which I will use the copy is: \_\_\_\_\_.  
(See [http://www.archives.nysed.gov/a/research/res\\_topics\\_film\\_form.shtml](http://www.archives.nysed.gov/a/research/res_topics_film_form.shtml)) [URL verified 30 July 2012]

**§ 109a First sale doctrine.** The owner of a particular copy is free to do anything with it except reproduce (except for computer programs or sound recordings where rental is not allowed), including display publically (§109(c)) or resell (§109(a)) the particular copy. This provision allows libraries and archives to do in-person exhibits, despite the sense of clause § 106 (d) to the contrary. The House Judiciary Committee Report (House Report No. 94-1476) states:

"Section 109 (a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or destroy it. ¶ Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose." [p. 79]

Re § 109, there was an effort in the run-up to the 1998 DMCA, to provide for a digital equivalent to the "first sale" right, but unfortunately, the interests in the commercial opportunities for exploitation of digital materials precluded any such provision. As a result, we have the circumstance that digital material purchased by one user may not be transferrable to another.

**§ 110 Exemption on Certain Performances and Display (Education).** Under § 110 the following are not infringements of copyright:

(1) performance or display of a lawfully made or acquired copy of a work by instructors or pupils in the course of **face-to-face** teaching activities of a **nonprofit** educational institution, in a classroom or similar place devoted to instruction.

- (2) distance education transmissions except for nondramatic literary or musical works and limited portions of other works, or works designed for mediated instruction, and except for source copies not lawfully made, but several limits apply: (See “Conditions” and “Checklist” slides)
- (3) performance of a nondramatic literary or musical work or of a dramatic-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;
- (4) performance of a nondramatic literary or musical work without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, and admission charges.
- (5) to perform or display a work through home apparatus and in certain limited sized eating and drinking establishments.
- (6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural organization
- (7) performance in vending establishment where the sole purpose is to promote the retail sale of copies
- (8 & 9) performance directed to blind or handicapped
- (10) performances organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited.

With the TEACH Act of 2003, the idea of “mediated instruction” has been substituted for “face-to-face instruction” to support use in distance education. However, the exemption is only for instances where the copies are displayed as a regular part of the “systematic mediated instructional activities of governmental body, an accredited nonprofit educational institution, or a nonprofit library”.<sup>37</sup> Some cautions are in order since the copies are only for specific courses, on a restricted access basis, and can only be online for a limited period of time. Georgia Harper notes: “The TEACH Act expands the scope of educators' rights to perform and display works and to make the copies integral to such performances and displays for digital distance education, making the rights closer to those we have in face-to-face teaching. But there is still a considerable gap between what the statute authorizes for face-to-face teaching and for distance education. For example, as indicated above, curriculum, regardless of the medium, face-to-face in the classroom - still images, music of every kind, even movies. . . . Under 110(2), however, even as revised and expanded, the same educator would have to pare down some of those materials to show them to distant students. . . . “ As a result of these restrictions, educators still may have recourse to “fair use.”<sup>38</sup>

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<sup>37</sup>“Congress Eases Copyright Restrictions on Distance Education,” *Chronicle of Higher Education*, “Information Technology,” 8 October 2002, <http://chronicle.com/free/2002/10/2002100801t.htm>

<sup>38</sup>See the page from the link Texas’ “TEACH Act” website: <http://copyright.lib.utexas.edu/teachact.html>

TEACH Act: Check List  
(from <http://copyright.lib.utexas.edu/teachact.html#checklist> )

- My institution is a nonprofit accredited educational institution or a governmental agency
- It has a policy on the use of copyrighted materials
- It provides accurate information to faculty, students and staff about copyright
- Its systems will not interfere with technological controls within the materials I want to use
- The materials I want to use are specifically for students in my class
- Only those students will have access to the materials
- The materials will be provided at my direction during the relevant lesson
- The materials are directly related and of material assistance to my teaching content
- My class is part of the regular offerings of my institution
- I will include a notice that the materials are protected by copyright
- I will use technology that reasonably limits the students' ability to retain or further distribute the materials
- I will make the materials available to the students only for a period of time that is relevant to the context of a class session
- I will store the materials on a secure server and transmit them only as permitted by this law
- I will not make any copies other than the one I need to make the transmission
- The materials are of the proper [type and amount](#) the law authorizes:
  - Entire performances of nondramatic literary and musical works
  - Reasonable and limited parts of a dramatic literary, musical, or audiovisual works
  - Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching
- The materials are not among those the law specifically excludes from its coverage
  - Materials specifically marketed for classroom use for digital distance education
  - Copies I know or should know are illegal
  - Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session
- If I am using an analog original, I checked before digitizing it to be sure:
  - I copied only the [amount](#) that I am authorized to transmit
  - There is no digital copy of the work available except with technological protections that prevent my using it for the class in the way [the statute authorizes](#)

§ 110 (3) is the sub-section allowing for use of copyrighted material in a religious service. religious services, but it does not cover performances of motion pictures or secular musical dramas even if they have an underlying religious character or if they are for a social, educational, fund-raising, or entertainment purposes. Second, must occur at a place of worship or religious assembly

§114 (a). The denial of § 106 (4) exclusive rights of performance to sound recordings was a conscious decision of Congress in the 1976 law. Congress called for a Copyright office study which recommended such a right, but Congress never enacted it. § 114 (b) Exclusive rights in sound recordings do not extend to imitation of the original sounds, only to a direct re-recording of the original recording.

§ 120 Architectural Works. In 1990, the Architectural Works Copyright Protection Act added section 120 to cover architectural works as opposed to just drawings and plans which had been and continued to be covered under provisions of §102 (5):

- drawings (as graphic works and as the embodiment of an architectural works)
- specifications, design reports, project manuals, correspondence, etc. (as literary works)
- models (as sculptural works)
- limited distribution presentation renderings, if they meet the § 101 definition of “work of visual art” (Special § 106A coverage, as a work of visual art)
- photographs (as graphic works)
- electronic software (like other software as “literary works)
- building design (as per § 101 definition of an “architectural work”)

By the 1990/§120 provisions, the design of the building itself is covered by the specific definition of an “architectural work” as “. . .the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”<sup>38</sup> The phrase ‘architectural records’ connotes records relating to buildings and similar, large built structures; they are generally distinguished from engineering records, which connote records relating to smaller, fabricated materials, and records in which functionality takes precedence over aesthetics.”

The 1990 Architectural Works Copyright Protection Act, which added this definition and coverage, included two important limits:

1. The definition applies only to works created on or after 1 December 1990. Further, any architectural work that was then [December 1, 1990] embodied in plans or drawings but still unconstructed had until December 31, 2002 for the work to be constructed and covered by 120 provisions.
2. The copyright in architectural work does not preclude the right of anyone to make, distribute, or display pictures, paintings, photographs, or other pictorial representations of the work, if the is located in or ordinarily visible from a public place. Further, the owner of a building may make alterations or destroy such building. (§ 120)<sup>39</sup>

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<sup>38</sup>Compare this to an archivists’ archives’ definition of architectural records: “Documents and materials that are created or assembled as part of the design, construction, and documentation of buildings and similar large structures, and that are preserved for their administrative, legal, fiscal, or archival value.” Richard Pearce-Moses, *A Glossary of Archival and Records Terminology*, (Chicago: Society of American Archivists, 2005) [http://www.archivists.org/glossary/term\\_details.asp?DefinitionKey=287](http://www.archivists.org/glossary/term_details.asp?DefinitionKey=287)

<sup>39</sup>Some useful resources particular helpful re architectural records include: Thomas Hayton, *Copyright for Architectural Works*. Stephen A. Hess, Jerome V. Bales, P. Douglas Folk, and L. Tyrone Holt, eds., *Design Professional and Construction Manager Law*, (Chicago: American Bar Association, 2007); Jessica L. Darraby, *Art, Artifact, & Architecture Law*,



§ 201 (a) “Initial Ownership. — Copyright in a work protected under this title vests initially in the author or authors of the work.” Because the authors of a joint work are coowners of copyright in the work, one of the joint owners may grant permission for use of a work without obtaining the consent of the other joint owners. However, the approval of joint owners is needed to effect a transfer of ownership. Thus, if a repository is acquiring material from one who may have had several co-authors, it may be more sensible to obtain a license from the donor rather than a transfer of copyright because the one author can grant permission without the concurrence of the co-authors, but a transfer of copyright would require permission of all co-authors. A key part of the idea of joint ownership is that, at the time of creation, each of the co-authors had intended to create a joint work, although there is not an obligation that separate contributions have separate copyrightability.

