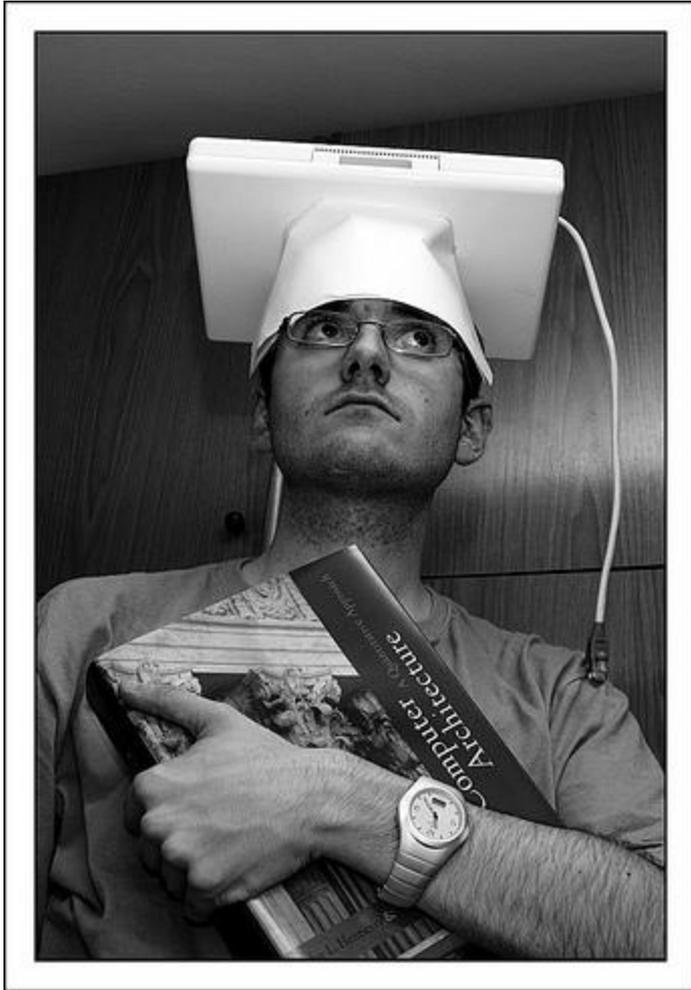




Before You Digitize: What Are the Legal Issues?

- Hope O’Keeffe, Library of Congress, *Copyright and Permissions Overview*
- Christopher Cole, National Agricultural Library, *Copyright, Data Rights and Permissions in Government Works*
- Bonnie Klein, Defense Technical Information Center, *Digitizing Government Documents: Control Requirements*

The Fine Print



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- The presentations are the opinions of the authors and do not represent the official policies of their respective agencies or the U.S. Government.

Before You Digitize: What Are the Legal Issues?



COPYRIGHT & PERMISSIONS OVERVIEW

Hope O’Keeffe
Associate General Counsel
Library of Congress

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Goals of this Presentation

- Learn basic copyright and rights principles as they apply to digitization
- Learn special rules that apply to libraries and archives
- Explore permissions process
- Think about risk assessment
- Chris will talk about U.S. Government works
- Bonnie will talk about controlled information

