

Prospectus for *Introduction to Copyright and Unpublished Manuscripts*

By SAA Intellectual Property Working Group (IPWG)

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Theme, purpose, and scope:

The Society of American Archivists' Intellectual Property Working Group (IPWG) has prepared the attached introductory text on copyright and unpublished material for users of archives and manuscript collections. The text, structured in a Q&A format, is intended to answer in brief questions that users may have about archives and manuscript collections that may be protected by copyright. Because copyright law is constantly evolving, this text is provided for introductory and educational purposes only. It is not intended to be a complete discussion of the subject and is not a substitute for qualified legal advice. It also applies only to U.S. law.

Estimated format and length:

IPWG proposes that SAA publish the text in a format and distribution model similar to SAA's *A Guide to Deeds of Gift*, available both as a free download and as a print brochure which can be purchased in bundles of 25 and distributed on-site to an archives' or repository's users. IPWG would also like to propose that SAA consider making the download version, and possibly the print version, partially customizable, as ARL did with its brochure on copyright for faculty members; see <http://www.knowyourcopyrights.org/resourcesfac/kycrbrochure.shtml>

Intended audience and potential market:

While the primary intended audience is users of archives and manuscript repositories, the text will likely reach that audience most frequently through the conduit of professionals staffing those institutions. Therefore, the target market audience is archivists, librarians, and their parent institutions. IPWG hopes that the guide will also serve as a refreshers text for archivists and librarians who may not be so deeply versed in the intricacies of U.S. copyright law.

IPWG developed this educational text partly in response to Jean Dryden's IMLS-funded research study that investigated "the ways American archives attempt to educate their online users about copyright." While her study focused on online users, the outcomes seem relevant to on-site users as well. Dryden (who is a member of IPWG) writes: "It is clear that the user community is not of one mind about what (if anything) they want to know about copyright." In consequence, IPWG has made a concerted effort to provide useful information in as concise a manner as possible.

Prospective value to the archival profession and relationship of the proposed publication to the literature in the field:

In Dryden's April 2013 summary discussion of her study, she considers the "scope of copyright

education” a key consideration for archives, asking: “Is it sufficient to simply inform users about the policies and practices of one’s institution? If the repository is going to place responsibility for copyright compliance on the user, is there some obligation to at least point the user to reliable sources that will enable them to apply the complexities of copyright to their particular situation? Or is it even more incumbent on the repository to provide at least basic information about copyright matters to start the user off on the right foot?” To these questions IPWG answered No, Probably, and Yes, and proceeded to develop this introductory text.

Possibility of co-sponsorship:

While IPWG thinks that SAA will want to take full ownership of this publication, endorsements (which might be used in marketing the publication on SAA’s website) could be solicited from such organizations as the Rare Book and Manuscripts section of the Association of College and Research Libraries.

Possibility of outside financial support:

None that IPWG can identify at this time.

Graphics and illustrations:

IPWG members are prepared to make images from their own archives and repositories available for use by the publication’s designer. If, however, the formatted download distribution option is elected, then purchasers might be offered the option of customizing the image content with pictures from their own institution, perhaps thus making the download a more compelling product.

Anticipated publication schedule:

There is no particular publication deadline that needs to be met, although IPWG would like to see the text made available in a timely fashion.

Plans for updating and/or expanding the content:

Because copyright law is constantly evolving, this text was written to be as case-law neutral as possible. If, as suggested above, the guide text is offered by SAA on a fee basis as a formatted download, it would be relatively easy for IPWG to update or expand the content as copyright law legislation and case law dictates and for subsequent new editions of the text to be made available by SAA.

COPYRIGHT & UNPUBLISHED MATERIAL: AN INTRODUCTION FOR USERS OF ARCHIVES AND MANUSCRIPT COLLECTIONS

*This text is intended to answer questions you may have about archives and manuscript collections that may be protected by copyright. Because copyright law is constantly evolving, this text is provided for introductory and educational purposes only. **It is not intended to be a complete discussion of the subject and is not a substitute for qualified legal advice.** Other countries have different rules; this document applies only to U.S. law.*

I want to use material from the archives. What do I need to know?

U.S. Copyright law governs, among other things, using copyrighted material in research papers, published books and articles, web pages, exhibits, plays, songs, etc. Ultimately, you are responsible for determining whether you need permission to make use of a work.

What is protected?

Copyright protects works of original authorship the moment a work is fixed in some tangible form. Exceptions are works produced by the U.S. government and some state governments. Under U.S. law, the simple act of fixing the work in a “tangible medium” is sufficient to establish the creator’s copyright in unpublished material—no copyright statement (e.g., © 2013) is mandated, nor does the item need to be registered with the Copyright Office. The law distinguishes between published and unpublished material and the courts often afford more copyright protection to unpublished material when an asserted fair use is challenged.

How can I tell if something is published or unpublished?