The matter of joint ownership is a key to dealing with questions about oral history interviews when there has been no signed release. As John Neuenschwander noted, “No court has yet ruled whether an oral history is a work of joint authorship, but the safest answer is that it would rule in the affirmative.” This point is reinforced by Copyright Office manual (*Compendium II*) indicating in an interview each owns the expression in the absence of an agreement to the contrary.<sup>40</sup> While most of words may be those of the interviewee, the separate contributions to a joint work do not need not be equal as long as the original intent was to provide a single work. Of course, best professional practice going forward is for the interviewer to obtain a copyright transfer via a signed release, and even better is to have both the interviewer and interviewee assign copyright to the archival repository. In regard to the work-made-for-hire possibility for a non-employee, note that the second part of the §101 definition of a work-made-for-hire applies to “a work specially ordered or commissioned for use as a contribution to a collective work,” and unless there is an overall collective project a simple w-m-f-h agreement might not suffice.

§ 201 b Ownership of a Work for hire (cf., § 101) must be a work prepared within the scope of the employee's responsibilities. This concept was added by the 1909 act with little advance experience. Thus, the [Ives &] Myrick Insurance Company could not claim ownership of Charles Ives' compositions, nor could the Hartford Insurance Company claim ownership of Wallace Stevens' poetry. Note that while an assignment agreement can seem to accomplish the same thing as a work-made-for-hire agreement, there is a difference—a work-made-for-hire is not subject to termination rights.

One critical question in considering whether or not a work is a work made for hire, is whether the person is an employee or not. This issue was addressed in the case of: *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 [1989] (sculptor hired to do a 3-D display for use in fund-raising for an organization's work for the homeless was found not to be an employee).<sup>41</sup> The right to “supervise and control,” as if the employer were making creative decisions in the production of the work is critical, although an employer does not necessarily have to exercise that right. Case law and commentary, suggests that because of the independence and judgement of professionals and academics, much of their work is not by default, works-made-for-hire. Of course that general

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(Deerfield, Illinois, New York, Rochester, New York: Clark Boardman Callaghan, 1995).

<sup>40</sup>Neuenschwander (p. 31, fn. 11) cites: U.S. Copyright Office, *Compendium II*, Copyright Office Practices, Sec. 317. However, Copyright office website provides only chapter 1600 and 1900, and indicates that this manual is intended primarily for Copyright Office staff.

<sup>41</sup>*Reid* opinion said: “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.”

condition can be overwritten by specific provisions of an employment contract.

However, some cases have raised the question of the boundaries between what is done on work time and outside of work, but of a relationship to the business of the employer. For example, there is the case of a man who founded a religious order, and a subsequent dispute over whether some of his religious writings were owned by the church. This is *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, United States Court of Appeals for the Ninth Circuit, 206 F.3d 1322; (2000) (531 U.S. 1126 *cert. denied*) (2001) which decided on the basis that “Works motivated by Yogananda’s own desire for self-expression or religious instruction of the public are not ‘works for hire’ . . . . Moreover, there was no evidence of supervision or control of Yogananda’s work by [Self-Realization Fellowship Church] . . . .”

This approach limits work-for-hire under the 1909 Act to traditional employment relationship.” For example, a member of a religious order is not necessarily an employee for a works-made-for-hire consideration, rather the relation of the copyrighted work to the nature of the person’s responsibilities is the critical factor.<sup>42</sup> Rosemary Coombe’s is critical of the notion of a work-made-for-hire: “The fictions of creativity, personality, and originality are preserved to legitimate rights of investors to control circulation of corporately produced textuality and its reworkings by others.<sup>43</sup>

Works-made-for hire issues are more complex when one has to consider whether the 1909 or the 1976 law applies. Under the old law, where works-made-for-hire by non-employees did not require a signed agreement as stated in the current law. Determination of ownership basically came only through court decisions in response to litigation. In those instances, the courts relied on indications of the source of the initiative, control, and compensation for the creation of the work.<sup>44</sup> One of the best guides to how the changes from the 1909 law to the 1978 law affect the issue of works made “on commission” is Alan Latman, *The Copyright Law: Howell’s Copyright Law Revised and the 1976 Act*, fifth edition, (New York: Bureau of National Affairs, 1979).

§ 201 (c) Contributions to Collective Works. Note that, court cases from 1997-2007 have examined issues relating to digitization of collective works such as newspapers and magazines. In *Tasini v. New York Times* (decided June 2001), the U.S. Supreme Court ruled that databases such as Lexis-Nexis that retrieved and presented articles by freelance writers independent of their original on-the-page context (as would have been done with microfilm) did not constitute a revision of the collective work but rather a new collective work and would thus require permission of the freelance writers. In March 2001, the case of *Greenberg vs. National Geographic*, initiated in 1997 was decided by the 11<sup>th</sup> Circuit Court of Appeals. It ruled that the National Geographic had infringed on the rights of freelance photographers (awarding \$400,000 in damages) when it reissued page images of the *Complete National Geographic* on CD-ROM. However, in a case decided in March 2005, with virtually the identical facts, *Faulkner v. National Geographic*, the 2<sup>nd</sup> Circuit Court of Appeals ruled the opposite way. It argued that “because the original context of the Magazines is omnipresent in the

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<sup>42</sup> *Schmid Bros. Inc. v. W. Goebel Porzellanfabrik KG* 589 F. Supp. 497 (E.D. N.Y. 1984). The “essential factor” or “hallmark” in determining whether a work is made by an employee “for hire” is whether the employer has the right to direct and supervise the actual performance of the work.” [Core question was whether Schmid Bros. (as assignee of Sr. Hummel’s mother and sole heir) held renewal rights in Sr. Hummel’s copyrighted work (largely drawings used as basis for Goebel to create porcelain figures). Judgement was awarded to Schmid.]

<sup>43</sup> In the 18th century, the notion was that intellectual property was for the purpose of enlightenment. Now, however, the mantle of authorship is proclaimed for the purpose maintaining the exchange value of entertainment. (Coombe p. 283)

<sup>44</sup> See *Lumier v. Robertson-Cole Distributing Corp.*, *supra*; *Yardley v. Houghton Mifflin, Co., Inc.*, 103 F.2d 28, 44 USPQ 1 (2<sup>nd</sup> Cir. 1939), *cert denied*, 309 U.S. 45 USPQ 713 (1940); and *Avedon v. Exstein* 141 F. Supp. 278, 109 USPQ 373 (S.D. N.Y. 1956); and *Altman v. New Haven Union Co.*, 254 Fed 113 (D. Conn. 1918).



CNG and because it is a new version of the Magazine, the CNG is a privileged revision.” In June 2007, a panel of the the 11<sup>th</sup> Circuit re-examined *Greenberg* and reversed itself and vacated the damage award, accepting that the *CNG* was a privileged revision. On June 30, 2008 sitting *en banc* and by a 7-5 majority, the 11<sup>th</sup> Circuit upheld the panel’s decision that *CNG* was a privileged revision since while *CNG* was in a digital format, it faithfully preserved the original context of the National Geographic’s print issues, and thus §201(c) allowed issuance as a revision.

§ 202 Ownership of copyright as distinct from material object. Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. “Transfer of ownership of any material object, including the copy or phonorecord in which the work is fixed, does not of itself convey any rights in the copyrighted work embodied in the object. Nor, does transfer of ownership of a copyright or of any exclusive rights convey property rights in any material object. This is a concept that originated in Statue of Anne, thus even if you own or bought a manuscript, you do not necessarily own the copyright.<sup>45</sup>

§ 203 Termination of transfers. **Warning:** do not try to understand termination rights while operating heavy construction machinery, holding any sharp object, or doing anything other than sitting down, completely sober. The basic concept is that under certain complex conditions, an author may terminate a transfer of rights (except in the case of works-made-for-hire) at a specifically defined interval. The 1976 House Report explains:

The Problem in General. The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec.

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<sup>45</sup>The case of the photographs of Mississippi bluesman Robert Johnson (1911-38) provides an example of the hazards around accepting a family member’s word as definitive about ownership. In 1973, Blues historian Stephen LaVere met with Johnson’s half-sister, Carrie Thompson, as he conducted research on Johnson, and she showed him a ca. 1935 photograph of Johnson made by Hook Brothers Photography Studio (Memphis, Tennessee). She allowed LaVere to copy the photograph. Assuming that she was Johnson’s only living heir, he also persuaded her to assign him the rights to the photograph, other memorabilia, as well as the recordings that had been issued up to that date. CBS Records’ project to produce a record was held up until 1990 when CBS finally went ahead and issued the works without resolving a conflicting claim from another blues historian who had also advanced a claim to ownership of a Johnson photograph.

Subsequently a truck driver, Claud Johnson came forward with a birth certificate and testimony which a court found persuasive as demonstrating that he was indeed Robert Johnson’s son, and allocated the royalties to him. While Claud was allowed to split the royalties with LaVere, the ruling left nothing for Annye Anderson, the half-sister of Carrie Thompson, who along with a Robert Harris (Thompson’s grandson) were named as her heirs in Thompson’s will.

