Undue Diligence
Seeking Low Risk Strategies for Making Collections of Unpublished Materials More Accessible

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An OCLC Research Seminar
San Mateo, CA
March 11, 2010
10:00 Welcome and Introduction – Merrilee Proffitt

Where are we now, moderated by Jennifer Schaffner
10:30 Rights and unpublished works, Aprille Cooke McKay
11:00 What it takes to be thorough, Maggie Dickson
11:30 Walking the tightrope, Rebekah Irwin
12:00 Discussion

Lunch 12:30 – 1:30

Where can we go from here? – moderated by Sharon Farb
1:30 Factoring the case for fair use, Georgia Harper
2:00 Coloring outside the lines, Peter Hirtle
2:30 Break
2:45 Discussion of community of practice, Ricky Erway
Merrilee Proffitt is a Senior Program Officer in OCLC Research. Her current projects and interests include: archival description, increasing access to special collections, the impact of copyright on primary source material, and digital library initiatives.
Focus and Reframe: rights and unpublished collections

Merrilee Proffitt
OCLC Research

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“We need to articulate a new set of ... guidelines that 1) expedites getting collection materials into the hands of users; 2) assures arrangement of materials adequate to user needs; 3) takes the minimal steps necessary to physically preserve collection materials; and 4) describes materials sufficient to promote use.”
“In a world where it is increasingly felt that if it’s not online it doesn’t exist, we need to make sure that our users are exposed to the wealth of information in special collections.”

“...intentionally does not encompass technical specifications for various formats, born digital materials, nor rights issues”
Copyright Investigation Summary Report, 2008

Permissions based
High effort, low return
“We say no a lot.”

Portrait of professional paralysis, collections shackled

“...further explore community practice and issues around unpublished materials held in special collections and archives.”
Orphan Works: Statement of Best Practices

January 12, 2009
Rev. June 17, 2009

1. INTRODUCTION

Purpose of the Report

“Orphan works” is a term used to describe the situation in which the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. Proposed orphan works legislation, such as the Orphan Works Act of 2005 (H.R. 5589) and the USA Roundtable on Copyright Act of 2005 (S. 1513), would address penalties for infringement if an infringing copyright. This statement is intended to identify materials that are likely to obtain rights information for

Although the statement focuses usually on archives, the authors recognize that many of the techniques that are useful in identifying rights holders for unpublished materials may also be useful in identifying and locating rights holders of published materials.

Acknowledgments

Heather Britton, Mark Allen Greene, Cathy Henderson, Peter Hirtle, Peter Jaszi, William Maher, Aprilie Cooke McKay, Richard Parncutt, and Marcella Proffitt are the primary authors of this statement, which was approved by the Society of American Archivists Council on June 1, 2009.

SAA gratefully acknowledges the financial and administrative support of RLG Programs, OCLC Research and the RLG Partnership, which made the preparation of this document possible.

“...best practices regarding reasonable efforts to identify and locate rights holders.”
Orphan works

- A copyrighted work where it is difficult or impossible to find or contact the rightsholder.
  - Anonymous or “Aunt Sally”
  - Rights belong to heirs
  - Rights belong to a new company
Archival Code of Ethics

• IX “Archivists must uphold all federal, state, and local laws.”

• VII “Archivists protect the privacy rights of donors and individuals or groups who are the subject of records....”

• VI “Archivists strive to promote open and equitable access to their services and the records in their care without discrimination or preferential treatment...”

• III “Archivists should exercise professional judgment in acquiring, appraising, and processing historical materials....”
We have a duty to take risks

- Service to researchers
- Provide democratic access to collections
- Honor archival practices
- Use professional judgment
...our goal is to reframe the discussion:

- to ask a better set of questions
- to better appreciate the consequences of certain choices that archivists make every day
- to understand and apply real administrative economies
- to distinguish what we really need to do from what we only believe we need to do

More Product, Less Process, 2005
Introduce Balance in Rights Management advisory group

