Learning to live with risk

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How can cultural heritage institutions use new technologies to improve access to holdings for remote users when so much material is protected by copyright and the repository is normally not the copyright owner? Many American institutions have put material online even when they do not own the copyright, after taking thoughtful measures to minimize the risk that this may incur. Others have elected to forego any efforts to control the use of public domain reproductions from their holdings.

Whenever I talk about copyright in the United States, two issues are sure to arise. The first, bluntly put, is ‘how can I use other people’s stuff?’ To be precise, how can one exercise one of the exclusive rights of the copyright owner, such as the right to reproduce a work or distribute that work to others, if one is not the copyright owner? The second question is the converse of the first: ‘How can I legally make sure that no one else is using my stuff?’

There are legal answers to these questions, but they are often insufficient. Strict adherence to the letter of the law may mean that libraries, archives, and museums fail to fulfill their primary missions of education and service. As a result, a new approach to copyright issues in cultural heritage institutions has begun to emerge in the US. Everyone acknowledges the need to have a good understanding of the law and its limitations. But there is also a new emphasis on evaluating and assessing the practical dangers associated with copyright infringement, especially when measured against the harm that too strict an interpretation may do to the institutional mission. The purpose of this paper is to identify and explain some of the approaches that US cultural institutions are following, especially when they seek to digitize collections in order to support teaching or learning. While the examples are based in US law, a similar risk assessment would be possible in the UK.
The starting point of any discussion must begin with the deep desire of cultural heritage professionals to obey the law. Our professional codes of conduct stipulate that we obey copyright laws, as do the policies of many of our employing institutions. But due to the complexity of copyright law, that is often impossible. As anyone who has read Tim Padfield’s excellent manual, Copyright for archivists and records managers, a seemingly simple and straightforward copyright regime quickly becomes very complex as one probes the details and exceptions of copyright. The result is that, in acting with the very best of intentions and with the greatest respect for our professional and institutional codes, we often unintentionally infringe copyright.

A good example of a repository that apparently unintentionally violates copyright law with the best intentions is the Judaica Sound Archives at Florida Atlantic University. The archives makes available through its website many sound recordings made before 1923. (Later recordings are accessible through research stations that are distributed to other universities.) It claims it can do this because ‘these recordings were produced before 1923 and are in the public domain.’ It is true that most items published before 1923 are in the public domain in the US, but sound recordings are an exception to this general rule; almost no US sound recording will enter the public domain until 2068. Some of the sound recordings that Judaica Sound Archives are distributing are still protected by copyright, and they may be technically infringing copyright law.

There are two lessons to take away from the example of the Judaica Sound Archives. First, it demonstrates how hard it is to get copyright correct. We constantly, and usually unknowingly, infringe copyright. Rules that were written initially to support the commercial distribution of published text become complicated when they are applied to the noncommercial reproduction of unpublished texts, images, sound, and video.

The second lesson to take away is even more important: while the Judaica Sound Archives may be engaged in a technical violation of copyright, it has received no reported criticism or complaints, but only praise. This is true for almost every institutional infringement of copyright. Almost none have resulted in lawsuits against the infringing institution, nor have the technical infringements generated any identifiable harm to copyright owners. Imagine how much poorer
the internet would be if the Judaica Sound Archives had truly understood copyright law and, from a sense of obligation to obey the law, had not made digital copies of pre-1923 recordings available online. There is a growing sentiment in the US that repositories, in their desire to obey the law and avoid litigation, may have been overly cautious.

Some might argue that regardless of the fact that no one has complained about the sound archive, Florida Atlantic University still should have sought permission to digitize and make the sound recordings publicly available. In many cases, especially if the work is by a well-known artist or author, that approach is entirely appropriate. But much of the material in our repositories is ‘orphan’: the copyright owners are either unknown or unlocatable. A recent study commissioned by the British Library concluded that 43% of the published textual works in a sample investigation were orphans. Furthermore, the investigators spent on average four hours per book clarifying the copyright status of the work and conducting a diligent search.\(^5\)