As of March 2005, the suit of Anderson and Harris against LaVere, Claud Johnson, and Sony Corp. (the successor to CBS Records) was in trial in Mississippi. (Mitchell Pacelle, “Johnson Snapshots Lead to Tug of War,” *Greenwood Commonwealth* (Greenwood, Mississippi), March 23, 2005. The December 2004 Mississippi Supreme Court ruling that mandated that the case go to trial is *Anderson v. LaVere*, 895 So. 2d 828; 2004 Miss., and that opinion provides background on facts of the case. The core of the Supreme Court decision was “there is no evidence in the record before us showing that this claim [of Anderson and Harris to ownership of the copyright in the photographs] has ever been challenged. It is apparent that this claim has never been litigated in a suit between the parties, nor was it required to be. The doctrine of *res judicata* may not now be used to preclude its litigation. Thus we reverse the trial court and remand this case for trial on the merits.” Interestingly, the opinion makes no reference to whether Hooks Brothers studio could be claimed to be the owner of the studio photograph. Lower Court: Leflore County Circuit Court; Lower Court Judge: W. Ashley Hines; Lower Court Case #: 20-0136 ;Lower Court Ruling Date: 12/07/2001.” A July 31, 2012 search of Lexis found only the 2003 and 2004 court actions, and an earlier search of the *Greenwood Commonwealth* showed the last reference to be the March 2005 article referenced above.

24 [section 24 of the 1909 law]) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

The right of termination cannot be waived. According to § 203 (A) 1-2, only authors can exercise the right of termination. After the author's death, his or her children can only terminate rights granted before death, but they cannot terminate grants made by the authors' heirs after authors' death. Under most circumstances, termination rights may be unlikely to affect archival materials.<sup>46</sup>

§ 204. Execution of transfers of copyright ownership. Any transfers should be accomplished by some written document, generally a deed of gift or will. Before 1978, the copyright ownership transfer rules were quite different and the federal law did not apply to unpublished works. Instead under state common law, authors had a perpetual property right, but it was understood that when an author transferred an unpublished item or work of art under what was called the "Pushman presumption." Before revision of the copyright act, the librarian Ralph R. Shaw argued that depositing unpublished material in an archives or library constituted publication. However, the "Pushman presumption" is essentially moot after the 1976 act, and it had not been applied to literary property but to the more specialized area of works of visual art transferred to a museum or gallery. Still, news stories in 2002 noted that the writings of Mary Baker Eddy were being claimed as "published" because they had been deposited in a research library.

Review Question

A local architectural preservationist salvaged the negative files from a bankrupt photo studio the night before it was bulldozed. She gave the 8 boxes to your archives so you can scan them all and put them on the internet. She says that since she owns the negatives (the studio owner gave them to her in payment for back rent), her depositing them in the archives gives you the rights to duplicate them.

- Do you have the right to put them on the internet?  
\_\_\_\_\_ Yes                      \_\_\_\_\_ No

§ 301- § 305 Duration of Copyright. Chapter 3 regulates the length of time during which a work is covered by the exclusive rights of copyright. Trying to determine the term of a particular work can be complicated by date of creation, location of the creator, vital status of the author, etc. While reading the text of these sections is certainly appropriate, the easiest way to work through the web of complications is to examine one of the "When Works Enter the Public Domain" charts, especially Peter Hirtle's: <http://copyright.cornell.edu/resources/publicdomain.cfm>

§ 301 (c) As to the confusing language in 301 (c) [". . . no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067"], the idea is that pre-1972 sound recordings go directly into the public domain 95 years after the effective date of that law. The 1976 House Report makes rather clear that the House wanted the sound recordings to fall into step with Federal copyright at some time, and that the time in question was consistent with the then present term of 75 years (now 95 years) being used for works-made-for-hire. Under the 1909 sound recordings were not subject to copyright because they were not considered writings. While this might have made sense in the era of piano rolls, it became obsolete as wax cylinders were replaced by disk and then tape recordings. Yet, it was not until late 1971 that the federal law was changed. As a consideration of existing state anti-piracy laws in effect when the 94<sup>th</sup> Congress passed a law to bring sound recordings under federal copyright, the provision called for those older recordings made prior to the effective date of the law to not be subject to

<sup>46</sup>*National Law Journal*, October 16, 2000, at C9.

federal provisions until they had a term comparable to that for other copyrighted material.<sup>47</sup>

A layer of complexity is added by the fact that many older sound recordings not covered by U.S. Federal law have entered the public domain in their country of origin. This was the issue in 2003/2005 case settled under New York law. Its highest court has asserted that all pre-1972 sound recordings remain subject to common law copyright in New York (until 2067) regardless of their public domain status elsewhere. In this case of *Capitol Records v. Naxos*, the court declared Naxos' release in New York of its restorations of 1930s recordings that had entered the public domain in the U.K. as an infringement on Capitol's state common law copyright even though the recordings had been originally made in London. Nimmer notes: "The decision, the first in decades in which a state's high court canvasses the terrain of continuing protection within its borders for sound recordings, robustly reaffirms protection. Other state courts can be anticipated to think long and hard before rejecting such protection within their own domains."<sup>48</sup> In a 2008 case, *EMI Records and Capitol Records v. Premise Media Corporation et al.* the New York Supreme Court argued that the principles of federal copyright case law on Fair Use could be applied to sound recordings, which otherwise were outside the scope of federal copyright [use of John Lennon's 1971 *Imagine* in a documentary film relating to how those advancing anti-Darwinian viewpoints were excluded from academe and schools.]<sup>49</sup>

§ 303 The 1909 rules apply to works published or registered before the effective date of the 1976 act.

THREE DIFFERENCES OF THE 1909 ACT:

- 1) term was measured from PUBLICATION or registration, not creation.
- 2) copyright was for a STATED TERM, not a contingent term of life plus 50, or 70.
- 3) term included MANDATORY PUBLICATION AND RENEWAL PROCEDURES, and failure to comply meant that the work entered the public domain (28 years plus 28 years)

All United States works published (with or without notice) before January 1, 1978 are candidates for already being in the public domain, but each item has to be examined and assessed in relation to a complex of dates for expiration.

§ 304 (a), pertains to works still in their initial term or in its renewal term on the effective date of the 1976 Copyright revision act (1 January 1978). Thus, a work published January 1, 1951 would be the oldest work that would qualify under the "initial term" part of this clause since the 28th year of its first term would not have expired until December 31, 1978, and as we know independently via the Hirtle chart, a work published 1923 would have its first term ending in 1950, and if not renewed then would not qualify for the transitional provisions of the 1976 law that since the 1998 Copyright Term Extension Act (CTEA) would give it 95 years. However, lack of a notice provides a clearer course, in instances where documents appear without notice and where an archives or library may want to make copies of such works.

In the 2003 ruling on *Eldred v. Ashcroft*, a 7 to 2 majority of the Supreme Court held that the 1998 CTEA was "a rational exercise of the legislative authority conferred by the Copyright

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<sup>47</sup>The House report.(p. 133) states: "However it [the House Committee] cannot agree that they should be in effect accorded perpetual protection, as under the Senate amendment, and it has therefore revised clause 4 to establish a future date for the pre-emption to take effect. The date chosen is February 15, 2047, which is 75 years from the effective date of the statute extending Federal protection to recordings."

<sup>48</sup>Nimmer 8C[D]. See also: *Capitol Records, Inc. v Naxos of Am., Inc.* 2005 NY Slip Op 02570. See also: "Bit Parts" *Entertainment Law and Finance*, Vol. 20; No. 4; Pg. 8, July 6, 2004.

<sup>49</sup>*EMI Records Limited and Capitol Records LLS vs. Premise Media Corporation L.P., C&S Production L.P.* (New York State Supreme Court Index No. 601209/08), August 8, 2008. Note that this opinion was simply the ruling on the New York Supreme Court's decision to reject Plaintiff's motion for preliminary injunction and Defendants' motion to dismiss.

Clause[.]” and “reflected judgements of a kind Congress typically makes[;] judgements we cannot dismiss as outside the Legislature’s domain.” (123 U.S. 781) At the same time that the Court in *Eldred*, limited users and archivists rights in older copyrighted material, it also affirmed the importance of fair use and the idea/expression dichotomy (“this idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” Also while it acknowledged that CTEA might not impact First Amendment rights, Congressional enactments in Title 17 could be examined to determine if they crossed the line of impinging on freedom of expression rights.

In the 2003 case of *Dastar Corp. v. Twentieth Century Fox Film Corp*, the Court gave credence to the idea that the public has a right to exploit works in the public domain, and that trademark law could not be used to extend exclusive rights over works not in copyright. Basically, it found that the Lanham (i.e. Trademark) Act could not be used to create a cause for action in what it characterized as plagiarism—the use of otherwise unprotected works without attribution.<sup>50</sup>

Review Question:

You just found a hand-written letter from a 45th Illinois Regiment militia member writing from right after the surrender of Vicksburg in 1863 among some papers of his 1940s descendent you are just now reprocessing. Can you publish the letter in the newspaper and post to the internet without obtaining permission from the family?

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

The easiest way to thread though the term provisions is to work with Peter Hirtle’s chart, found at: <http://copyright.cornell.edu/resources/publicdomain.cfm> and reproduced below.