- Joanne Archer, University of Maryland
- Jeanne Boyle, Rutgers
- Eli Brown, Cornell
- Sharon Farb, UCLA
- Elizabeth Smart, BYU
- Jenny Watts, Huntington
- Diane Zorich (Museum Consultant)
- Ricky Erway, Merrilee Proffitt and Jennifer Schaffner, OCLC Research
Jennifer Schaffner is a Program Officer with OCLC Research. She designs projects and leads work with the RLG Partnership concerning archives, rare books, manuscripts, scholarly expectations, data curation, and collaboration among libraries, archives and museums.
Aprille Cooke McKay holds a JD from the University of Chicago, and an MSI with a specialization in Archives and Records Management from the University of Michigan School of Information. Aprille is working to identify and implement an email archiving solution for the University of Michigan’s records of enduring value. She is a member of the SAA’s Intellectual Property Working Group.
UNDUE DILIGENCE: RIGHTS AND UNPUBLISHED WORKS – THE BASICS
COPYRIGHT LIABILITY FOR DIGITAL MANUSCRIPTS
What’s different from paper?

• Agency of the archives
• Traditionally, archives pushed responsibility for copyright clearance to the patron
• Now the archives is potentially the publisher
• Digital preservation
• Wider opportunities for impact and access
Infringement

• Anyone who violates any of the exclusive rights of the copyright owner is an infringer
  – Copying, displaying, making derivative works, etc

• Consequences (remedies)
  – Injunction (eg. recall all copies in circulation, takedown)
  – Damages
    • Actual damages OR
    • Statutory damage
Statutory damages

• Fixed amount of damages per infringement, because it is so hard to prove foregone profit
• Was more sensible when terms of copyright were shorter, and registry made it easier to locate copyright owners
• Not less than $750 or more than $30,000 as the court considers just – per item
Lucky to be an archivist

No statutory damages available if:

– Infringer an employee of non-profit educational institution, library or archives acting within scope of employment OR

– Is such an institution, library or archives AND

– The infringer believed and had reasonable grounds for believing that the use was a “fair use.”
Fair Use

- For works in the public domain, don’t rely on fair use: [www.copyright.cornell.edu/resources/publicdomain.cfm](http://www.copyright.cornell.edu/resources/publicdomain.cfm)

- Nor for your own intellectual property, or works of the US government

- Some *uses* are deemed to be of so little harm to the copyright owner, or of so great a benefit to others, that they are "fair"

- **Key resource:** Stanford Libraries Copyright & Fair Use: [fairuse.stanford.edu/](http://fairuse.stanford.edu/)
## Fair use factors

<table>
<thead>
<tr>
<th></th>
<th>Likelier yes</th>
<th>Likelier no</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Purpose</strong></td>
<td>Non-Profit  Transformative use, creativity</td>
<td>Commercial No new work, or to supersede original</td>
</tr>
<tr>
<td><strong>Nature</strong></td>
<td>Reference, non-fiction, Published</td>
<td>Fiction, art, unpublished</td>
</tr>
<tr>
<td><strong>Amount</strong></td>
<td>Small amount, relative to the whole original</td>
<td>Complete work, heart of work</td>
</tr>
<tr>
<td><strong>Market</strong></td>
<td>Doesn’t hurt market for the original</td>
<td>Hurts market or potential market of original</td>
</tr>
</tbody>
</table>
§108 Preservation and use copies

• You can claim Fair Use in addition!
• Privileges may or may not go beyond what might otherwise be Fair Use
• Deals with the right of reproduction for certain library and archival purposes
  – Interlibrary loan
  – Equivalent of interlibrary loan for a copy of an unpublished work or a replacement preservation copy
§108(b) and (c): Preservation

- For library or archives open to researchers
- **Unpublished materials** may be copied for preservation and security or for deposit for research use in another archives
- **Published materials** may be copied if deteriorating, in a defunct format, lost or stolen, if a replacement isn’t available
- For Both:
  - Only 3 copies (archival, a copy-master and use)
  - Digital cannot be made available to the public outside the building
§108(e) Access copies for patrons

Libraries and archives can copy for patrons if:

1. **No more than one copy be made at a time**, for a given patron, so that the copying never becomes "systematic" or a substitute for regular subscriptions or purchases

2. No commercial advantage

3. The library or archives is open to researchers

4. If an entire work, not be available at a reasonable price

5. **Textual works only** (except for TV news programs)
§108(h) Digital reproduction and distribution

• Mitigates effect of Copyright Term Extension Act – mini Orphan Works
  – Limited digital copying for works in the last 20 years of copyright, not being commercially exploited, and not available for purchase
  – Unless owner filed a notice with the copyright office

• Textual published works only
THIRD PARTY PRIVACY LIABILITY
DIGITAL MANUSCRIPTS
What’s different from paper?