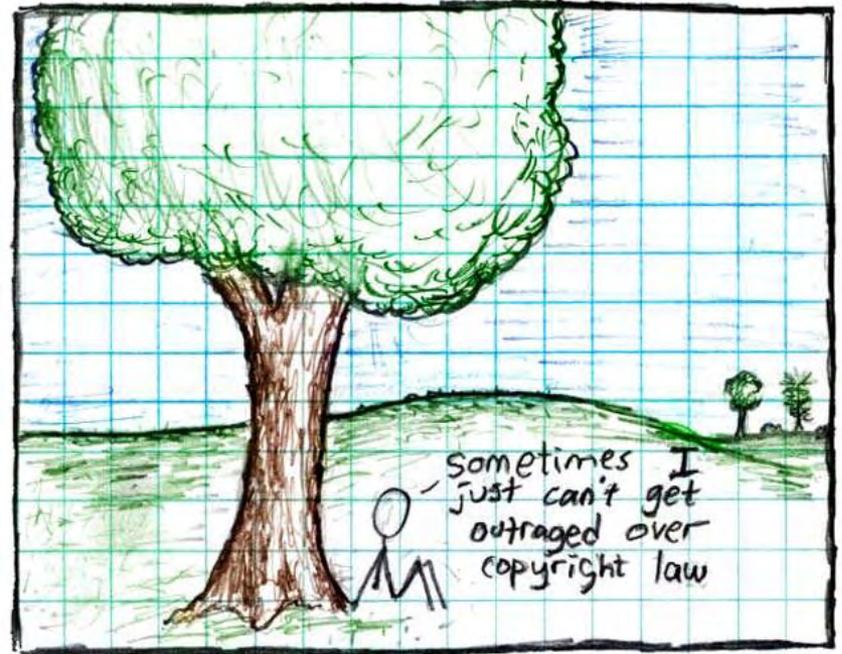


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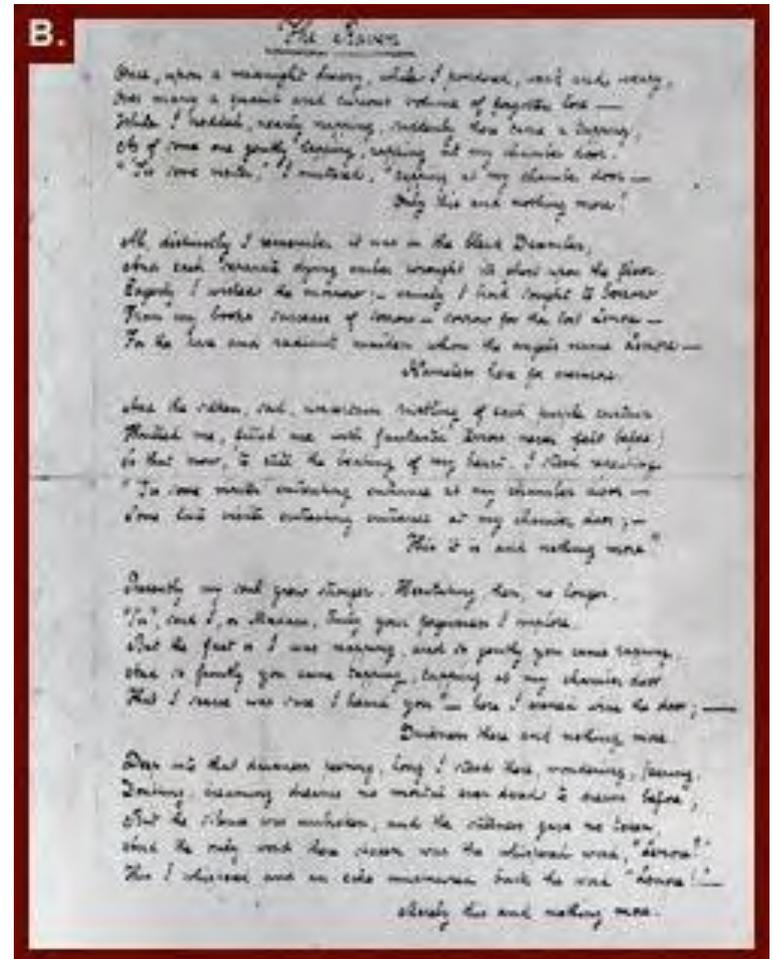
Sources of Rights and Restrictions

- Copyright law
- Acquisition agreements:
 - Government contracts
 - Gift agreement or will
 - Purchase agreement
 - Licenses
- State law: e.g.,
Privacy/publicity
- Other federal law, e.g.,
trademarks, classification
- International law (foreign
works)



Basic Rules of Copyright

- Copyright is a property interest
 - May be conveyed like any other personal property.
 - Generally copyright is conveyed in writing
- The owner of the physical work does not necessarily also own copyright in the work.
- Just because you **can** copy something doesn't mean you **should**.
 - Especially online & digital works



