

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Seeking Low Risk Strategies for Making Collections of Unpublished Materials More Accessible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



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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10:30 Rights and unpublished works, Aprille Cooke McKay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*

Welcome and Introduction

Merrilee Proffitt



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Focus and Reframe: rights and unpublished collections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

proffitm@oclc.org

Mark A. Greene and Dennis Meissner

“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.”

ment, description, and cataloging. What prevents such a wishy conclusion? Put very simply, processing is not keeping up with acquisitions and has not been for decades, resulting in massive backlogs of inaccessible collections at repositories.

The authors owe a significant debt of gratitude to the Central Historical Publications Commission for funding the Archival Research Fellowship Program, which supported the research in this article. The 2003–2004 program was administered by Massachusetts Historical Society and sponsored by Brenda Lawson who joined the Fellowship staff in June 2004. The Fellowship provided the funding it provided were crucial in making possible supporting this research, by providing a platform for the authors' work at the National Archives symposium and a session at the 2004 Society Meeting.

Best Value and Local Authorities (2004) and on "Competition," n.d. (<http://bestvaluearchivists.org.uk/competition>, accessed 25 May 2004). The Best Value drive has encouraged all efforts to modernize and improve the service at the local level. The National Archives' own motto of continuity: "The Archival Mapping Project" states that the cataloguing the service is not working properly. It revealed that 52% of the archives have large gaps in their coverage, resulting in a denial of public access to collections of local and national significance, and that 70% of the coverage of their holdings."

Shifting Gears 2007

Shifting Gears: Gearing Up to Get Into the Flow

Ricky Erway and Jennifer Schaffner

Program officers
OCLC Programs and Research

“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.”

A publication of OCLC Programs and Research



“...**intentionally does not encompass** technical specifications for various formats, born digital materials, nor **rights issues**”

Copyright Investigation Summary Report, 2008

Copyright Investigation Summary Report

Participating RLG Program partner institutions and staff:

Cornell University
Peter Hittle

Stanford University
Mimi Carter

Emory University
Lisa Macklin

University of California, Los Angeles
Angela Riggio

New York Public Library
Tom Lisanti

University of Michigan
Judy Aronheim

Rutgers University
Grace Agnew

University of Texas at Austin
Dennis Dillon

Report prepared by:

Merrilee Proffitt, Arnold Arcolio, and Constance Malpas, RLG Programs

Background:

To support the RLG Programs work agenda, RLG Partners collaborate to identify new service areas and structures. This collaboration helps libraries, archives, and museums achieve a common understanding of the processes for which they should be responsible.

In this project, staff from eight partner institutions participated in copyright investigation interviews between August and September 2007 to share the ways in which their institutions currently obtain copyright permission to provide users with access to high-risk or special collection materials.

A few things to note about the participating partner i

- Some are involved in mass digitization projects.
- Some are concerned with determining copyright status of digitized materials.
- All of these institutions are concerned with identifying specific permissions when scholars or b materials, often special collections materials, particularly photographs.
- In some cases, the same staff are responsible for both mass digitization and activities around archival or special collections materials.

www.rikl.org/rlgprograms/publications/rlg0708/2008-01.pdf
Proffitt, et al., for OCLC Programs and Research

March 2008
Page 1 of 6

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 2008 (H.R. 5889) and the Shawn Bentley Orphan Works Act of 2008 (S. 2013), would reduce penalties for infringement if an infringer makes reasonable efforts to identify and locate rights holders of materials that are likely to obtain rights information for

Although the statement focuses on unpublished materials, 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 Briston, Mark Allen Greene, Cathy Henderson, Peter Hirtle, Peter Jaszi, William Maher, Aprille Cooke McKay, Richard Pearce-Moses, and Merrilee 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.

SAA Orphan Works Statement of Best Practices 2009

“...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 Collections

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

Where are we now moderated by Jennifer Schaffner



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.