• Agency of the archives
• Uncertainty about standards of care to prevent disclosure
• Wider distribution and access
  – More findable
  – Can do more damage to reputation
• Potential status of the archives as a publisher
  – Publication of private facts
  – Defamation
Legal duty of confidentiality

- Fiduciary or agency relationships
  - Attorney-client
  - Employer-employee
  - Doctor-patient
- Court order
- Law or regulation
  - HIPAA
- Contract
  - Non-disclosure agreements
  - Legal settlements
  - Donor agreements
Publication of private facts

• True information about the private life of a person that would be highly offensive to a reasonable person and not of legitimate public concern
  – Sexual activity
  – Health – including mental health, addictions
  – Economic status
  – But criminal acts are of legit public concern
Publication of private facts (cont)

• Community standards
  – Law does not protect the overly sensitive
  – Community standards have changed
    • Pre-marital sex
    • Out-of-wedlock births
    • Race of parents
    • Sexual orientation
  – Means that case law is not always relevant
Defamation

• Slander – spoken words or perhaps IM
• Libel—written words
  – Published: computer screens count
  – Subject identified: including corporations
  – Harm: seriously shames, ridicules, disgraces or injures reputation. Not just embarrassing
  – Fault: What would a reasonable archivist have done?
Limit on libel

• Short statute of limitation: eg 1 year
• Only living people (and corporations)
• Only untrue information
  – Facts, not opinions
  – That which cannot be proven untrue
• Only non-consenters
• If public figure, publication must have been malicious
• Hard to win – only 13%
MANAGING RISK
Select material thoughtfully

- Balance public value vs. risk
- Older material less likely to be problematic, both from copyright and privacy perspective
- Create good donor documentation:
  - Get copyright at the time of donation
  - Interview donor about confidential material using a checklist
- Make the case that you have undertaken a thoughtful analysis. What would a reasonable archivist do? Document your analysis.
Consent / Copyright clearance

- Consider asking for consent if there is a large amount of material in the collection related to a few individuals
  - Risk mitigation can involve pursuing permission from some parties or copyright holders but not others
  - Many third parties would be satisfied with take-down
Create a takedown policy

• Plan what you will do if someone objects
• Be respectful and treat complainers politely
• Consider removing item from public access until it can receive thorough review
• Will buy time
  – To consider how important the documents are
  – To consider the concerns of the third party
• Keep track of take-down requests and share your data! We all want to know!
Tailor access

• Think carefully about what is exposed to Google and other search engines
• Or allow only onsite access and no digital copying
Create a contingency fund

• Set money aside to cover cost of litigation
  – Privacy torts have short statutes of limitation (<3 years)

• Create case law for the rest of us, so we won’t have to guess what a court would do

• Argue that you serve the public interest, mitigated damage to the complainer by prompt takedown, and acted as a “reasonable archivist”
Help develop best practices

• “This is what we have learned through undertaking a thoughtful process of inquiry, research, and analysis about reasonable practices today in the use of others' works.”

• Manage the risk, don’t avoid it entirely
Questions?

Aprille Cooke McKay

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Fig leaf photo credit: Flickr – Geishaboy500
Maggie Dickson is currently the Digital Projects Librarian in Special Collections at North Carolina State University. Before moving to NCSU, she managed the Watson-Brown project in the Southern Historical Collections at the University of North Carolina. While at UNC’s University Libraries, she created digital collections and provided training to other Library departments.
What It Takes To Be Thorough: Dotting the I’s and Crossing the T’s

Maggie Dickson
Digital Project Librarian, NCSU Libraries
11 March 2010
About the

Thomas E. Watson Papers Digitization Project

- Funded by the Watson-Brown Foundation of Thomson, Georgia
- Two year, $300,000 grant to digitize the Thomas E. Watson Papers, a manuscript collection housed in the Southern Historical Collection
- Strong research and experimentation component
About the

Thomas E. Watson Papers

• 27.5 linear feet of shelf space
• ~12,300 items, including:
  • Correspondence
  • Book manuscripts
  • Speeches
  • Publications
  • Scrapbooks and Diaries
  • Photographs and Photograph Albums
Copyright Status