The law defines “publication” as offering for distribution or actually distributing copies of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The phrase “to the public” was described by Congress as distribution to persons who are under no explicit or implicit restrictions with respect to disclosure of the contents. An informational text, such as this one, is published if it is distributed to the public, whether or not it is offered for sale. Generally, material is considered unpublished if it was not intended for public distribution or if only a few copies were created and distribution was limited.

How long does copyright in an unpublished work last?

Copyright in an unpublished work lasts for the life of the author plus 70 years. If the author (or the author’s death date) is unknown or if the author is a corporate body, then the term is 120 years from the creation date for the work. Therefore much unpublished material in archives or manuscript collections is likely to still be under copyright.

Can the archives or manuscript repository give me permission to publish an unpublished work?

The fact that the archives or repository holds the physical document does not mean it also owns the copyright. Many donors or sellers, when they transfer collections, retain the creative rights to the material for which they are the rights holder. Only when rights holders assign the copyright in the work to a repository can the latter (and only it) give you permission to publish. But even

when copyrights are transferred along with a collection, the repository may not receive copyright in all of the material, whether analog or born-digital. This is because rights holders can transfer only the copyrights they own, and in most cases donors will own copyright only in material they created. For example, donors would generally own copyright in photographs they took or in letters they wrote to others; however, they may not own (and therefore could not transfer) copyrights in photographs taken of them by someone else or letters they received written by others. The original rights holders may also have transferred copyright to a third party, such as a publisher, and thus no longer own the rights to works they originally made.

Note that the repository that owns the item you wish to publish may charge fees for publication (even if it may not own copyright in the work) in addition to any fees a rights holder might charge. Any such stipulation is separate from copyright permission and is determined by a repository's use policies.

Why can you give me a copy of an unpublished work but not give me permission to publish it?
Sections 107 and 108 of copyright law provides archives and libraries with a limited authority to make copies of copyrighted material without permission under certain conditions, such as when the copy is to be used for private study, scholarship or research.

Is there any way I can use an unpublished work without permission from the copyright holder?

The fair use doctrine (as codified in Section 107) recognizes that there are uses that do not infringe on the rights of copyright holders and provides a defense for the use of copyrighted works without permission from the copyright owner. The statute does not say what is or is not fair. Rather, courts evaluate fair use cases based on four factors, no one of which is determinative in and of itself:

1. **The purpose and character of the use:** How are you using the copyrighted work, and in what context? The statute lists several examples of the kinds of uses that might be fair—"criticism, comment, news reporting, teaching, scholarship, and research." This list is not all-inclusive and some uses that fall under one of these might not be fair. Commercial uses can be fair, but courts tend to give more weight to non-commercial uses. Recently, courts have primarily been asking if the use is transformative; does it "merely supersede" the original work or does it add "something new, with a further purpose or different character, altering [it] with new expression, meaning, or message?" [Campbell v. Acuff-Rose Music]
2. **The nature of the copyrighted work:** is the work you are using published or unpublished? Is it highly creative or primarily factual? Courts give more protection to works that are "closer to the core of copyright protection," such as unpublished or highly-creative works. [Campbell]
3. **The amount and substantiality of the portion used in relation to the copyrighted work as a whole:** There is no pre-determined amount of a work that constitutes fair use or that is automatically an unfair use. Determining factors include how much of the copyrighted work was used, the relative importance of the amount used to the work as a whole (whether the portion used constituted "the heart of the work," for example), and whether the amount used was justified by the purpose and character of the use. [Harper & Row v. Nation, Campbell]

4. The effect of the use upon the potential market for, or value of, the copyrighted work:

This factor assesses how, and to what extent, the use damages the existing and potential market for the original. Courts have recognized that where uses are highly transformative under the first factor, the affected markets receive less protection. [Castle Rock v. Carol]

How can I determine if a proposed use is fair?

Determining that a use may be fair involves conducting an analysis along a continuum of “less likely fair” to “more likely fair.” Helpful aids in conducting such an analysis can be found at the resource page of the Society of American Archivists’ Intellectual Property Working Group <http://www2.archivists.org/groups/intellectual-property-working-group/selected-copyright-resources>

Could I be sued for using someone else’s work even though it seems a fair use?

Yes, it is possible. Because of the case-specific nature of fair use, you can only know whether a use is fair if a court rules it to be so. However, several authorities have produced guides to help people take advantage of this vague, but very useful, exception to copyright. If there is a question about whether a particular use is fair, it is always safe to seek permission.

What if I cannot determine who owns the copyright or if I am unable to locate a known copyright holder?

The Society of American Archivists’ Intellectual Property Working Group has produced a document that is designed to provide guidance with this dilemma, commonly known as the Orphan Works problem, and that suggests search strategies for identifying the creator of a work, identifying the work’s copyright holder, and for locating the copyright holder. The document may be found at <http://www2.archivists.org/groups/intellectual-property-working-group/selected-copyright-resources>