The situation is even worse with unpublished materials, as a recent research project at the University of North Carolina demonstrated.\(^6\) The project attempted to identify rightsholders in the small (7.5 linear feet) collection of correspondence of Thomas Watson, a somewhat-prominent Senator from Georgia who died in 1922. There were 8434 items in the 7.5 linear feet. It took archivists more than 90 hours of work to extract the names, dates and geographical locations of authors of all of the incoming correspondence, obtaining 3304 names. Using the genealogical database Ancestry.com and other online resources, they found that 608 of the correspondents had died more than seventy years ago, which placed their unpublished work in the public domain. Archivists could determine death dates for only 1101 of the remaining correspondents. This work required the full-time labor of an archivist for fourteen weeks. After all of this effort, only a handful of the representatives of correspondents were successfully contacted, and they freely gave their consent for the old letters to be published.\(^7\)

The Thomas Watson project example proves that there are situations when it is a waste of time and money to look for copyright owners. More and more repositories in the US are willing to accept that digitizing and making available some materials without the permission of the copyright owner presents an acceptable level of risk. Take, for instance, the example of a photograph from the George Eastman House in Rochester, N.Y., entitled Woman and boy sitting
in a chair. (Figure 1) No author is given, and there is no evidence or indication that the photograph was ever published. Copyright law says that copyright in an unpublished anonymous work expires 120 years after creation. The Eastman House, however, has concluded that since no copyright owner can be identified, it can treat the photograph as if it were in the public domain, and has added it to its collection of images on the Flickr Commons with the label ‘no known copyright restrictions.’ They explain their actions this way:

To the best of our knowledge we see no reason that these historical images should not be available to the public for personal research and enjoyment; however, we cannot deny the possibility that the sharing of these images may inadvertently infringe upon the rights of copyright holders unknown to us. The user of the images must understand that George Eastman House cannot guarantee that your private use of the images shared here on The Commons will not violate the rights of unidentified copyright holders, and George Eastman House cannot be responsible for any liability resulting from your use of these images.

As far as I know, no copyright owner has stepped forward and no copyright owner has objected.

Similarly, in 2001 my institution, Cornell University, decided to make available on the web digital copies of all incoming and outgoing correspondence with our founder, Ezra Cornell, who died in 1874. None of this material would enter the public domain until 2003, but we concluded that the risk that anyone would come forward and object was exceedingly small.

Currently the gold standard for copyright risk assertiveness is the Archives of American Art, a component part of the Smithsonian Institution. It has digitized and posted in their entirety over 100 archival collections. It is possible to find in the digitized collections things such as a 1938 letter from Philip Hendy, director of the City Art Gallery in Leeds, to Germain Seligman, president of the art gallery Jacques Seligmann & Co., even though Hendy died in 1980 and this letter will not enter the public domain until at least 70 years after his death. (Figure 2)

How can these institutions feel comfortable engaging in technical violations of copyright? What are they doing to reduce the risk that they face? There are at least four approaches that are being followed in the US: reliance on best practices; limits on size and resolution; the use of
disclaimers; and recognition of the limits on relief available to potential plaintiffs. Each will be discussed briefly in turn.

Reliance on best practices

In response to the growing recognition that repositories, in their desire to obey the law and avoid litigation, may have been overly cautious, the Online Computer Library Center in 2010 held a workshop on what it suggested could be described as ‘undue diligence’ among special collection curators when it came to respecting copyright. The workshop developed recommendations on well-intentioned practice that can be followed when placing large amounts of unpublished material online. The recommendations stress sensitivity to the material, so that material that might cause harm to the third parties, or place the repository at risk, is not digitized. Furthermore, it encourages the use of disclaimers and takedown provisions (see further discussion below).

The recommendations have been well received in the community and have been endorsed by many groups, including the Society of American Archivists. In 2011, the Triangle Research Network, a consortium of research libraries in North Carolina, developed their own digitization protocol based on the recommendations of the well-intentioned practice document.

In addition to the well-intentioned practice recommendations and the North Carolina interpretation of them, the Society of American Archivists prepared a document on best practices when searching for the copyright owners of unpublished orphan works. The recommendations stress that no single protocol can be followed, but that the level of effort one makes must be related to the likelihood of success.

Community standards and norms have no legal authority; they by themselves cannot authorize or condone a copyright infringement. Nevertheless, they can be helpful if one should ever find
oneself in court over digitized content. They are evidence that the institution acted with care and respect for the copyright owner by following best professional practices.