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<sup>50</sup>The Supreme Court’s decision stated: “The gravamen of [Fox’s] . . . claim is that in marketing and selling [the video] . . . as its own product without acknowledging its nearly wholesale reliance on the [original] . . . series, Dastar . . . made a . . . misleading representation . . . as to the origin of . . . [the work].” The Court argued that accepting Fox’s interpretation of the Lanham Act “would create a species of mutant copyright law that limits the public’s federal right to copy and use expired copyrights.” (539 U.S. 23 (2003)). Indeed, adopting Fox’s interpretation would have “creat[ed] a species of perpetual . . . copyright, which Congress may not do.” See also: “Supreme Court Expands the Rights of Copyright Holders,” 6:23 *Delaware Law Weekly*, June 11, 2003, p. d 5. For a contrary view arguing that the failure to accept the application of trademark represents an intrusion on the “author’s moral rights” and thus a cause to remove Berne status from the U.S. see Janet Fries and Michael J. Remington, “Who Remembers the Names? Authors’ Rights in Flux after Dastar Ruling,” *Legal Times*, July 21, 2003, Magazine section, p. 30.



# Copyright Term and the Public Domain in the United States

1 January 2012<sup>1</sup>

## Never Published, Never Registered Works<sup>2</sup>

<i>Type of Work</i>	<i>Copyright Term</i>	<i>What was in the public domain in the U.S. as of 1 January 2012<sup>3</sup></i>
Unpublished works	Life of the author + 70 years	Works from authors who died before 1942
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1892
Unpublished works when the death date of the author is not known <sup>4</sup>	120 years from date of creation <sup>5</sup>	Works created before 1892 <sup>5</sup>

## Works Registered or First Published in the U.S.

<i>Date of Publication<sup>6</sup></i>	<i>Conditions<sup>7</sup></i>	<i>Copyright Term<sup>3</sup></i>
Before 1923	None	None. In the public domain due to copyright expiration
1923 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities

1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1923 through 1963	Published with notice but copyright was not renewed <sup>8</sup>	None. In the public domain due to copyright expiration
1923 through 1963	Published with notice and the copyright was renewed <sup>8</sup>	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Created after 1977 and published with notice	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1978 to 1 March 1989	Created before 1978 and first published with notice in the specified period	The greater of the term specified in the previous entry or 31 December 2047
From 1 March 1989 through 2002	Created after 1977	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
From 1 March 1989 through 2002	Created before 1978 and first published in this period	The greater of the term specified in the previous entry or 31 December 2047
After 2002	None	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
Anytime	Works prepared by an officer or employee of the United States Government as part of that person's official duties. <sup>21</sup>	None. In the public domain in the United States ( <a href="#">17 U.S.C. § 105</a> )

## Works First Published Outside the U.S. by Foreign Nationals or U.S. Citizens Living Abroad<sup>9</sup>

<i>Date of Publication</i>	<i>Conditions</i>	<i>Copyright Term in the United States</i>
Before 1923	None	In the public domain (But see first special case below)
<b>Works Published Abroad Before 1978<sup>10</sup></b>		
1923 through 1977	Published without compliance with US formalities, and in the public domain in its source country as of 1 January 1996 (but see special cases) <a href="#">20</a>	In the public domain
1923 through 1977	Published in compliance with all US formalities (i.e., notice, renewal) <sup>11</sup>	95 years after publication date
1923 through 1977	Solely published abroad, without compliance with US formalities or republication in the US, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
1923 through 1977	Published in the US less than 30 days after publication abroad	Use the US publication chart to determine duration
1923 through 1977	Published in the US more than 30 days after publication abroad, without compliance with US formalities, and not in the public domain in its home country as of 1 January 1996 (but see special cases)	95 years after publication date
<b>Works Published Abroad After 1 January 1978</b>		
1 January 1978 - 1 March 1989	Published without copyright notice, and in the public domain in its source country as of 1 January 1996 (but see special cases) <a href="#">20</a>	In the public domain
1 January 1978 - 1 March 1989	Published without copyright notice in a country that is a signatory to the Berne Convention and is not in the public domain in its source country as of 1 January 1996 (but see special cases) <a href="#">20</a>	70 years after the death of author, or if work of corporate authorship, 95 years from publication
1 January 1978 - 1 March 1989	Published with copyright notice by a non-US citizen in a country that was party to the Universal Copyright Convention (UCC)	70 years after the death of author, or if work of corporate authorship, 95 years from publication
After 1 March 1989	Published in a country that is a signatory to the Berne Convention	70 years after the death of author, or if work of corporate authorship, 95 years from publication

After 1 March 1989	Published in a country with which the United States does not have copyright relations under a treaty	In the public domain
<b>Special Cases</b>		
1 July 1909 through 1978	In Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands ONLY. Published in a language other than English, and without subsequent republication with a copyright notice <sup>12</sup>	Treat as an unpublished work until such date as first US-compliant publication occurred
Prior to 27 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country <sup>19</sup>	In the public domain
After 26 May 1973	Published by a national of Turkmenistan or Uzbekistan in either country <sup>19</sup>	May be protected under the UCC
Anytime	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries <sup>13</sup>	Not protected by US copyright law until they become party to bilateral or international copyright agreements
Anytime	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of January 1, 1996 , be owned by a government <sup>14</sup>	Not protected by US copyright law
Anytime	If published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier:  Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jordan, Democratic People's Republic of Korea, Laos, Micronesia, Montenegro, Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen	

## Sound Recordings

(Note: The following information applies only to the sound recording itself, and not to any copyrights in underlying compositions or texts.)

<b>Date of Fixation/Publication</b>	<b>Conditions</b>	<b>What was in the public domain in the U.S. as of 1 January 2012<sup>3</sup></b>



## Unpublished Sound Recordings, Domestic and Foreign

Prior to 15 Feb. 1972	Indeterminate	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
After 15 Feb. 1972	Life of the author + 70 years. For unpublished anonymous and pseudonymous works and works made for hire (corporate authorship), 120 years from the date of fixation	Nothing. The soonest anything enters the public domain is 15 Feb. 2067

## Sound Recordings Published in the United States

<i><b>Date of Fixation/Publication</b></i>	<i><b>Conditions</b></i>	<i><b>What was in the public domain in the U.S. as of 1 January 2012<sup>3</sup></b></i>
Fixed prior to 15 Feb. 1972	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
15 Feb 1972 to 1978	Published without notice (i.e., ©, year of publication, and name of copyright owner) <sup>15</sup>	In the public domain
15 Feb. 1972 to 1978	Published with notice	95 years from publication. 2068 at the earliest
1978 to 1 March 1989	Published without notice, and without subsequent registration	In the public domain
1978 to 1 March 1989	Published with notice	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation. 2049 at the earliest

## Sound Recordings Published Outside the United States

Prior to 1923	None	Subject to state statutory and/or common law protection. Fully enters the public domain on 15 Feb. 2067
1923 to 1 March 1989	In the public domain in its home country as of 1 Jan. 1996 or there was US publication within 30 days of the foreign publication (but see special cases)	Subject to state common law protection. Enters the public domain on 15 Feb. 2067
1923 to 15 Feb. 1972	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	Enters public domain on 15 Feb. 2067
15 Feb. 1972 to 1978	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	95 years from date of publication. 2068 at the earliest
1978 to 1 March 1989	Not in the public domain in its home country as of 1 Jan. 1996. At least one author of the work was not a US citizen or was living abroad, and there was no US publication within 30 days of the foreign publication (but see special cases)	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
After 1 March 1989	None	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation

### **Special Cases**

Fixed at any time	Created by a resident of Afghanistan, Eritrea, Ethiopia, Iran, Iraq, or San Marino, and published in one of these countries <sup>13</sup>	Not protected by US copyright law because they are not party to international copyright agreements
Fixed prior to 1996	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of 1 January 1996 be owned by a government <sup>14</sup>	Not protected by US copyright law
Fixed at any time	If fixed or solely published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier:	

Andorra, Angola, Armenia, Bhutan, Cambodia, Comoros, Jordan,  
 Democratic People's Republic of Korea, Laos, Micronesia, Montenegro,  
 Nepal, Oman, Papua New Guinea, Qatar, Samoa, Saudi Arabia, Solomon  
 Islands, Sudan, Syria, Tajikistan, Tonga, United Arab Emirates,  
 Uzbekistan, Vietnam, Yemen

## Architectural Works<sup>16</sup>

(Note: Architectural plans and drawings may also be protected as textual/graphics works)

<b>Date of Design</b>	<b>Date of Construction</b>	<b>Copyright Status</b>
Prior to 1 Dec. 1990	Not constructed by 31 Dec. 2002	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed by 1 Dec. 1990	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed between 30 Nov. 1990 and 31 Dec. 2002	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation <sup>17</sup>
From 1 Dec. 1990	Immaterial	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation <sup>17</sup>