Rights and unpublished works

Aprille Cooke McKay



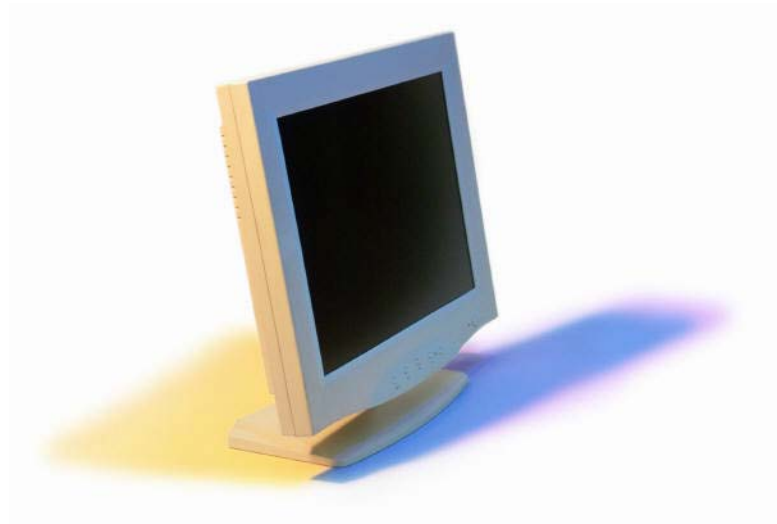
Aprille Cooke McKay holds a JD from the University of Chicago, and an MSI with a specialization in Archives and Records Management from the University of Michigan School of Information.

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.



Aprille C. McKay, JD, MSI
University of Michigan

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
- 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/

Fair use factors

| | Likelier yes + | Likelier no - |
|---------|-------------------------------------------------|--------------------------------------------------------|
| Purpose | Non-Profit Transformative use, creativity | Commercial No new work, or to supersede original |
| Nature | Reference, non-fiction, Published | Fiction, art, unpublished |
| Amount | Small amount, relative to the whole original | Complete work, heart of work |
| Market | Doesn't hurt market for the original | Hurts market or potential market of original |

