

# **Fair Use**

## *and digitization projects*

# Libraries' immense cultural wealth...

- *Our missions: sustain and provide access*
- Digitizing can help us achieve our missions, but copyright poses a significant challenge
  - *Coincident with increased opportunity came increased copyright protection*
    - *Longer terms*
    - *Anti-circumvention*
    - *Increased penalties*

## ...Shared

- The copyright ratchet only seems to go up
- Nevertheless, digitization projects proceed
  - The most important reason digitization projects abound is our willingness to take reasonable risks

## Reasonable risk

- A reasonable risk is one informed by
  - Knowing the law
  - Knowing your materials and how the law applies to them
  - A frank discussion of risk, probability and likely consequences
- *Harm can result from action*  
*-- and inaction!*

# Assessing facts and law

- Is the work protected?
  - Who owns the copyright?
- Do we need permission?
  - Do we already have a license?
  - Is our use a fair use?
  - Does last-20-years rule apply?
- If we need permission and can't get it, what do we do?
  - *Risk assessment and orphan works*

## Peter Hirtle's Public Domain

- Many paths lead to the copyright commons
  - Published before 1923
    - Unpublished author dead 70 years
  - Published between 1923 and 1989 w/o ©
  - Published between 1923 and 1964 w/© but not renewed ([onlinebooks.library.upenn.edu/cce](https://onlinebooks.library.upenn.edu/cce))
  - A copy (a photo or digital image) of a two-dimensional pd work is also a pd work (Bridgeman v. Corel)

## Foreign works

- No longer pd for failure to adhere to our “formalities” in earlier eras
  - If protected in country of origin in 1996, works are protected by US copyright regardless of adherence to US formalities at time of foreign publication
- US terms apply even to foreign works
  - US does not adhere to Berne “rule of the shorter term”

# Ownership issues

- Initial ownership of copyright: author
- Joint works
- Work for hire – US works only
- Assignment; reversion clauses
- Copyrights pass to heirs
- Deeds of gift: revise to favor assignment to your institution, or at minimum, generous use rights



## Deeds of gift

- Examine what your institution is using
  - Can you understand what it says?
  - If you can't, revise it so you can
- Make it easy to assign copyright
- Make it easy to grant generous and flexible use rights
  - Use general “institutional purposes” language that will allow for new, unanticipated uses

# Fair use

- Nonprofit educational and research uses
- Amounts reasonable in light of use
- Not a commercial substitute
- No established market for permission for the type of work
  - Unpublished works lack an efficient permission market

# Fair use: First factor

- Transformative uses
  - Providing context
    - Curation
    - Providing commentary
    - Inviting commentary
  - Facilitating creative uses by scholars, educators and researchers

## Fair use: Second factor

- Unpublished nature of the work
  - Congress in 1992: it's just one factor
  - Matters most when work has publication potential or implicates privacy concerns
    - President Ford's memoirs
    - Salinger's letters
  - Courts more likely find fair use in unpublished works after 1992
    - But keep in mind: ***no cases based on facts like ours*** – and facts make a difference in fair use

## Fair use: Third factor

- Have an internal policy that correlates the amount of a work to be displayed or performed with the type of use to which it will be put
  - The entire work is usually the relevant and reasonable amount for scholars, educators and researchers

## Fair use: Fourth factor

- Minimizing economic harm to copyright owner
  - It can no longer be assumed that a work's availability online undermines its commercial potential
  - There will be major qualitative differences between an archival copy and a work based on it, with value-added by an author and publisher
  - Generous take-down policies

# Fair use

- Strengthening the case
  - Notices regarding reliance on fair use
  - Explicit statement that public uses beyond fair use may need permission
  - Identification, attribution and request for additional information from the public
  - State your policy on sensitive information
    - Indicate intent to avoid exposure, but given practical difficulties of identification, request information re same from public viewers
  - Responsive take-down policy

# The 20-years rule

- US works *published* between 1923 and 1936 (works in their 76<sup>th</sup> year of protection, or older)
  - Duplication, distribution, display and performance
    - For preservation, scholarship or research purposes (similar to fair use)
  - So long as work is not “subject to normal commercial exploitation” or able to be “obtained at a reasonable price”
    - This usually means out of print



## Not confident of legal authority? Consider likelihood of getting permission

- If you decide to get permission –
  - Well-managed permissions work flow
  - Database of permission knowledge
    - Contact information; other works owned
    - Time to acquire; cost, if any
    - Record scope of any permission obtained
    - Structure permission to cover more than one use
- To manage risk at series or collection level
  - Assess likelihood that there's an owner who cares

# Rights unclear and no response – orphans and risk assessment

- Orphan works, “insurance” and fair use
  - If you can’t identify or find owners, chances are, they won’t find you either
  - Very slim chance of suit for nonprofit educational uses
    - Respond to requests to take down
  - Lack of market harm enhances fair use
  - Libraries are well-positioned to take reasonable risks, helping establish community norms
    - [Calisphere](#) is a good example of reasonable risk-taking

# Collaboratively establishing community norms

- The thoughtful policy is insurance, in the absence of clear legal guidance
  - Elements of a reasonable approach to placing unpublished materials online will be established by communities of practice

# You're in good company

- Take comfort from all the other libraries, archives and museums that are already out there!
- Library of Congress
  - [Prints and Photographs Online Catalog](#)
  - [American Memory project](#)
- University of California
  - [Calisphere](#)
- Duke University
  - [Rare Book, Manuscript and Special Collections Library](#)
- Yale University
  - [Manuscripts and Archives Digital Images Database](#)
- Cornell University Library [Digital Collections](#)
- Just Google -- *archive museum digital image collections*

# Decision-makers -- know your personal risk tolerance level

- Fair use analyses apply the law to a set of facts
- Orphan works analyses ask, “is there someone out there who cares?”
- Risk can’t be eliminated but *it can be managed*

# Summary

- Do you already have authority?
  - Public domain
  - Institutional ownership
  - Institutional rights obtained from owner
  - Fair use; last 20 years
- If not, is the work a likely orphan
  - Assess likelihood of getting permission
  - Decide whether to take risk to digitize and publicly display the work

# Discussion