### Notes

1. This chart was first published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," *Archival Outlook*, January/February 1999. This version is current as of 1 January 2012. The most recent version is found at <http://www.copyright.cornell.edu/resources/publicdomain.cfm>. The chart is based in part on Laura N. Gasaway's chart, "When Works Pass Into the Public Domain," at <http://www.unc.edu/~uncclng/public-d.htm>, and similar charts found in Marie C. Malara, *A Legal Primer On Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156. A useful copyright duration chart by Mary Minow, organized by year, is found at <http://www.librarylaw.com/DigitizationTable.htm>. A "flow chart" for copyright duration is found at <http://www.sunsteinlaw.com/practices/copyright-portfolio-development/flowchart.htm>, and a "tree-view" chart on copyright is at <http://chart.copyrightdata.com>. Several U.S. copyright duration calculators are available online, including the Public Domain Sherpa (<http://www.publicdomainsherpa.com/calculator.html>) and the Durationator (in beta at <http://www.durationator.com/>). Europeana's public domain calculators for 30 different countries outside of the U.S. (at <http://www.outofcopyright.eu/>). The Open Knowledge Foundation has been encouraging the development of public domain calculators for many countries: see <http://publicdomain.okfn.org/calculators/>. See also Library of Congress Copyright Office. Circular 15a, *Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection* (Washington, D.C. : Library of Congress, 2004) <http://www.copyright.gov/circs/circ15a.pdf>. Further information on copyright duration is found in Chapter 3, "Duration

and Ownership of Copyright," in *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, by Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon (Ithaca, NY: Cornell University Library, 2009) available for purchase at <http://bookstore.library.cornell.edu/> and as a free download at <http://ecommons.cornell.edu/handle/1813/14142>.

2. Treat unpublished works registered for copyright prior to 1978 as if they had been published in the US (though note that the only formality that applied was the requirement to renew copyright after 28 years). Unpublished works registered for copyright since 1978 can be considered as if they were an "Unpublished, Unregistered Work."
3. All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on the first of the year following the expiration of its copyright term. For example, a book published on 15 March 1923 will enter the public domain on 1 January 2019, not 16 March 2018 (1923+95=2018).
4. Unpublished works when the death date of the author is not known may still be copyrighted after 120 years, but certification from the Copyright Office that it has no record to indicate whether the person is living or died less than 70 years before is a complete defense to any action for infringement. See [17 U.S.C. § 302\(e\)](#).
5. Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.
6. "Publication" was not explicitly defined in the Copyright Law before 1976, but the 1909 Act indirectly indicated that publication was when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.
7. Not all published works are copyrighted. Works prepared by an officer or employee of the United States Government as part of that person's official duties receive no copyright protection in the US. For much of the twentieth century, certain formalities had to be followed to secure copyright protection. For example, some books had to be printed in the United States to receive copyright protection, and failure to deposit copies of works with the Register of Copyright could result in the loss of copyright. The requirements that copies include a formal notice of copyright and that the copyright be renewed after twenty eight years were the most common conditions, and are specified in the chart.
8. A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For books, the figure was even lower: 7%. See Barbara Ringer, "Study No. 31: Renewal of Copyright" (1960), reprinted in Library of Congress Copyright Office. *Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session*. (Washington: U. S. Govt. Print. Off, 1961), p. 220. A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," *Library Resources and Technical Services* 41:4 (October, 1997): 323-334. See also Library of Congress Copyright Office, [How to investigate the copyright status of a work. Circular 22](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004]. The Online Books Page FAQ, especially "[How Can I Tell Whether a Book Can Go Online?](#)" and "[How Can I Tell Whether a Copyright Was Renewed?](#)", is also very helpful.
9. The following section on foreign publications draws extensively on Stephen Fishman, *The Public Domain: How to Find Copyright-free Writings, Music, Art & More*. (Berkeley: Nolo.com, 2004). It applies to works first published abroad and not subsequently published in the US within 30 days of the original foreign publication. Works that were simultaneously published abroad and in the US are treated as if they are American publications.
10. Foreign works published after 1923 are likely to be still under copyright in the US because of the Uruguay Round Agreements Act (URAA) modifying the General Agreement on Tariffs and Trade (GATT). The URAA restored copyright in foreign works that as of 1 January 1996 had fallen into the public domain in the US because of a failure to comply with US formalities. One of the authors of the work had to be a non-US citizen or resident, the work could not have been published in the US within 30 days after its publication abroad, and the work needed to still be in

copyright in the country of publication. Such works have a copyright term equivalent to that of an American work that had followed all of the formalities. For more information, see Library of Congress Copyright Office, [Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act \(URAA\), Circular 38b](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004].

11. US formalities include the requirement that a formal notice of copyright be included in the work; registration, renewal, and deposit of copies in the Copyright Office; and the manufacture of the work in the US.
12. The differing dates is a product of the question of controversial [Twin Books v. Walt Disney Co.](#) decision by the 9th Circuit Court of Appeals in 1996. The question at issue is the copyright status of a work only published in a foreign language outside of the United States and without a copyright notice. It had long been assumed that failure to comply with US formalities placed these works in the public domain in the US and, as such, were subject to copyright restoration under URAA (see note [10](#)). The court in *Twin Books*, however, concluded "publication without a copyright notice in a foreign country did not put the work in the public domain in the United States." According to the court, these foreign publications were in effect "unpublished" in the US, and hence have the same copyright term as unpublished works. The decision has been harshly criticized in *Nimmer on Copyright*, the leading treatise on copyright, as being incompatible with previous decisions and the intent of Congress when it restored foreign copyrights. The Copyright Office as well ignores the *Twin Books* decision in its circular on restored copyrights. Nevertheless, the decision is currently applicable in all of the 9th Judicial Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam and the Northern Mariana Islands), and it may apply in the rest of the country.
13. See Library of Congress Copyright Office, [International Copyright Relations of the United States, Circular 38a](#). [Washington, D.C.: Library of Congress, Copyright Office, 2004].
14. See 63 Fed. Reg. 19,287 (1998), Library of Congress Copyright Office, [Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act: List Identifying Copyrights Restored Under the Uruguay Round Agreements Act for Which Notices of Intent To Enforce Restored Copyrights Were Filed in the Copyright Office](#).
15. Copyright notice requirements for sound recordings are spelled out in the Copyright Office's Circular 3, "Copyright Notice," available at <http://www.copyright.gov/circs/circ03.pdf>. Here is the exact text:

The copyright notice for phonorecords embodying a sound recording is different from that for other works. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Copyright in a sound recording protects the particular series of sounds fixed in the recording against unauthorized reproduction, revision, and distribution. This copyright is distinct from copyright of the musical, literary, or dramatic work that may be recorded on the phonorecord. Phonorecords may be records (such as LPs and 45s), audio tapes, cassettes, or disks. The notice should contain the following three elements appearing together on the phonorecord:

  1. The symbol ©; and
  2. The year of first publication of the sound recording; and
  3. The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.
  4. Example: © 2004 X.Y.Z. Records, Inc.
16. Architectural works are defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." Architectural works were expressly included in copyright by Title VII of Pub. L. 101-650.
17. What constitutes "publication" of a building is a very interesting question. As the Copyright Office has noted, "A work is considered published when underlying copies of the building design are distributed or made available public by sale or other transfer of ownership, or by rental. Construction of

a building does not itself constitute publication registration, unless multiple copies are constructed." See its Circular 41, "Copyright Claims in Architectural Works," available at <http://www.copyright.gov/circs/circ41.pdf>.

19. Turkmenistan and Uzbekistan may have inherited UCC obligations and protections from the USSR , which joined the UCC on 27 May 1973 . See Peter B. Maggs, "Post-Soviet Law: The Case of Intellectual Property Law," The Harriman Institute Forum 5, no. 3 (November 1991). They have not as yet, however, filed a "Notification of Succession" with the UCC. See [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=1814&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1814&URL_DO=DO_TOPIC&URL_SECTION=201.html) for signatories to the two UCC treaties.
20. If the source country's first adhered to either the Berne Treaty or the WTO after 1 January 1996, then the relevant date is the earliest date of membership. Date of membership is tracked at [http://en.wikipedia.org/wiki/list\\_of\\_parties\\_to\\_international\\_copyright\\_agreements](http://en.wikipedia.org/wiki/list_of_parties_to_international_copyright_agreements)
21. Contractors and grantees are not considered government employees. Generally they create works with copyright (though the government may own that copyright). See [CENDI Frequently asked Questions about Copyright: Issues Affecting the U.S. Government](#) . The public domain status of U.S. government works applies only in the U.S.



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[Cornell Copyright Information Center <http://www.copyright.cornell.edu/>](http://www.copyright.cornell.edu/)

Chapter 4 Copyright Notice and Registration. On first glance, provisions relating to notice or registration would seem to be largely irrelevant after the 1976 law which made copyright automatic rather than contingent. However, there are some important provisions in Chapter 4 which can make life for the archivist a bit easier, even if they also complicate matters.