§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

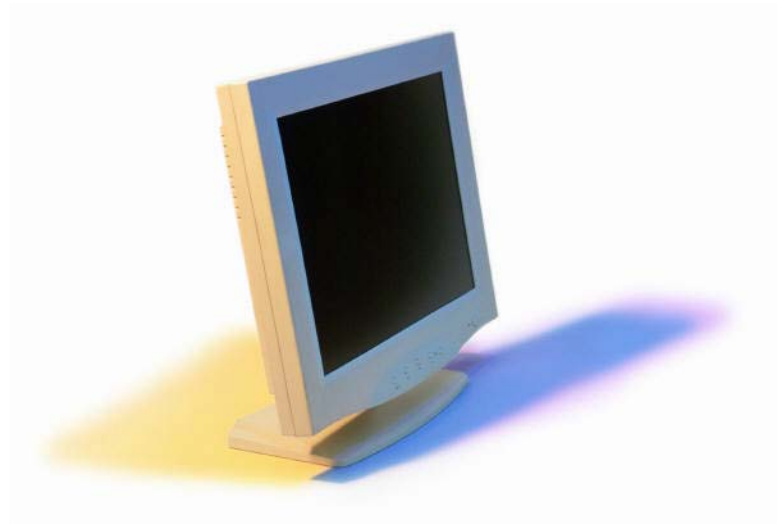
§108(e) Access copies for patrons

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



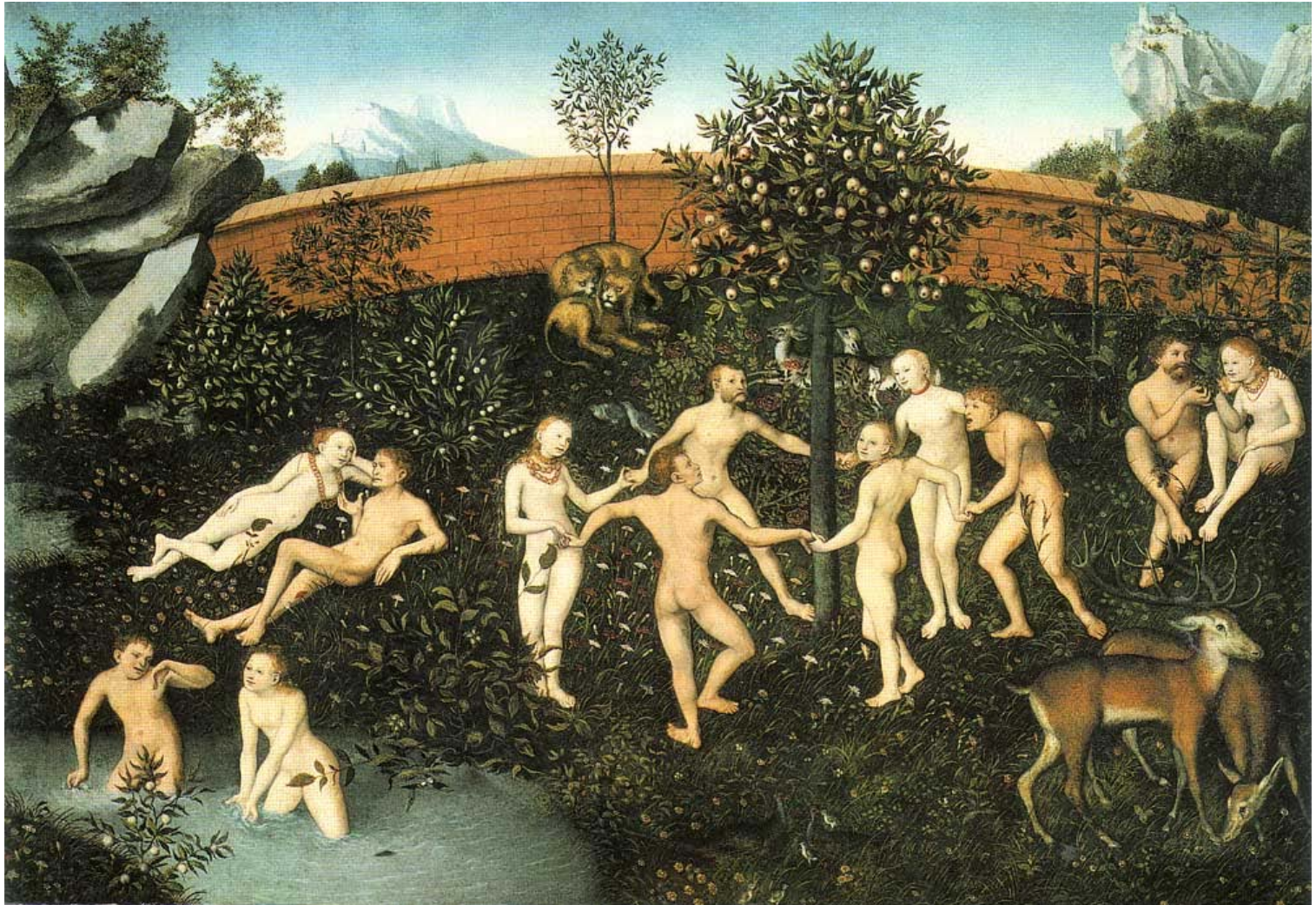
Defamation

- 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?

Limits 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.”

Georgia Harper <http://chaucer.umuc.edu/blogcip/collectanea/2008/07/>

- Manage the risk, don't avoid it entirely

Questions?