Use of disclaimers

One of the recommendations in *Well-intentioned practices* is to use a disclaimer on one’s website that includes an offer to take down any material that may offend. For example, the Kheel Center for Labor Documentation at Cornell University put online a few years ago most of its photographs. Most of them would be protected by copyright, and most would be orphan works. By placing the photographs online, there is a possibility that the ‘parents’ of the orphans might find them. After some experimentation, we settled on the following notice for its website:

> 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.

To date, no requests to remove an image have been received.

Limits on resolution and/or access

It is not always necessary to make a high-resolution version of a document publicly available on the internet. Some institutions have elected to make thumbnail versions of works of art accessible to all without permission, but only make larger versions accessible when permission
from the copyright owner has been received. Some US court rulings have suggested that making thumbnail versions of images accessible for different purposes than that for which the image was created (for example, in an image search engine) is a fair use and hence not an infringement of copyright.\textsuperscript{21} The Association of Art Museum Directors (AAMD) recently issued a statement endorsing the use of thumbnail copies of images. The \textit{AAMD policy on the use of ‘thumbnail’ digital images in museum online initiatives}, states

\begin{quote}
AAMD supports the position that a museum’s use of thumbnail images in the museum’s collections image database, promotional materials to identify works in a museum’s collection, and online scholarly publications are fair uses under applicable provisions of the United States copyright law.\textsuperscript{22}
\end{quote}

An excellent example of how one museum uses thumbnails in its public programs is the Brooklyn Museum of Art’s Copyright Project. According to Deborah Wythe, the director of the project, the goals of the copyright project are to make as much of the collection available as possible as openly as possible and with as few restrictions as possible, while at the same time respecting the rights of artists. To accomplish this, they have implemented a set of working rules. First, painting with broad strokes and using broad rules of thumb, they divide the collection into works that are still likely to be in copyright versus those that are clearly in the public domain. If they err, it is on the side of protecting artists’ rights.\textsuperscript{23}

They actively seek out the current rights owners of in-copyright works, but they will also make a thumbnail version of the works available even when a copyright owner cannot be located. When thumbnails are the only option available online, the Museum includes the following disclaimer:

\begin{quote}
Why is this image so small? This image is presented as a ‘thumbnail’ because it is protected by copyright. The Brooklyn Museum respects the rights of artists who retain the copyright to their work.\textsuperscript{24}
\end{quote}
A second, different approach followed by many educational institutions is to make larger versions available online, but only to their own faculty and students and in direct support of the school’s educational mission. For example, at Cornell University we have in the Claire Holt collection approximately 1780 slides of Indonesia that were created for the Cornell Indonesian Arts Project.25 The slides were taken in the 1960s and document Indonesian folk and contemporary art. Cornell does not have resources to try to locate the current copyright owner of the original works of art found in the collection, but we do want to make this work known to the world so that people can find material that may be of interest to them. Therefore, anyone in the world can download a thumbnail version of the image or view a portion of the image at a higher resolution, but only authorized users of the Cornell network have the ability to download higher-resolution versions of the work to support teaching and research.

Low risk

The strongest protection for an aggressive program of making visual images available is the limited liability that such a program faces. In the US, the penalties for the infringement of works that have been registered with the Copyright Office can be substantial. If a work has never been registered (as is the case with most archives, photographs, and works of art), the possible damages are much reduced. One can be forced to pay the actual damages suffered by copyright owner as a result of the infringement, but in most cases, this would only be the reasonable licensing fee one would have paid had an agreement been reached prior to the use. This is similar to infringement suits in the United Kingdom. In almost all cases, the actual financial harm to the copyright owner is minimal.

Of course, there is always the risk that a copyright owner might bring an infringement suit as a matter of principle, rather than expecting large monetary rewards as a result. In general, however, libraries, archives, and museums are not very appealing defendants, and so even in the litigious United States there have been only a handful of suits against cultural heritage institutions. It is much more likely that someone would request that copyrighted material be
removed than it is that an aggrieved copyright owner would bring a suit alleging copyright infringement.