§407. The purpose of §407's registration requirement is to supply the Library of Congress with copies for its collections. Ironically, under §704(d) the Library of Congress is not required to retain the works, even for the period of copyright term, except in the case of unpublished materials where a facsimile copy must be made before discarding any unpublished item deposited.<sup>51</sup>

§408 Copyright Registration in General is “permissive” rather than mandatory. The purpose of §408(b) is to identify the copyrighted work for purposes of registration. It would seem that for most unpublished works in modern archives, the conditions the Copyright Office establishes for their registration would make it rather unlikely that most unpublished works in modern archives would be registered.<sup>52</sup>

§ 411 Registration and Civil Infringement Actions. Registration may not be required for copyright to exist, but it brings some benefits.

§ 411. Registration and civil infringement actions

- (a) Except for . . . [visual works of art rights], no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.

§ 412 Registration and Infringement Remedies. Because of the way in which remedies for infringement are related to registration status, the current law provides an element of protection to benefit the archivist’s risk management calculation:

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<sup>51</sup>Copyright Office Circular #1 *Copyright Basics*: states the following about the registration of “Unpublished Collections”: “Under the following conditions, a work may be registered in unpublished form as a “collection,” with one application form and one fee: ¶The elements of the collection are assembled in an orderly form;¶The combined elements bear a single title identifying the collection as a whole;¶The copyright claimant in all the elements and in the collection as a whole is the same; and¶All the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.¶An unpublished collection is not indexed under the individual titles of the contents but under the title of the collection.

Copyright Office Fact Sheet *Group Registration of Published Photographs [FL-124]* (May 2009) states:

“A group of published photographs can be registered on a single form with a single fee if (a) all the photographs are by the same photographer (if an employer for hire is named as author, only one photographer’s work can be included); (b) all the photographs are published in the same calendar year; and (c) all the photographs have the same copyright claimant. ¶You can use Form GR/PPh/CON, . . . Online registration through the electronic Copyright Office (eCO) is not available at this time (May 2009) for groups of published photographs.” Up to 750 photographs can be registered as a group.

<sup>52</sup>Copyright Office Circular #1 *Copyright Basics*: states the following about the registration of “Unpublished Collections”: “Under the following conditions, a work may be registered in unpublished form as a “collection,” with one application form and one fee: ¶The elements of the collection are assembled in an orderly form;¶The combined elements bear a single title identifying the collection as a whole;¶The copyright claimant in all the elements and in the collection as a whole is the same; and¶All the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.¶An unpublished collection is not indexed under the individual titles of the contents but under the title of the collection.

§ 412. Registration as prerequisite to certain remedies for infringement

Except for §106A claims, no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

- (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Thus, to bring an infringement claim, each work for which an infringement is to be alleged must be registered, and if statutory damages are to be sought, the registration must occur within 3 months of publication. (or for unpublished, before the date of the alleged infringement, cf. 411 (a)). Furthermore, according to Goldstein "If the infringement began before registration, statutory damages and attorney's fees will not be recoverable for acts of infringement occurring after registration."<sup>53</sup> These conditions should have the effect of partially limiting the risk of web posting of unpublished archival material unless the financial gain or market loss is very significant. Note that the Copyright Office regards pending litigation as a justification for "special handling" for registration of a work. If so, note, however, that the fee is then not \$35 (or \$65) per work but \$760 special handling, plus \$35.<sup>54</sup> Overall, this section opens up the possibility for certain repositories to take a calculable risk and digitize materials for the Internet. Of course we could still be liable for injunction and impoundment, but the criminal penalties apply only to works that are worth more than \$1000.

Chapter 5's provisions dealing with infringement and seeking remedies are relevant as a key part of how archivists administer copyright as a matter of risk management. The idea behind "statutory" damages is that the amount to be awarded is dependent upon amounts in the law itself rather than depending on the parties, jury, or judge estimating the extent of financial damage coming from an infringement. They provide a level of predictability to those debating whether to sue. Actual damages include damages resulting from the infringement (e.g., lost profits, lost opportunities, and injury to the market value) and the profits made by the infringer.

§ 501a Statutory Damages are at the judge's discretion and are likely to be influenced by circumstances as to whether the infringement was *willful* or *unconscious*. "Willful Infringement" occurs when the infringer had no reasonable basis for assuming his/her conduct was legal. It can be applied if the court can find either a) that the infringer had actual knowledge of infringement or b) if the infringer showed reckless disregard of the copyright owner's interests. If the infringer had a reasonable belief that he/she was not infringing, then the court cannot find willfulness.<sup>55</sup>

*Contributory* and *vicarious* infringement are issues that should be of concern to archives. Contributory infringement applies when a person has knowledge of the infringing activity and contributes to it in a material way. Vicarious infringement applies when a person has the ability to

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<sup>53</sup>Goldstein, 12.2 n1 and 12.3 n2

<sup>54</sup>Rate of \$35 applies for on-line registration (via electronic Copyright Office [eCO]), but fee is \$50 for registration on form CO, and \$65 for form TX [literary works, VA [visual arts works], PA [performing arts], SR [sound recordings], SE [single serial issues]. Circular 04 (<http://www.copyright.gov/circs/circ04.pdf>) lists the fee rates and also includes statements regarding "special handling fee to be applied when there is "pending or prospective litigation." As per *Have a Question About Copyright Registration* SL 9 (2004), the copyright registration is effective as soon as all required elements are received, although it may be several months before a registrant receives a certificate.

<sup>55</sup>*McCarthy's Desk Encyclopedia of Intellectual Property* and Michael S. Shapiro and Brett I. Miller. *A Museum Guide to Copyright and Trademark*. (Washington, D.C.: American Association of Museums, 1999).



control the conduct of the infringing person even if the person does not have actual knowledge of the infringing activity. Note concept of *innocent infringement*. One clear way of protecting a repository from contributory infringement claims is to require that researchers complete a detailed user registration form or copy order form that includes warning of copyright issues.

Section 504 Remedies for Infringement: Damages and Profits contains clauses which should provide some comfort for librarians and archivists. First, one needs to understand that statutory damages are very important to the likelihood that a potentially aggrieved copyright owner will pursue action for infringement. Thus, if one's actions can avoid exposure for statutory damages, then one's risk level is reduced. See subsection (c) to see the rates for damages (not less than **\$750** or more than **\$30,000**, but if it is proven that the infringement was willful, the court may increase the award of statutory damages to a sum of not more than **\$150,000**.)<sup>56</sup> If the infringer proves that the infringement was not willful the court may reduce the award of statutory damages to a sum of not less than \$200.

Especially important for libraries and archives working in a good faith belief of fair use is Subsection 504 (c) 2: "The court shall remit [pardon or abate] statutory damages if infringer had reasonable grounds to believe that the use of the copyrighted work was a fair use under section 107." This provision applies only in the case of nonprofit educational institutions, libraries, or archives and public broadcasting entities, but for those note that if an archives believes it was acting under fair use, statutory damages would not apply, but as with § 412, you have to be able make the case that you had a reasonable basis for assuming that you were engaged in fair use.

#### § 505. Remedies for Infringement: Costs and Attorney's Fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

As an element in one's risk management calculations, the matter of attorney's fees is very important. Commentators have noted that the rationale of allowing successful copyright holders the opportunity to gain attorney's fees, or conversely to allow fees to prevailing copyright defendants, is to deter infringers on the one hand and to discourage overly zealous copyright owners on the other hand. This makes clear the notion that fees are intended to be part of the system of incentives in copyright, and thus strengthens the point that if an archives or a user is likely to have a safe haven from attorney's fees, he/she will have a more favorable risk-management quotient.<sup>57</sup>

An example of the role of the amount of attorney's fees can be seen in the case of Marilyn Monroe Photos in which it was ruled that a publisher had not infringed because the images were found to have been in the public domain. Approximately \$800,000 in attorney's fees were awarded to VNU Business Media Inc, in relation to the use of seven Monroe photographs in the 2001 biography *Blonde Heat*. The court had previously issued a summary judgement finding that the photos, from *Bus Stop* and *The Prince and the Showgirl*, were in the public domain. (The Milton H. Greene Archives Inc. appealed the award and the case. The case eventually was denied cert. by the

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<sup>56</sup>As an example of how damages can add up, in the 2007 case of *Capitol Records v. Thomas* [the Minnesota mother who forced the RIAA to go to a jury trial to collect for her son's illegal file sharing] at one point the Electronic Frontier Foundation reported that jury awarded damages of \$220,000 or \$9,250 per song (calculates to 24 songs) [See: <http://www.eff.org/deeplinks/2007/10/riaa-convines-jury-impose-fines-filesharing>]. The case is still ongoing, but at various times the courts have stated damage awards from \$54,000 to \$1.5 million.

<sup>57</sup>Goldstein 12.3.2.2.