Aprille Cooke McKay

aprille@umich.edu

Fig leaf photo credit: Flickr – Geishaboy500

What it takes to be thorough

Maggie Dickson



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**

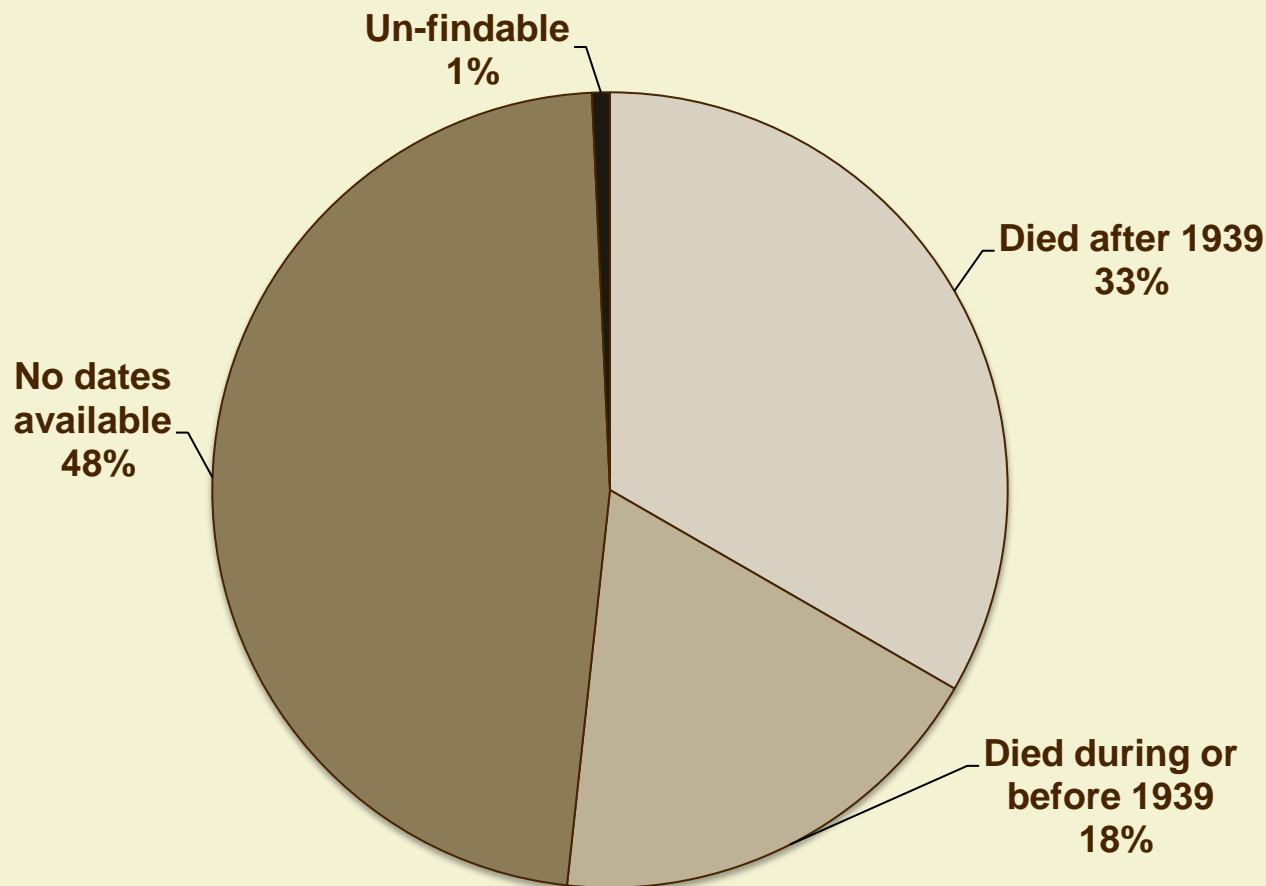
Correspondent name investigation

- 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



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

Identifying copyright contacts

- 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

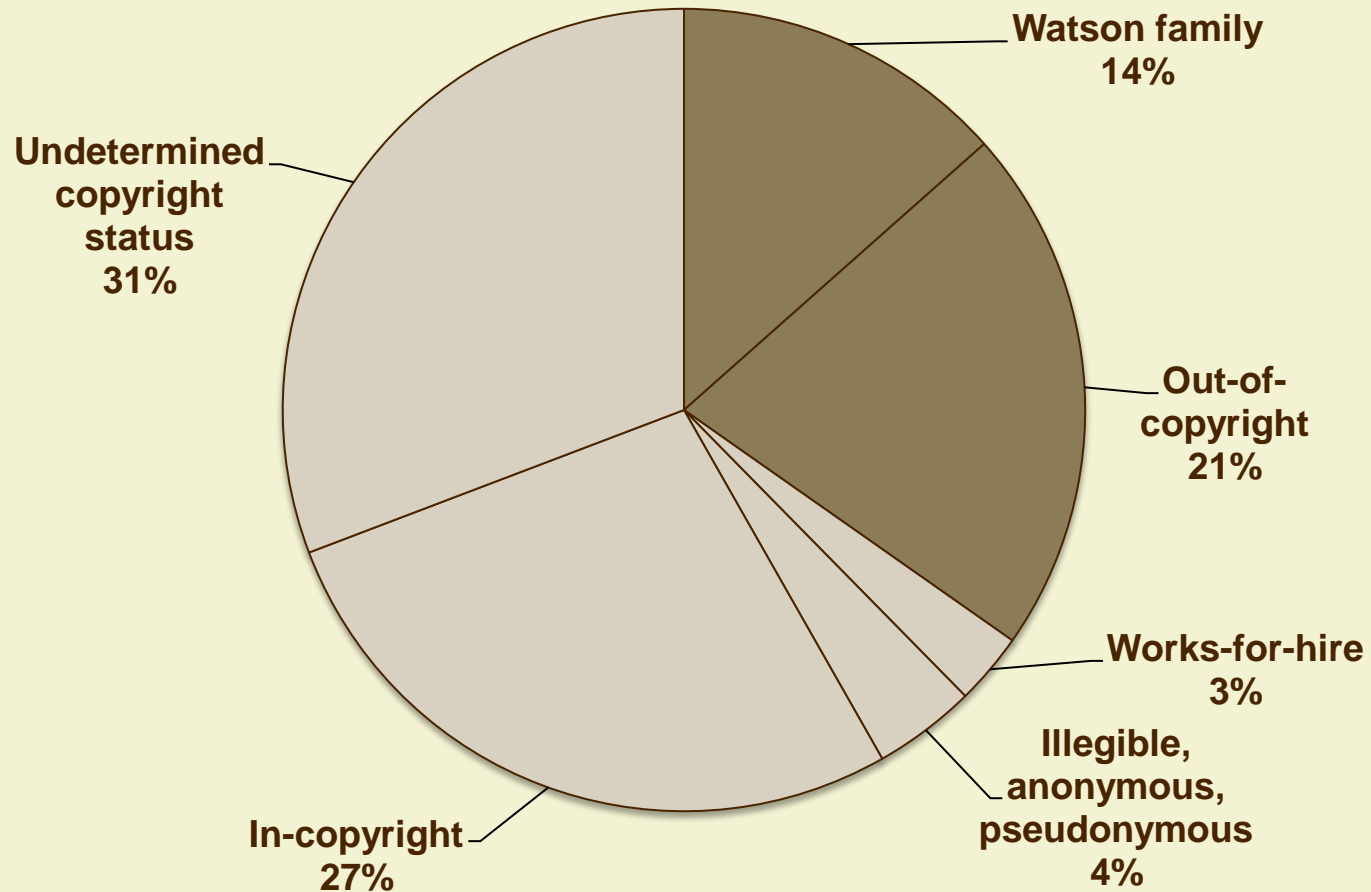
Obtaining copyright permissions

- 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



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

Mrs E Watson.

THE THOMAS E. WATSON PAPERS

Form 1204

| CLASS OF SERVICE | SYMBOL |
|------------------|--------|
| Telegram | |
| Day Letter | Blue |
| Night Message | Nite |
| Night Letter | N L |

If none of these three symbols appears after the check (number of words) this is a telegram. Otherwise its character is indicated by the symbol appearing after the check.

WESTERN UNION TELEGRAM



NEWCOMB CARLTON, PRESIDENT

GEORGE W. E. ATKINS, FIRST VICE-PRESIDENT

| CLASS OF SERVICE | SYMBOL |
|------------------|--------|
| Telegram | |
| Day Letter | Blue |
| Night Message | Nite |
| Night Letter | N L |

If none of these three symbols appears after the check (number of words) this is a telegram. Otherwise its character is indicated by the symbol appearing after the check.

RECEIVED AT

44A BF 13 NITE

PORTLAND OREG SEP 26 1922

MRS THOS E WATSON

THOMSON GA

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

MILES POINDEXTER

1110A

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

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.

Walking the tightrope

Rebekah Irwin



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





SEARCH DIGITAL IMAGES



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[Cary Playing Cards Database](#)

Distinguished collection of playing cards, card sheets, wood blocks, metal plates, ephemera, and prints.



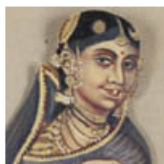
[J.M. Barrie's Boy Castaways](#)

The only surviving copy of an adventure story by J.M. Barrie, the creator of *Peter Pan*.