• Unpublished materials – 70 years + life of author

• For us (digital publication in 2009):
  • Died prior to or during 1939 – public domain
  • After 1939 – potentially still in copyright
Strict interpretation of copyright statute

- Identify all authors/creators
- Determine their death dates
- Locate descendants of those who died after 1939
- Contact those descendants
- Request and obtain permission to use materials
Case Study

• Goal:
  • Attempt intense copyright research on Correspondence Series

• Study team:
  • Maggie Dickson, project manager
  • Amy Johnson, graduate research assistant
About the Correspondence Series:

• 7.5 linear feet (15 archival boxes)
• Letters, postcards, telegrams and notes written by Watson and family, friends, and political and business colleagues
• Date range 1873-1986 (bulk 1890s-1920s)
Identifying materials in the series

• Basic metadata gathered from documents:
  • Correspondent & recipient names
  • Dates
  • Locations
  • Letterhead

• 91 hours of project manager/research assistant time

• Initial cost of $1,960
Correspondent name investigation

- List of correspondents condensed and regularized to 3,304 personal names
- Workflow developed for attempting to identify correspondents and determine death dates
- Completed 10% sample in 36 hours
- Decided to research remaining names
Sources consulted for name investigation

- ancestry.com
- Congressional Biographical Directory
- Historical Marker Database online
- Library of Congress Authority database
- New Georgia Encyclopedia
- print references
- University of Texas WATCH file
- Wikipedia
- WWI draft registration forms
Results of name investigation

- Died after 1939: 33%
- Died during or before 1939: 18%
- No dates available: 48%
- Un-findable: 1%
Cost analysis for name investigation

• Copyright research conducted by research assistant
• Completed over 4 ½ months at 20 hours/week (360 hours)
• Total cost of $5,958
Identifying copyright contacts

- 50 relevant archival collections located using:
  - ArchiveGrid
  - Congressional Biographical Directory
  - National Union of Manuscript Collections
  - Searching the open Web with Google
Identifying copyright contacts

• 50 repositories contacted, asking for acquisition information or information about descendants of correspondents

• 25 responses:
  • Contact information generally unavailable
  • When available, outdated – 20-50 years old
Contact information obtained for two correspondents via repository inquiries:

- William Randolph Hearst
- Miles Poindexter

Contact information for two authors with literary estates located using U Texas WATCH file:

- Upton Sinclair
- Hamlin Garland
Obtaining copyright permissions

- Request for permission letters and forms sent via certified mail to four addresses
- Three of four forms returned
- Explicit permission obtained to use the letters of:
  - Upton Sinclair
  - Hamlin Garland
  - Miles Poindexter
Copyright status breakdown by document

- 8,434 letters in correspondence series
  - 1,135 (14%) written by members of Watson family
  - 244 (3%) works for hire out of scope for current study (still in copyright)
  - 349 (4%) incomplete, illegible, anonymous, or pseudonymous names
  - 1,795 (21%) out-of-copyright
  - 2,315 (27%) in-copyright
  - 2,596 (31%) unknown copyright status
Copyright status breakdown by percentage

- In-copyright: 27%
- Undetermined copyright status: 31%
- Out-of-copyright: 21%
- Watson family: 14%
- Works-for-hire: 3%
- Illegible, anonymous, pseudonymous: 4%
- Copyright status breakdown by percentage
Cost analysis, total study

- 450 hours over nine months
- Total cost $8,000
  - $1,050 per linear foot
- Permission obtained to display 4 letters online
- Return-on-investment = $2,000 per document
Other solutions?

- Use existing description found in the finding aid to target potential copyright risks
- In our case, this method would have yielded nearly the same results as the intensive method
RECEIVED AT
44A BF 13 HITE

PORTLAND OREG SEP 26 1922

MRS THOS E WATSON
THOMSON GA

DEEPEST SYMPATHY IN YOUR GREAT LOSS I WAS GREAT ADMIRED YOUR
DISTINGUISHED HUSBAND

MILES POINDEXTER
Final thoughts

- Go-ahead received from UNC-Chapel Hill’s legal counsel
- Digital collection live for 7 months
- No contact or challenge from copyright holders to date

Visitor analytics, 8/11/09-3/8/10

1,049 people visited this site
1,783 Visits
1,049 Absolute Unique Visitors
25,348 Pageviews
14.22 Average Pageviews
00:08:46 Time on Site
29.89% Bounce Rate
57.77% New Visits
Was it worth it?

