



Navigating Legal Landmines in Museums and Archives

There are many aspects of running an archive and museum that are grounded in the law. This information-packed session addresses legal concerns surrounding oral history, collections, and digital copyright to help increase your legal literacy in recognizing and understanding the various concerns organizations face in these areas. The session is intended to be academic in nature and will not provide legal advice.



Risk Management - Digitizing Safely

Much of this presentation is excerpted from *Copyright and Cultural Institutions Guidelines for Digitization for U.S. Libraries, Archives, and Museums* which is available for download at: <http://bit.ly/ahTHdj>

Important copyright basics.... (overly simplified)

Published before 1923

- In public domain

Published from 1923-63 (When published with notice)

- Copyright for 28 years
- Could be renewed for 47 years (+20 years)
- If not so renewed, now in public domain

Created before 1978 but not published

- Life of the author + 70 years

Libraries and archives exemptions in the Copyright Act*

Section 108 supplements the fair-use exemption found in Section 107 of the Copyright Act. It does so in two ways:

- Preservation copying of unpublished works [17 U.S.C. § 108(b)]
- Replacement copying of published works [17 U.S.C. § 108(c)]
- Reproduction services for patrons [17 U.S.C. § 108(d) and (e)]
- Interlibrary loan [17 U.S.C. § 109 and 108(g)(2)]
- Acquisition and reproduction of television news programs [17 U.S.C. § 108(f)(3)]
- Reproduction equipment in libraries [17 U.S.C. § 108(f)(1)]
- Digitization during the last 20 years of copyright term. (Section 108)

*Museums are not mentioned in the wording or legislative history of Section 108

Restrictions

When dealing with copyrighted material there are two restrictions on the uses that can be made of the digital copies, however.

They are:

1. There can be no subsequent distribution of the digital format
2. The digital copy cannot be used “outside the premises of the library or archives”

Digital Millennium Copyright Act (DMCA) of 1998

The DMCA modified the details of copyright law in a variety of ways, including:

- anti-circumvention prohibitions
- exception that permits nonprofit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work.
- safe-harbor requirements for Internet Service Providers (ISPs)
- specifying exemptions for library and archival copying of copyrighted materials

Section 404 of the DMCA amends the exemption for nonprofit libraries and archives in section 108 of the Copyright Act to accommodate digital technologies and evolving preservation practices. Prior to enactment of the DMCA, section 108 permitted such libraries and archives to make a single facsimile (i.e., not digital) copy of a work for purposes of preservation or interlibrary loan. As amended, **section 108 permits up to three copies, of unpublished works and for replacement of unobtainable published works** which may be digital, provided that digital copies are not made available to the public outside the library premises. In addition, the amended **section permits such a library or archive to copy a work into a new format if the original format becomes obsolete**—that is, the machine or device used to render the work perceptible is no longer manufactured or is no longer reasonably available in the commercial marketplace.



8mm tape image: Wikimedia Commons

Interesting....

Fewer than 11 percent of the copyrights registered between 1883 and 1964 were renewed at the end of their 28-year term.

Only a tiny fraction of the books ever published are still in print; for example, of 10,027 books published in the United States in 1930, only 174 were still in print in 2001 — 1.7 percent.

Copyright (in theory) exists to benefit the public good.

Cultural institutions have long occupied a special place in copyright law, due to their missions of preserving and facilitating access to intellectual and creative works. It would be unfortunate if, in their desire to avoid all risk, those same institutions failed in their fundamental missions.

Orphaned Works

Examples of Orphaned Works:

- work is anonymous
- the company that owned copyright is defunct
- it is impossible to trace copyright through multiple bequests and transmissions
- copyright owner's identity is known but the owner or the owner's representative cannot be located



In order to deal with orphaned works the Copyright Office chose to recommend a fairly simple solution:

- Users would be expected to conduct a reasonably diligent investigation to locate the copyright owner before they could exploit an orphan work.
- If such an investigation is done, and a copyright owner later surfaces, the user would only have to pay reasonable compensation for the use of the work—not the high penalties that can be associated with copyright infringement.
- Libraries, archives, museums, and other noncommercial users could avoid even those fees if they stopped using the item immediately.