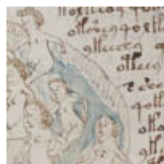


[Frederick Samuel Dellenbaugh's Photographs and Drawings of the Colorado River Region](#)

Approximately 900 photographic prints depicting the Colorado River region and other areas of the U.S. West, 1871-1934



[Seventy-two Specimens of Castes in India](#)



[Voynich Manuscript](#)

A mysterious, undeciphered



[Carleton Watkins Glass Stereographs of John C. Frémont's Mariposa](#)



[William Carlos Williams Papers](#)

NEW SEARCH MY GROUP HELP

Results for : (Page 2 of 95)

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Pearl Bailey in nightclub dress. 628



Image ID: 1088289

4x 8x ZOOM

Pearl Bailey. 629



Image ID: 1088290

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Pearl Bailey. 630



Image ID: 1088291

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Pearl Bailey. 631



Image ID: 1088292

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Pearl Bailey. 632



Image ID: 1088293

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Pearl Bailey. 633/636



Image ID: 1088294

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Pearl Bailey. 637



Image ID: 1088295

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Pearl Bailey. 638



Image ID: 1088296

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Pearl Bailey. 639



Image ID: 1088297

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Pearl Bailey. 640

NEW SEARCH MY GROUP HELP

Results for : (Page 1 of 71)

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[Ceremony of the fasting woman].
755a

Image ID: 1043270

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[Givers of the sun dance seated
behind the altar]. 759

Image ID: 1043271

4x 8x ZOOM

[View of tribal camp]. 804



Image ID: 1043272

4x 8x ZOOM

[Horse tipi on left, Snake tipi,
Antelope, and winter tipis]. 811

Image ID: 1043273

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[Buffalo tipi on left, Snake tipi on right,
Star tipi in back center]. 812

Image ID: 1043274

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[Star tipi with woman in the doorway].
819

Image ID: 1043275

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[Red Stripe Tipi and the Thunder
Tipi]. 821