Yes – research value
No – return-on-investment
Questions/comments

Maggie Dickson
maggie_dickson@ncsu.edu

Article forthcoming in the Fall 2010 issue of American Archivist

URL for the Thomas E. Watson Papers Digital Collection
http://www.lib.unc.edu/dc/watson

Thank you.
Rebekah Irwin is the Head of Digital Projects and Metadata at the Beinecke Rare Book and Manuscript Library at Yale University.

She is responsible for a wide range of activities including the digitization of materials from the Library's collection and the development of blogs, podcasts, mobile phone services, and social networking tools to promote and enhance access to collections, in analog and digital formats.
Walking the Tightrope
Balancing Precaution and Production

Rebekah Irwin
Yale University
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<td>July 1-December 31 2009 [six months]</td>
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<td>25,169 medium-resolution jpgs</td>
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<td>[1,957 patron requested]</td>
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<td>6,112 Paper photocopies*</td>
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<td>6,163 Microfilm frames</td>
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<td>548 Requests for TIFFs discovered online</td>
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<td></td>
</tr>
<tr>
<td>114 Microfilm reels</td>
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</tbody>
</table>
been too dark — too dark altogether.

After a time, the Director suddenly walked around. The office was lined by a black oak bar of clouds and the atmosphere hung quite heavy. Water was lapping the walls, and the top of the earth flowing under an overcast sky, blended to the heart of an immense darkness.

The End.
Dancing out of Penn Station

e a new nation,

dancing out of planes from Porto Rico

and the hands of boats from Cuba, chico,

Jamaica, Haiti, Panama,

out of busses from Georgia,

Florida, Louisiana, marked NEW YORK—

to Harlem, Brooklyn, Bronx, San Juan Hill,

but most of all to Harlem:

Montage of a dream deferred,

Tomorrow, ain't you heard?

A dream deferred:

Does it dry up like a raisin in the sun?

Or fester like a sore—

and then run?

Does it stink like rotten meat?

Or crust and sugar over—

like a lumpy sweet?

Or does it explode?

Has anybody heard // what happened to a dream deferred?
Permissions

Permission from the New Directions Publishing is required to publish William Carlos Williams materials in any format in North America.

Permission from Pollinger Ltd is required to publish Williams materials in the UK. To learn more, contact the Curator, Yale Collection of American Literature.

Call Number: YCAL MSS 116
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Walking the Tightrope
Balancing Precaution and Production

Rebekah Irwin
Yale University
Where can we go from here? - moderated by Sharon Farb

Sharon E. Farb is Associate University Librarian for Collection Management and Scholarly Communication at UCLA. She holds a J.D. and Ph.D. and her research and professional interests focus on key policy issues affecting libraries, archives and cultural memory institutions including copyright, privacy and intellectual freedom.
Georgia K. Harper is the Scholarly Communications Advisor for the University of Texas at Austin Libraries, where she focuses on issues of digital access.

She was Senior Attorney and manager of the Intellectual Property Section of the Office of General Counsel for the University of Texas System until August 2006, and currently represents the Office of General Counsel as outside counsel for copyright. She is author of the online publication, *The Copyright Crash Course*, that provides guidance to university faculty, students and staff.
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, mass digitization projects proceed
  - The courts have been much more receptive to fair use claims for creative uses
  - Statute provides some protection for distribution
  - But the most important changes are in owners’ practices, norms, business models, and in libraries’ 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!*
Fair use

- Nonprofit educational and research uses
- Amounts reasonable in light of use
- Not a commercial substitute
  - Relatively low resolution images
- 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 case overall:
  - 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 -- caution

- US works *published* between 1923 and 1934 (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”
    - In the past this meant “out of print,” but post GBS, many owned and orphan *books* will be “commercially available”
Not confident of legal authority? Consider likelihood of getting permission

- Well-managed permissions work flow
  - Database of permission knowledge
    - Contact information; other works owned
    - Time to acquire; cost, if any
  - Record *efforts* to acquire permission
  - Record scope of any permission obtained
  - Structure permission to cover more than one use
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
  – Flickr Commons project, Panoramic Photographs
  – 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 must know their own personal risk tolerance levels