U.S. Supreme Court.)<sup>58</sup> On the other hand, the court can decide against granting attorney's fees if it finds that the losing plaintiff had a non-frivolous and objectively reasonable claim not pursued its claim with bad faith or with an improper motive.<sup>59</sup>

### § 511. Liability of States, instrumentalities of States, and State officials.

A few cases have called into question the correctness of this part of the Copyright Act. In a 1999 Florida patent infringement case (*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*), the U.S. Supreme Court ruled that the state of Florida and a state agency could have the benefit of Eleventh Amendment immunity from infringement damages.<sup>60</sup> (Eleventh Amendment indicates that no state may be held liable in legal proceedings in federal court.) In the copyright area, a January 1998 decision of the Court of the Northern District of Texas found that a state agency could not be held liable for copyright infringement. A similar finding occurred in the U.S. Court of Appeals for the Fifth Circuit in April 1998.

As background, note that although Congress passed the language now in § 511 in 1990 (the Copyright Remedy Clarification Act) based on an earlier comment from the Supreme Court. Yet, in 1996 the Supreme Court ruled (*Seminole Tribe of Florida v. Florida* 116 S. Ct. 1114, 1996) that its earlier decision empowering Congress to make such statutory exceptions had been in error.<sup>61</sup>

However, several important caveats are in order: 1) the Texas rulings or the Supreme Court rulings in re Florida are not the final word on this as a matter of copyright. 2) If there is immunity, it might not extend to individuals. 3) Even with immunity, other remedies such as injunctive and declaratory relief could be applied. 4) In some cases there might be other state laws that are violated by the same infringing use for which Eleventh Amendment immunity would not apply. 5) Ethical behavior calls for not engaging in willful infringement. Thus, these ruling suggest a reduced risk, not an eliminated risk.<sup>62</sup>

## 8. GHOSTS AND SHADOWS ON COPYRIGHT "Moral Rights"

Artistic integrity (French moral rights) should be kept totally separate from copyright. Among other reasons, there is a serious problem with the requirement that "artist" would have to be defined as well as what constitutes a work of art. In the U.S., copyright belongs to J. D. Salinger as

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<sup>58</sup>"Publisher Wins Fees in Monroe Photo Spat" AP story that appeared on Yahoo.com March 21, 2006 and possibly in *Seattle Post-Intelligencer* and other papers on either March 21 or 22. Case is: *Milton H. Greene Archives, Inc., vs. Bpi Communications, Inc. et al.*, Defendants., United States District Court for the Central District of California, Southern Division, (378 F. Supp. 2d 1189; 2005). Case discussion of why these photos ended up in public domain is an interesting reflection on the nature of publication and general release to the public in pre-1976 world. [District court case was June 6, 2005. Eventually appealed to U.S. Supreme Court, cert. denied October 5, 2009.]

<sup>59</sup>*Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 03 Civ. 9507 (GBD) , U.S. SDNY (2007).

<sup>60</sup>*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, (527 U.S. 666) [federal courts lack jurisdiction over suits brought against a state agency according to provisions of Trademark Remedy Clarification Act which had included states in the definition of a 'person' who violates trademark law, ruled that the TRCA was unconstitutional because it expressly abrogated the sovereign immunity clause of the 11<sup>th</sup> amendment].

<sup>61</sup>Goldstein 13.6.2.

<sup>62</sup> (Kenneth D. Crews, "Are State Universities Immune from Copyright Liability." *Indiana University Copyright Management Center*.  
<http://www.iupui.edu/~copyinfo/immunity.html>)

well as to J. Danforth Quayle, but moral rights imply an artistic merit not necessary in copyright (c.f. *Bleistein v. Donaldson Lithography*, 1903).

A notion well-entrenched in Continental legal systems. Typically they include:

- 1) *droit de divulgation*-right of authors to control the circumstances in which the work will be released to the public.
- 2) right to withdraw a work from circulation;
- 3) *droit de paternité* or right to claim attribution as the author and the right to be free from being falsely named as author;
- 4) integrity right or the right to prevent mutilation of a work; and
- 5) *droit de suite*-the right to share the proceeds of future sales, as might pertain to works of art. These rights are perceived as remaining with the author/creator even after he or she has released economic interest in the work.

As Peter Jaszi notes, moral rights are not in the marketplace, but they are inalienable. The application of the moral rights would impede free commerce in intellectual and artistic production long supported by Anglo-American copyright and represent a charter for censorship. Writing in 1991, Jaszi noted that decisions in *Harper & Row v. Nation Magazine*, *Salinger v. Random House*, and *New Era Publications v. Henry Holt* suggested a trend toward court imposition of moral rights in the guise of copyright.<sup>63</sup> However, with more than two decades since the adoption of the Visual Artists Rights Act and 20 years since the Fair Use of Copyrighted Unpublished Works act put an end to the basis for the decisions in *Salinger* and *New Era*, it may be possible to be less alarmed that moral rights are intruding into copyright. On the other hand, the weight of moves in international treaties suggests greater momentum towards a natural law theory of copyright. Nevertheless, Visual Artists Rights Act, along with CTEA are evidence of a European intrusion on American law in an era of economic globalization, and one only need to read some law review and law news commentary on decisions to see that the notion of natural law property and attendant “moral rights” is an ongoing threat to the American notion of copyright.<sup>64</sup>

An example of the nuisance that can be raised by “moral rights” can be seen in the dispute over productions of Samuel Beckett’s *Endgame* by the American Repertoire Theatre in Boston (1984-85) It was a failed attempt to bar the use of black actors and setting of the play in a subway station vs. the successful barring of use of pink lighting and music in a Paris production intended for the Comédie Française in 1988.<sup>65</sup>

#### Rights of Privacy and Publicity

Privacy and publicity rights are fundamentally not part of federal intellectual property rights, but they are often confused by owners, users, and archivists. There is an archival responsibility not to allow copyright to be invoked to support privacy or publicity rights, and to do so, one must be familiar with some basic principles of privacy and publicity. Overall, privacy and publicity rights recognize that a person has a personal and financial interest in his/her name, image, voice, and other distinctive or identifying aspects.

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<sup>63</sup>Peter Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship,’” *Duke Law Journal* (April 1991) 496-500.

<sup>64</sup>Edward Samuels, “The Public Domain in Copyright Law” 41 *Journal of the Copyright Society* 137 (1993). Orit Fischman Afori, “Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law,” 14 *Fordham Intell. Prop. Media & Ent. L.J.* (2004) 497. Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,” 102 *Yale Law Journal* (1993) 1533.

<sup>65</sup>“Who’s to Say Whether a Playright is Wronged?” *New York Times* 14 December 1984, IV: 6:3; *International Herald Tribune* 14 October 1988, p. 20 under heading of “People” and “Actualité: À la Comédie Française Roland Bertin joue Beckett,” *Avant-Scene Théâtre* 1-15 December, 1988.

### Key Issues of Privacy and Publicity

Generalization is difficult because privacy and publicity rights are a matter of state, not federal legislation, and privacy and publicity are also governed by common law. Nevertheless, in general, privacy is a right to be free from unwarranted exposure and resultant emotional harm in the form of “four prongs:”-

- 1) Intrusion on a person's seclusion
- 2) Public disclosure of private facts
- 3) Being publicly placed in a false light
- 4) Appropriation of one's name or likeness (a bridge to publicity rights)

To be actionable, violation of privacy must be offensive and objectionable to persons of reasonable sensitivity. Public figures also have less of a right of privacy than private individuals. The extent of violation is determined by the extent to which the document revealed was taken in a public place (e.g., a photograph of Martha Stewart shopping for linens at a flea market). Finally, privacy rights are not absolute but in tension with the First Amendment.

By common law as well as state statute in most cases, privacy rights do not endure beyond death, although some states, such as Illinois, have developed protection against unauthorized appropriation for a stated period after death. Although personal privacy does not extend beyond death, it has long been recognized in common and state law, that the privacy of one's family members can survive one's death.

The 2004 U.S. Supreme Court decision in *National Archives and Records Administration v. Allan J. Favish* 541 U.S. 157) found that the family members of the deceased Vincent Foster's own privacy (especially ) would have been violated if the Office of the Independent Counsel and the National Archives had been required to release, under FOIA, death scene photographs. It stated: “Foster's relatives instead invoke their own right and interest to personal privacy. They seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased.” The unanimous opinion written by Justice Kennedy cites several older lower court decisions dealing with family members whose personal privacy had been deemed to be affected by revealing information about the deceased's condition of death.<sup>66</sup> At the same time, it must be remembered that a major part of the *Favish* decision was a weighing of whether the personal privacy interests of the family were or were not in balance with the public's right to know according to the specifics of exemption 7(C) of the federal FOIA. I.e., finding a privacy interest to be present, by itself, was not dispositive

**Publicity.** The right of publicity is the right of an individual, especially a public figure, to control the commercial value of his/her name, image, voice, or other identifying features and to prevent others from appropriating that name, image, voice, or feature for financial gain. While very close to the appropriation prong of privacy, the right of publicity is more a matter of control of property than an individual inalienable right. A good example of the ways in which publicity rights, if overly-enforced, could lead to a restriction on speech, can be seen in the “cease and desist” letter which the *Atlanta Journal-Constitution* received saying that their music critic, Bill Wyman, had to cease using his name since this was the same name as the Rolling Stones' former bassist Bill Wyman (born William George Perks). While the action was settled with an out-of-court agreement that the journalist would include a disclaimer on his name whenever he wrote about the Stones, the experience of having your employer receive a cease and desist letter can be unsettling.<sup>67</sup>

Unlike privacy, the right of publicity can survive after death for varying lengths of time, based on state law. (e.g., 10 years in Tennessee, 50 in Illinois and California, 100 in Indiana). Yet, claims

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<sup>66</sup>These include: *Schuyler v. Curtis*, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895) and *New York Times Co. v. National Aeronautics and Space Admin.*, 782 F. Supp. 628, 631, 632 (CADDC 1991), and they also refer to the *Restatement (Second) of Torts* § 652D, p. 387 (1977).