Strategies for locating copyright owners

- Examine scholarship
- Ask the publisher
- Ask the literary/talent agent
- Check with membership organizations for records on content creators
- Check with relevant reproduction rights organizations
- Write to the content creator's last known address
- Use reference sources to locate on where the content creator lived or their family
- Use genealogical and probate investigations
- Publish queries in appropriate journals

Risk Management Strategy

Identify the possible risks associated with a digitization project prior to its commencement and identify strategies to mitigate some of those risks.

The reasons for this risk include:

- The copyright status of the work may be unclear
- It may not be possible to identify all of the subsisting copyrights incorporated into one work
- It may not be possible to locate copyright owners and secure permission
- Works that are in the public domain in the United States may be protected by copyright in other countries
- Individuals and groups may believe they have more rights in material than the law allows, and take umbrage when an institution digitizes the material

Research might also lead one to conclude that although the contemplated action might technically infringe copyright, the likelihood that anyone would complain is small. After assessing and mitigating risks, each cultural institution can determine whether it is comfortable with the level of risk associated with each project before proceeding.

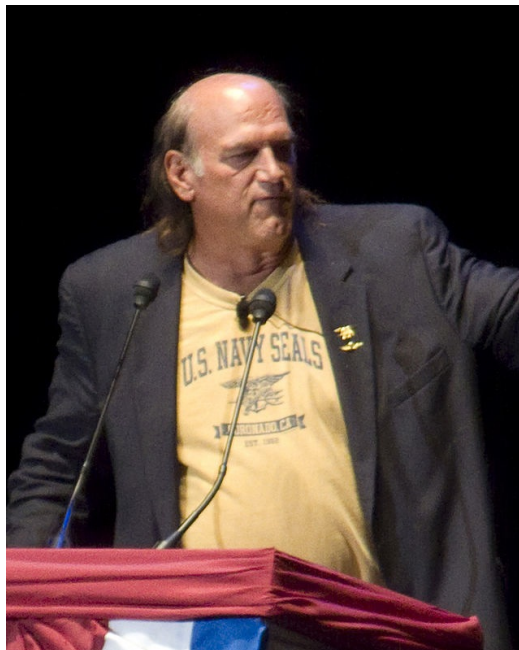
How an institution assesses risk will vary with the institution and the particular project under consideration. Relevant factors might include:

- the nature of material being digitized
- the accessibility of digital content
- the likely remedies in the event of legal proceedings
- the availability of sovereign immunity arguments
- the arguable existence of an implied license
- the likelihood of a complaint being made
- the potential impact of the project on the institution's reputation or relationship with current and future donors
- the institution's level of comfort with risk
- the availability of legal advice
- the perceived social utility of proceeding with the project.

Risk-analysis addresses questions such as:

- What factors increase the risk my institution faces?
- How likely is it that I might be sued?
- What are the potential damages?
- What strategies can my institution follow to minimize risk?
- What role do disclaimers and other notices play?

Risky?



Not Risky?



The risk of litigation against cultural institutions varies, but historically has been very low.

WHY? Because the costs of copyright litigation can be high

- Section 504(c)(3) stipulates that nonprofit educational institutions, libraries, and archives are not subject to statutory damages for copyright infringement when they have reasonable grounds for believing that their use is a fair use.
- Section 412 states that there can be no award of statutory damages or attorneys fees for infringement of unpublished works prior to registration.
- The 11th Amendment to the Constitution makes it possible for libraries, archives, and museums that are part of state governments to raise a sovereign immunity argument in relation to copyright claims for monetary damages.

From a monetary viewpoint, these provisions make it financially risky to bring legal action against a library or archives. (Museums may make for slightly better targets unless they are also nonprofit educational institutions.)

Thank you.

Fair Use

When a copyright holder sues a user of the work for infringement, the user may argue in defense that the use was not infringement but "fair use." Under the fair use doctrine, it is not an infringement to use the copyrighted works of another in some circumstances, such as for commentary, criticism, news reporting, or educational use. The defense generally depends on a case-by-case judgment of the facts.

Fair use is codified at Section 107 of the Copyright Act, which gives a non-exclusive set of four factors courts will consider in deciding whether a use is fair or not. These factors are:

- the purpose and character of the use
- the nature of the copyrighted work
- the amount and substantiality of the portion used
- the effect of the use on the potential market for or value of the copyrighted work