• Fair use analyses are interpretations of law, given a set of facts
  – More tolerant: relies on fair use when analysis result is in the gray zone (2/2 split on factors)
  – More averse: when in gray, gets permission
    • No permission? No use

• Orphan works determination
  – More tolerant: displays work if, for example, 2 other universities’ search results indicate no known copyright owner
  – More averse: displays work when own independent search confirms others’ results
• Risk continuum – identify your legal authority and place it in context
  – 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
Summary 2/2

- Risk assessment affects *every aspect* of decision-making
  - *Every step of categorization* should involve explicit discussion of risk assessment and tolerance levels, especially of decision-maker
- Clarify respective roles of counsel and library in decision-making
  - Don’t let risk be the only consideration -- place it in context of benefits and probabilities
Peter Hirtle is a senior policy advisor in the Cornell University Library with a special mandate to address intellectual property issues.

A past president of SAA, he is currently a member of its Working Group on Intellectual Property. He is also co-author of the recently published manual *Copyright & Cultural Institutions*. 
COLORING OUTSIDE THE LINES:
ASSESSING RISK

PETER B. HIRTLE
INTELLECTUAL PROPERTY OFFICER
CORNELL UNIVERSITY LIBRARY
PBH6@CORNELL.EDU
You are entering an area of great legal uncertainty
Challenges in Archival Digitization

- Explicit legal authority is limited: 108(b)
  - 108(b) terms
  - Does the rest of 108 apply to archives?
- What constitutes fair use of unpublished material is uncertain
  - Current emphasis on transformativeness
  - Persistence of per se objections
More Challenges

- Strong belief by some in the right of first publication, right to exclude
- Difficulty and expense in locating copyright owners, seeking permission

You are not going to get complete certainty
Does this mean we give up?

- We use *risk management* instead
- You do this already (even if you don’t know it):
  - making textual copies for users
  - photographic copies
  - preservation copies
  - contracting out microfilming
- You are at risk with every copy you make
Two Examples of Unanticipated Risk
Mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection. However, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook, there may be a basis for copyright protection.
**STEWING IN TEXAS**
Recipes Sizzling in Texas History, A Cookbook War, and More
$18.95
This 126-page volume tells the fascinating and often hilarious account of what happens when Penfield Press was sued in Texas on the copyrightability of recipes. Follow the story of the pending lawsuit through the eyes of Joan Liffring-Zug Bourret and the words of one extraordinary Texas district court judge for both dramatic reading and hearty laughter.
“When Attorneys Byrd and Hardy offered to settle for $10,000 and an apology, we agreed since the suit had already cost us in excess of $30,000.”

Copyright Notes From A Small Publisher

By Joan Liffring-Zug Bourret

http://www.penfieldbooks.com/stewing_in_texas2.php?article_id=37
Department of Public Safety officials have charged Kevin G. Vanginderen of 603 Winston Court Apartments with third degree burglary in connection with 10 incidents of petit larceny and five burglaries on campus over a period of a year. Safety reported recovering some $474 worth of stolen goods from him. Also, according to the morning reports of the
Alum Sues Cornell Chronicle
Libel accusation leads to $1 million lawsuit

January 24, 2008 - 1:00am
By Michael Stratford

A former student has filed a million-dollar defamation lawsuit against Cornell stemming from an archived Cornell Chronicle news report that describes burglary and larceny charges he faced while attending the University.

Kevin Vanginderen ’83, a practicing California lawyer, filed a complaint in San Diego County Superior Court last October for libel and public disclosure of private facts against Cornell resulting in “loss of reputation” and “mental anguish”.

The lawsuit seeks to hold Cornell liable for making libelous and private information about Vanginderen prominently available nearly 24 years after the article was published in print form.
June 9, 2008

Libel lawsuit over 1983 news item is dismissed

By Bill Steele

A federal judge has dismissed a Cornell graduate's $1 million lawsuit over a 1983 Cornell Chronicle report that he had been charged with burglary in the third degree, a felony, in the spring of 1983, when he was a student. The plaintiff, now a practicing California lawyer, had sought damages for libel and public disclosure of private facts in an alleged "republication" of the Chronicle article.