Image ID: 1043276

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[Otter tipi]. 824



Image ID: 1043277

4x 8x ZOOM

[Otter tipi]. 824



Image ID: 1043278

4x 8x ZOOM

[Otter tipi]. 824



Image ID: 1043279

4x 8x ZOOM

[Otter tipi]. 824



Image ID: 1043280

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[Otter tipi]. 824



TITLE: Letters from O'Keeffe to Stieglitz (View as Slideshow)
(Page 1 of 2)

Jump to page Go Next

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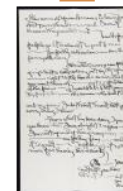


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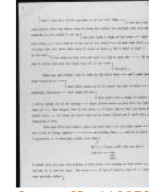


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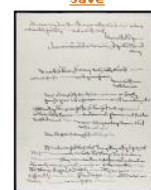


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1916 Aug 11 : (J) : p. [1]
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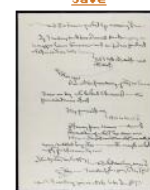


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1916 Aug 11 : (J) : p. [2]
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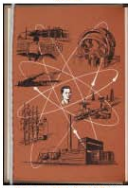
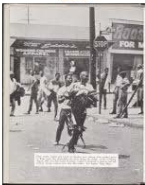





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1916 Aug 11 : (J) : [envelope]
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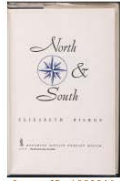




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| <p>Save</p>  <p>Image ID: 1004102 4x 8x ZOOM</p> <p>A Scamper among the Buffalo.</p> | <p>Save</p>  <p>Image ID: 1004105 4x 8x ZOOM</p> <p>David Crockett</p> | <p>Save</p>  <p>Image ID: 1004112 4x 8x ZOOM</p> <p>Sioux Queen.</p> | <p>Save</p>  <p>Image ID: 1004244 4x 8x ZOOM</p> <p>The Round-up.</p> |
| <p>Save</p>  <p>Image ID: 1004246 4x 8x ZOOM</p> <p>Lieut. Z. M. Pike</p> | <p>Save</p>  <p>Image ID: 1004260 4x 8x ZOOM</p> <p>Eiereker [?] hinn Raude</p> | <p>Save</p>  <p>Image ID: 1004270 4x 8x ZOOM</p> <p>View of St. Louis From the Illinois Shore, pl. I [1]</p> | <p>Save</p>  <p>Image ID: 1004744 4x 8x ZOOM</p> <p>[Untitled, unnumbered plate facing title page].</p> |
| <p>Save</p>  <p>Image ID: 1004779 4x 8x ZOOM</p> | <p>Show all images in this set</p>  <p>Image ID: 1005075</p> | <p>Show all images in this set</p>  <p>Image ID: 1005099</p> | <p>Show all images in this set</p>  <p>Image ID: 1005105</p> |
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| | | | <p>Save</p>  <p>Image ID: 1003750 4x 8x ZOOM</p> <p>[Title page]</p> |


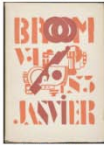











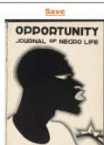
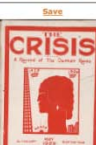

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| | <p>Save</p> <p>Image ID: 1003713 4x 8x ZOOM</p> <p>Illustrations of the manners, customs, and condition of the North American ...</p> | <p>Save</p>  <p>Image ID: 1003365 4x 8x ZOOM</p> <p>North & South.</p> | <p>Save</p>  <p>Image ID: 1003366 4x 8x ZOOM</p> <p>North & South.</p> |
| | <p>Save</p>  <p>Image ID: 1003726 4x 8x ZOOM</p> <p>Advertisement[Mr. Occom's Preface</p> | <p>Save</p>  <p>Image ID: 1003407 4x 8x ZOOM</p> <p>The Dial. Vol. 73, no. 5.</p> | <p>Save</p> <p>Image ID: 1003728 4x 8x ZOOM</p> <p>Wanderings of an artist among the Indians of North America ...</p> |
| | <p>Save</p> <p>Image ID: 1003778 4x 8x ZOOM</p> <p>Moeurs des sauvages ameriquains ...</p> | <p>Save</p>  <p>Image ID: 1003795 4x 8x ZOOM</p> <p>A concise natural history of East and West Florida.</p> | <p>Save</p>  <p>Image ID: 1003801 4x 8x ZOOM</p> <p>The general history of the vast continent and islands of America.</p> |

