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    - Unpublished author dead 70 years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)
  - 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 76th 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
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Discussion