Judge Barry Ted Moskowitz of the U.S. District Court for the Southern District of California...
Elements that Minimize Risk

- Potential risks and damages are small if the work is unregistered.
- Fair use exemption from some damages
- Federal actions are expensive
  - “Cease and desist” most likely
  - You can decide how to respond
- To date, almost no actions against archives
  - Two previous examples involve publications, not unpublished works
Reasonable archival practice instead

- Make yourself look like a “white hat”
- Make a “good-faith” effort to locate a copyright owner when appropriate
- Follow best practices such as SAA’s *Orphan Works: Statement of Best Practices*
- Look for collections of great public interest
- Older is better
More recommendations

- Argue fair use when you can
  - You don’t have to be right – just reasonable
  - Document your analysis
- Limit access to research and educational uses
  - Don’t make a profit on the copies
  - Consider using a click-through or browse-wrap license
- Use a disclaimer
Copyright

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“The Kheel Center would like to learn more about these images and hear from any copyright owners who are not properly identified on this Web site so that we may make the necessary corrections. If you have any additional information about the images or would like to suggest a correction, please contact Barb Morley at kheel_center@cornell.edu. Please include the photo identification number.”
Summary: Don’t run from risk

- Work with your institution to develop a mutually acceptable level of risk
  - Remember – you are engaging in risk already
- Be reasonable in your approach
  - Avoid problematic collections
  - Follow traditional archival practices
- Support efforts to develop community best practices in this area.
Ricky Erway is a Senior Program Officer in OCLC Research. She works on topics related to digitization (rights issues, mass digitization, and increasing the scale of digitization of special collections).

She is also involved in the Research Information Management program, investigating how academic libraries can better serve their institutions' research missions.
Our distinguished panel

Sharon Farb, Rebekah Irwin, Aprille McKay, Maggie Dickson, Peter Hirtle
Georgia Harper on the phone
And you! (local and remote participants)
This is a streamlined approach intended to establish a community of practice to cut costs and boost our ability to significantly improve access to unpublished materials. It promotes a well-intentioned, practical attempt to identify and clear any rights issues, for the purpose of furthering research and scholarship.

Involve your counsel in establishing these procedures at your institution.
Components of well-intentioned practice

1. Start with some judgment calls
2. For collections not identified as high-risk, take the following 3 steps
   • Check donor file / accession paperwork
   • Contact identifiable rights-holder
   • Document
3. Proceed with making the digitized collection accessible
4. Prospectively, work with donors
1. Start with some judgment calls

- Keep your mission in mind and start with a collection of high research value
- Avoid high-risk collections, such as
  - Literary papers
  - Collections peppered with sensitive information, such as social security numbers or medical records
  - Correspondence of a very sensitive nature between a large number of individuals
  - Collections created with commercial intent

NOTE: If research value is high and risk is high, consider compromises, such as keeping sensitive portions behind a wall or making it accessible on-site only, until a suitable time

- Assess whether there is a fair use basis
2. For collections not identified as high-risk, take the following 3 steps

- Check the **donor file / accession paperwork** for information regarding permissions, rights, or restrictions
- If there’s an **identifiable rights-holder** at the collection- or series-level, attempt to contact and secure permission
- **Document** your process, findings, and decisions
3. Proceed with making the digitized collection accessible

- Use an appropriate **disclaimer**, such as "No known restrictions on use"
- Have a liberal **take-down policy**, such as: "These digitized materials are accessible for research purposes. We are unaware of any rights issues, but if you have a concern, please let us know. If there is a problem, we’ll remove the material from public view while we look into it. Your help is appreciated."

[NOTE: For collections where there are no rights issues (e.g., institution holds the rights, collection is in the public domain, rights-holder has given permission), clearly indicate that when you make the digitized collection accessible]
4. Prospectively, work with donors

- Identify sensitive portions of the collection
- Transfer ownership to the institution
- Identify other ownership issues
- Include terms in your deed of gift that:
  - if the content is in the public domain, ensure that no restrictions are placed on it
  - if donor retains the rights, seek license to digitize the materials for unrestricted access
  - ensure that nothing will limit or restrict fair use rights
OCLC Research White Papers
http://www.oclc.org/research/publications/reports.htm

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http://hangingtogether.org/

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