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|  <p>Image ID: 1003406 4x 8x 200M The criterion, Vol. 1, no. 1.</p> |  <p>Image ID: 1003402 4x 8x 200M Bloom, Vol. 1, no. 3.</p> |  <p>Image ID: 1003412 4x 8x 200M Rogue, Vol. 1, no. 1.</p> |  <p>Image ID: 1003410 4x 8x 200M Others, Vol. 1, no. 2.</p> |
|  <p>Image ID: 1003415 4x 8x 200M Secehon, Vol. 1, no. 3.</p> |  <p>Image ID: 1003335 4x 8x 200M Blast, Number 2, July 1915.</p> |  <p>Image ID: 1003427 4x 8x 200M Des Imagistes.</p> |  <p>Image ID: 1003403 4x 8x 200M Broom, Vol. 1, no. 3.</p> |
|  <p>Image ID: 1003407 4x 8x 200M The Dial, Vol. 73, no. 5.</p> |  <p>Image ID: 1003175 4x 8x 200M Oregon Times Magazine, February/March 1976.</p> |  <p>Image ID: 1005177 4x 8x 200M Time, February 9, 1970.</p> |  <p>Image ID: 1008666 4x 8x 200M The Crisis.</p> |
|  <p>Image ID: 1008667 4x 8x 200M Opportunity.</p> |  <p>Image ID: 1008668 4x 8x 200M Opportunity.</p> |  <p>Image ID: 1008670 4x 8x 200M The Crisis.</p> |  <p>Image ID: 1011419 4x 8x 200M Art Exhibit.</p> |

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|  <p>Image ID: 1024472 4x 8x 200M The Ways of White Folks [dust jacket]</p> |  <p>Image ID: 1024474 4x 8x 200M The First Book of Negroes [dust jacket]</p> |  <p>Image ID: 1024476 4x 8x 200M The Best of Simple [dust jacket]</p> |  <p>Image ID: 1040274 4x 8x 200M Trans-Atlantic: Sub: a kochensarm autor / Witold Gombrowicz. [dust jacket]</p> |
|  <p>Image ID: 1005177 4x 8x 200M The Crisis.</p> |  <p>Image ID: 1040274 4x 8x 200M Das Tagebuch des Witold Gombrowicz / [aus dem Polnischen übersetzt von Walt...]</p> |  <p>Image ID: 1040275 4x 8x 200M Ferdydurke / Witold Gombrowicz; prefazione di Angelo M. Ripellino; [tradu...]</p> |  <p>Image ID: 1040276 4x 8x 200M Pornografia / Witold Gombrowicz; [dust jacket] [Pornografia, Italian]</p> |
|  <p>Image ID: 1040277 4x 8x 200M Utwory sceniczne / Sławomir Mrozek. [dust jacket]</p> |  <p>Image ID: 1040274 4x 8x 200M La seducción / Witold Gombrowicz [dust jacket]. [Pornografia, Spanish]</p> |  <p>Image ID: 1040275 4x 8x 200M All the king's men / by Robert Penn Warren.</p> |  <p>Image ID: 1040275 4x 8x 200M Poems / by Wilfred Owen ... [dust jacket.]</p> |
|  <p>Image ID: 1040826 4x 8x 200M Goodbye, Columbus, and five short stories / by Philip Roth. [Dust jacket.]</p> |  <p>Image ID: 1040827 4x 8x 200M Goodbye, Columbus, and five short stories / by Philip Roth. [Dust jacket.]</p> |  <p>Image ID: 1040997 4x 8x 200M Dust jacket for Italian edition of All the King's Men [Tutti i giorni del...]</p> |  <p>Image ID: 1041635 4x 8x 200M Poems / by Wilfred Owen ... [dust jacket.]</p> |

July 1-December 31 2009 [six months]

25,169

medium-resolution jpgs

[14,756 staff requested]

[9,041 patron requested]

10,738

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[8,781 staff requested]

[1,957 patron requested]