Controlling the use of reproductions from your institution

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Up to now, I have focused on how repositories can reproduce and make available to the public works that they may own physically, but whose copyright belongs to someone else. Repositories often wish to make sure that others cannot reproduce and use images from their institutional collections. Sometimes this is because the repository hopes to make money through the licensing of image collections – even when those images are in the public domain. In other cases, it is because the repository feels a moral compulsion to make sure that art is not abused. (One classic law review article described this as *Keeping the world safe from naked-chicks-in-art refrigerator magnets.*

In 2009, the National Portrait Gallery sent a letter threatening legal action to a Wikimedia volunteer. The National Portrait Gallery had been making portions of high-resolution images of public domain artwork available through its website. By only providing a portion of the image in high resolution, the Gallery sought to meet researcher needs while preserving an important source of revenue (the sale of high resolution copies of the entire image). The Wikimedia volunteer figured out a way to automatically stitch together the high-resolution tiles and subsequently uploaded 3000 high-resolution images to Wikimedia. Wikipedia spoke out forcefully in defense of the public domain, and the 3000 images remain on the Wikimedia Commons website.

In a fundamental article published in 2005, Kenneth Hamma of the J. Paul Getty Trust argued that the inability of repositories to limit and control the digital distribution of reproductions of their holdings was a benefit and not a liability. In *Public domain art in an age of easier mechanical reproducibility*, Hamma asked cultural heritage repositories to define their
fundamental mission and then determine whether imposing restrictions on the reproduction and use of public domain images is compatible with that mission.\textsuperscript{29}

Since the publication of Hamma’s article, more and more repositories are exploring how to lessen their hold over the reproductive use of material. For example, in 2007 the Metropolitan Museum of Art launched in ArtSTOR its Images for Academic Publishing (IAP) program to help address the challenges of scholarly publishing in the digital age.\textsuperscript{30} IAP allows the free use of its images in academic publications provided the print run is under 2000 copies. Two years later, the Cornell University Library dropped all permission fees and restrictions on the use of public domain materials.\textsuperscript{31} We only ask that scholars follow good scholarly practice and cite the source of the reproduction, but we do not require them to do so. In May of 2011, Yale University announced that it would provide open and unfettered access to all public domain works in its libraries, archives, and museums (including the Yale Center for British art).\textsuperscript{32} (Figure 3) An event similar in spirit was the creation of the UK Open Government license. Under the terms of the license, researchers are free to use and re-use material that is still subject to Crown Copyright so long as a few simple requirements are met.\textsuperscript{33} Most recently, in October 2011, the Walters Art Museum in Baltimore announced that its collection of 10,000 images of mostly medieval and ancient art will henceforth be licensed under a Creative Commons Attribution-NonCommercial-ShareAlike license.\textsuperscript{34}

Conclusion

Every day our repositories live with risk. We run the risk that someone might trip in the reading room, or that a staff member might engage in harassment, or that a patron might steal one of the items from the collection. In the face of that risk, however, we do not shut our doors and keep all patrons away. Instead we implement policies and programs that can manage that risk and hopefully avoid its worst consequences.
The same approach is true for copyright risks as well. The risk is real, but manageable. Respectful management of copyright that at the same time allows others to build on other people’s contributions will be one of the defining professional skills of our future.

References

3. An example is found on the page devoted to Alma Gluck at http://faujsa.fau.edu/gluck_alma/.
4. See, for example, Corynne McSherry, *No authors have been harmed in the making of this library*, https://www.eff.org/deeplinks/2011/09/no-authors-have-been-harmed-making-library/.


21. Examples of when the use of thumbnails without permission has been found to be acceptable include Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Perfect 10, Inc. v. Amazon.com, Inc. 508 F.3d 1146 (9th Cir. 2007); and Bill Graham Archives v. Dorling Kindersley Limited 448 F 3d 605 (2nd Cir. 2006).


24. See as an example http://www.brooklynmuseum.org/opencollection/objects/99296/Power_Flight/.


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Captions for Hirtle

Figure 1:


(Fig 1 File name: 2677418229_2026512077_o.jpg Downloaded from: http://www.flickr.com/photos/george_eastman_house/2677418229/sizes/o/in/photostream/)

Figure 2:

Screenshot, Archives of American Art digital collection.

Rights: © 2011 Archives of American Art, which authorizes educational, non-commercial use of its content.

(Fig 2 File name: Archives of American Art.jpg Screenshot from: http://www.aaa.si.edu/collections/container/viewer/Leeds-England-City-Art-Gallery--290104 )

Figure 3:


(Fig 3 File name: 55088.jpg Downloaded from: http://collections.britishart.yale.edu:8080/MediaService/MediaService?system=tms&id=5508&size=large )