<sup>67</sup>“Can Bill Wyman be Bill Wyman? No, says Bill Wyman” *San Francisco Chronicle*, November 21, 2002, p. A2.

of violation of right of publicity are subject to some limits: factual representations focused on news reporting or education are generally allowable. However, commercial uses, especially advertising, are not permitted. In Illinois, “commercial” includes fund-raising.

9. Case study exercises by teams.

Attendees need to divide up into small groups based on arbitrary assignment. Each needs to designate a reporter. Depending on interest in the cases, we will try to have up to two teams looking at each case. The report must be very brief, and each case’s report has to be delivered before we will discuss that particular case.

10. Archival policies to implement:

A DEED OF GIFT CLAUSE might read: “To facilitate the research use of the Materials, the Donor hereby gives and assigns to the Donee all other right, title, and interest, including copyright which the Donor has in the Materials.” [This is in addition to clauses such as: “title to the physical material shall pass to the Donee upon their delivery.”] Deed of Gift might be: “To facilitate the research use of the collection, the Donors hereby give and assigns to the Donee those rights of copyright which the Donors have in the collection.” One might also ask the donors to transfer their rights of trademark, publicity, and privacy, if any, in the materials. Note however, that such a clause only transfers rights they have. Often donors have very little idea of what they do and do not own, and they cannot transfer termination rights.

Userforms. One of the most useful steps, albeit a time-consuming one, is to develop a form for all copy orders which includes references to copyright issues. Not only should you look to the model provided by Ken Crews’ website, but you also need to consider obtaining your legal counsel’s review once you have drafted language that meets your archival interests. Another general copyright tutorial website site is North Carolina State University Library’s <http://www.lib.ncsu.edu/cdsc/copyright/instruction>. There are several good examples which can be found on the web and in conventional locations, such as, form from Connecticut Historical Society or for photographic and audiovisual works at the University of Illinois, form for online use as with the James B. Reston Papers), see also the American Museum of Natural History “Conditions of Use” for its Photo Collections <http://images.library.amnh.org/photos/conditions.html>


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## Well-intentioned Practice for Putting Digitized Collections of Unpublished Materials Online (W-iP)

Developed by: [OCLC Research](#)

### Preface prepared by SAA's Intellectual Property Working Group

"Well-intentioned Practice for Putting Digitized Collections of Unpublished Materials Online" (W-iP), prepared by [OCLC Research](#), offers a framework for an assertive approach to digitization of unpublished archival materials whose rights holders are often difficult to identify and contact. Consistent with the aggregate, rather than item-level, approach that traditionally has been so fundamental to the rest of archival practice, it emphasizes a collective approach to the management of the copyright responsibilities involved in large-scale digitization projects. By definition, the W-iP guidelines encourage a movement away from work-by-work or even author-by-author decision-making on rights clearances.

The guidelines offer the prospect of moving beyond a near paralysis coming from the impossibility of having copyright clarity on all the works or all the authors in a given collection or archival record series that otherwise merit wide exposure through digitization. If the guidelines are adopted widely enough, they offer the promise of becoming a "community standard" that, by its broad use, could become a foundation on which the archives profession could rely as a "best practices" defense.

For this to happen, however, archivists must understand what W-iP does and does not provide, and that W-iP cannot substitute for being well-informed about copyright. In essence, W-iP is a map of how to take risks in moving forward with digitization when a strict interpretation of copyright might argue otherwise. Those who wish to use W-iP as a basis for launching digitization programs must understand that the guidelines offer no formal legal protections, but merely define an approach for managing the inevitable risks in large-scale digitization. Before adopting the W-iP approach, archivists should confer with their legal counsel as well as their risk management staff, if available and appropriate, to be certain that the institution is prepared to accept responsibility and costs should a legal action or simply an out-of-court settlement result.

Although W-iP defines an approach consistent with the archival mission of promoting the widest possible access, it assumes a level of legal knowledge that not all archivists may possess or have available to them. Archivists need not become copyright lawyers, but to use W-iP well, they need to have a solid understanding of the law. Indeed, gaining the institutional approval to adopt the W-iP approach will be most likely if one can forcefully articulate the particular archival dimensions of copyright. A start for building a knowledge base can be found in the following sources:

- *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* by Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon. Ithaca, NY: Cornell University Library, 2009.
  - Available for purchase from:
    - [SAA online bookstore](#);
    - [Create Space](#); and
    - Other book retailers.
  - Available for free download at:
    - [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1495365](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495365)
    - <http://hdl.handle.net/1813/14142>
- *Orphan Works: Statement of Best Practices* (Society of American Archivists)
- [Columbia University Fair Use Page](#) (Kenneth Crews, Director, Copyright Advisory Office, Columbia University Library)
  - [Fair use checklist](#)
- [Copyright Term and Public Domain in the United States](#) (chart) (Peter Hirtle, Senior Policy Advisor, Cornell University Library)
  - Includes links to additional sources

SAA Council Approval/Endorsement Date: August 22, 2011

#### Links:

[View full text on OCLC Research website](#)

### Related Resources:

Browse the following member-contributed references to case studies, journal articles, events, and other resources related to this standard.

*No related resources have been added.*

SAA Members: [Log in](#) to add Related Resources.



# Well-intentioned practice for putting digitized collections of unpublished materials online

The primary responsibilities of cultural materials repositories - stewardship and support for research and learning - require us to provide access to materials entrusted to our care. This document establishes a reasonable community of practice that increases and significantly improves access to collections of unpublished materials by placing them online for the purpose of furthering research and learning. Although it promotes a well-intentioned, practical approach to identifying and resolving rights issues that is in line with professional and ethical standards, note that this document does not concern itself with what individuals who access particular items may do with them. While the document was developed with US law in mind, it is hoped that the spirit of the document will resonate in non-US contexts.

If your institution has legal counsel, involve them in adopting this approach; after the approach has been adopted, only seek their advice on specific questions.

## Select collections wisely

- Keep your mission in mind and start with a collection of high research value or high user interest.
- Assess the advantages and risks of relying on fair use (in the US) to support public access.
- Some types of materials may warrant extra caution when considering rights issues, such as
  - Contemporary literary papers
  - Collections with sensitive information, such as social security numbers or medical data
  - Materials that are likely to have been created with commercial intent (because they are more likely to have economic value)
  - Very recent materials that were not intended to be made public
- If research value is high *and* risk is high, consider compromises, such as making a sensitive series accessible on-site only, until a suitable time has passed.

## Use archival approaches to make decisions

- Check donor files and accession records for permissions, rights, or restrictions.
- Assess rights and privacy issues at the appropriate level, most often at the collection- or series-level.
- Attempt to contact and get permission from the rights-holder, if there's an identifiable rights-holder at that level.
- Include what you know about the rights status in the description of the collection, including if the collection is in the public domain, if the institution holds the rights, or if the rights-holder has given the institution permission to place the digitized collection online.
- Document your processes, findings, and decisions and share them with your professional community.

## Provide take-down policy statements and disclaimers to users of online collections

- Adopt a liberal take-down policy, such as: *"These digitized collections are accessible for purposes of education and research. We've indicated what we know about copyright and rights of privacy, publicity, or trademark. Due to the nature of archival collections, we are not always able to identify this information. We are eager to hear from any rights owners, so that we may obtain accurate information. Upon request, we'll remove material from public view while we address a rights issue."*
- Use an appropriate disclaimer at the institutional level, such as *"[Institution] makes digital versions of collections accessible in the following situations:*
  - *They are in the public domain*
  - *The rights are owned by [institution]*
  - *[institution] has permission to make them accessible*
  - *We make them accessible for education and research purposes as a legal fair use, or*
  - *There are no known restrictions on use*

*To learn what your responsibilities are if you'd like to use the materials, go to [link]"*

## Prospectively, work with donors

- Identify possible intellectual property issues and get relevant contact information.
- Ask donors to state any privacy concerns and identify sensitive materials that may be in the collection.
- Suggest that donors transfer copyright to the institution or license their works under a Creative Commons CC0 license.
- Include statements in your collecting policies and in your deeds of gift or transfer documents that:
  - ensure that no restrictions are placed on content that is already in the public domain,
  - grant license to digitize the materials for unrestricted access even when donors retain the rights,
  - and guard against limitations or restrictions on fair use rights.

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For more about this document, see <http://www.oclc.org/research/activities/rights>

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