12,265

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6,112

Paper photocopies*

6,163

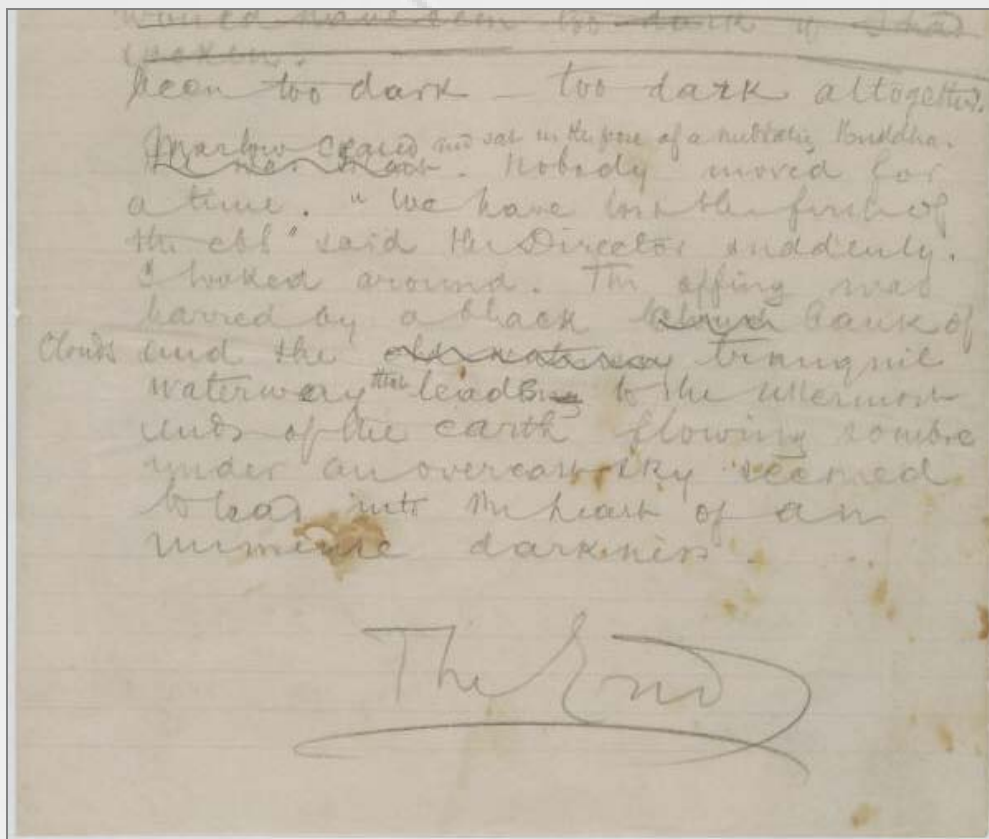
Microfilm frames

548

Requests for TIFFs discovered online

114

Microfilm reels



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WATCH

WRITERS ARTISTS AND THEIR COPYRIGHT HOLDERS



HARRY RANSOM
CENTER

Contact for Joseph Conrad 1857-1924

Almost all of Joseph Conrad's published writings are out of copyright in both the UK and the USA. As he was a naturalized UK citizen, his unpublished works and correspondence remain in copyright in the UK until 2040, but, as of 2003, are in the public domain in the USA.

Richard Underwood
Penningtons Solicitors

Phone: 44 - (0)1256 - 407100 [Office]
Phone: 44 - (0)1256 - 479425 [Fax]



3 # ~~Leaving~~ (out of Penn Station) # 3
~~was~~ a new nation,
~~stepping~~ out of planes from Porto Rico,
~~and~~ ~~from~~ the holes of boats
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 syrupy sweet?
Or does it ~~even~~ like explode?
Has anybody heard // what happened to a dream deferred?—
over

maybe it just sags
like a heavy load.

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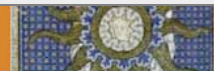
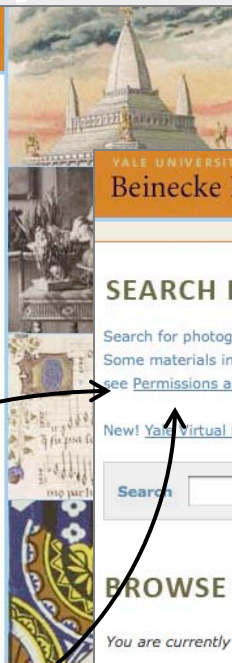
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Sketches by Robert Templeton documenting the Black

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Letters, manuscript photographs that the life of the Af



Cite as: Gertrude Stein and Alice B. Toklas Papers, Yale Colle



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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.

Factoring the case for fair use

Georgia Harper



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



Summary ^{1/2}

PD
use

Licensed

20- yrs

Fair use

Orphan work/fair

- 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}

PD
use

Licensed

20- yrs

Fair use

Orphan work/fair

- 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

Coloring outside the lines

Peter Hirtle



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*.



Cornell University
Library

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

The recipe example



Copyright

Recipes

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 Liffing-Zug Bourret and the words of one extraordinary Texas district court judge for both dramatic reading and hearty laughter.

Outcome?



“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 Liffing-Zug Bourret

http://www.penfieldbooks.com/stewing_in_texas2.php?article_id=37

Do it all right – and you are still at risk!



Blotter Barton

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

Print:  Email:  Share:  

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.



CHRONICLEONLINE

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

Infringe with Impunity?



- 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



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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.

Discussion of community of practice

Ricky Erway



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)

Well-intentioned practice for increasing access to collections of unpublished materials



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

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Ricky Erway erwayr@oclc.org