Copyright Owner's Exclusive Rights

Only the owner can do or authorize:

- Reproduce (e.g. *digitize*)
- Prepare derivative works (e.g. *digitize*)
- Distribute copies (e.g. *make available online*)
- Perform publicly (e.g. *via computer*)
- Display publicly (e.g. *on computer screen*)



17 USC 106

Rights Clearance for Digitization

- Do you own the copyright or have permission?
- Is it in the public domain or has any copyright expired?
- Is digitization within a copyright exemption?
 - Libraries & archives
 - Fair use
- Can you get permission?
- Has your institution determined that the level of risk is acceptable?



1. Do you already have permission?

- Determine what rights the archive has in the work (based on the acquisition agreement or contract)
- Plan ahead!
 - Negotiate rights transfer or license in acquisition agreements and contracts
 - Mark documents with rights information to facilitate use by others

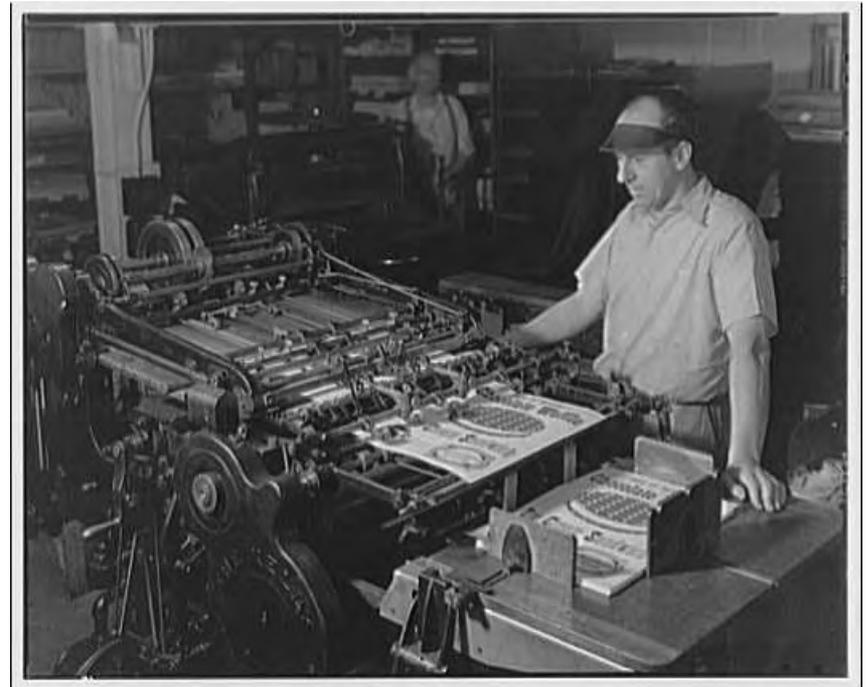


2. Is it protected by copyright?



Is it “copyrightable”?

- Original works of authorship
- Fixed in any tangible medium of expression now known or later developed
- From which they can be perceived ...
either directly or with the aid of a machine



Not Copyrightable

- Not fixed – live performance
- Ideas expressed in the copyrighted work
- Not original
 - Facts
 - Databases
 - Compilations are copyrightable if original
 - Something new but trivial. (-;



Has the copyright expired?

- Works **originally copyrighted** from 1923 through 1963 and **registered for renewal** are protected for 95 years.
- Works **originally copyrighted** between 1964 and 1977 are **automatically renewed** and are protected for 95 years.
- Works **originally copyrighted** from 1978 on are protected for a unitary term of life plus 70.
- For **anonymous or pseudonymous** works and works made for hire after 1978: sooner of:
 - 95 years after first publication or
 - 120 years after creation
- **Transfers post 1978** voidable after 35 years. May complicate matters.



Did it satisfy the formalities?

- Pre-1978 No copyright until
 - registered in unpublished form, or
 - published with proper © notice
- Pre-1978: Only common law (state law) protection for unpublished works
- Pre March 1, 1989: NO copyright protection if authorized publication without proper notice
- After 1989 – no notice required



Generally safe to digitize

- U.S. Government works (not subject to copyright in U.S.)
- Works published or registered pre-1923
- Works published in the U.S. before 1964 without being registered for renewal.
 - As many as 80% of works during this period were not renewed
- Works published in the U.S. before 1978 without notice
- Works published from 1/1/78 to 3/1/89 if no notice and no subsequent registration
- Works dedicated to the public domain by the creator



Image from Web, in public domain.

3. Does a Library Exemption apply?

Jefferson on Library Copying

"Time and accident are committing daily havoc on the journals deposited in our public offices. The late war has done the work of centuries in this business. The lost cannot be recovered; but let us save what remains: not by vaults and locks which fence them from the public eye and use, in consigning them to the waste of time, but by such multiplication of copies, as shall place them beyond the reach of accident."

— Thomas Jefferson, 1791 letter to Ebenezer Hazard, quoted in Patry on Copyright Sec. 11.1n.1.



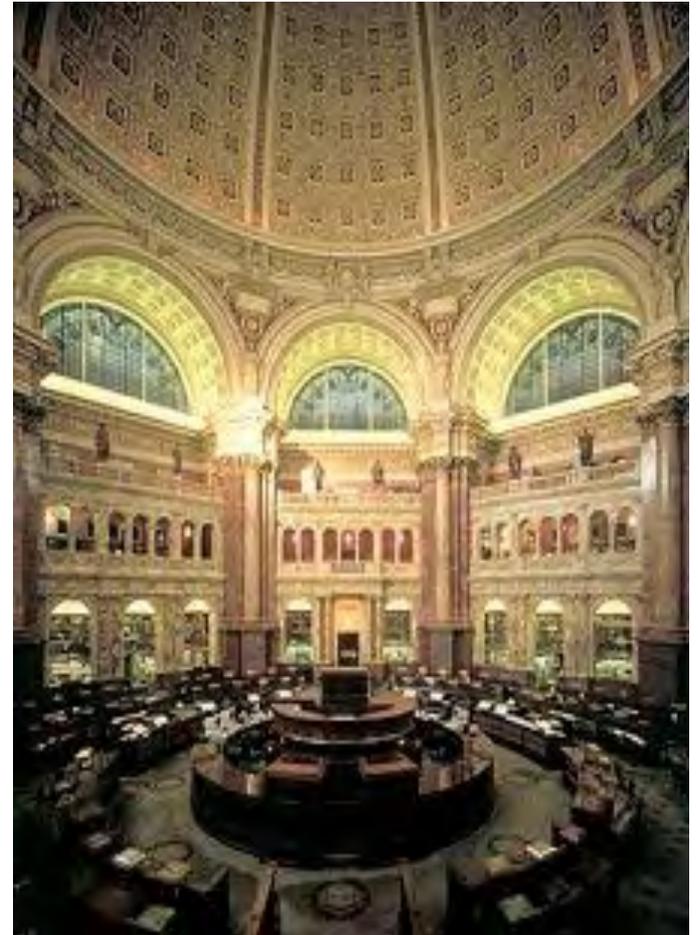
Image "Thomas Jefferson's favorite Websites,"
used with permission, courtesy of Robert Meganck

Section 108

Library & Archives Reproduction

Library/archive may make or distribute limited number of copies of a work, if

- The copy or distribution is not made with any purpose of commercial advantage
- Library's collections are open to the public; and
- The copy or distribution includes a notice of copyright



Copying for Preservation

Library/archive may make up to three copies of an unpublished work for purposes of preservation, security or interlibrary loan

- The copy must be in the library/archive's collections
- Any digital copy cannot be made available to the public outside the library/archive premises



Copying for Replacement

Library/Archive may make up to three copies of a published work to replace a copy that is damaged, lost, stolen, or has become obsolete

- The library/archive must determine that a replacement cannot be obtained at a fair price
- Any digital copy cannot be made available to the public outside the library/archive premises
- nb: digital copy may be obsolete at birth



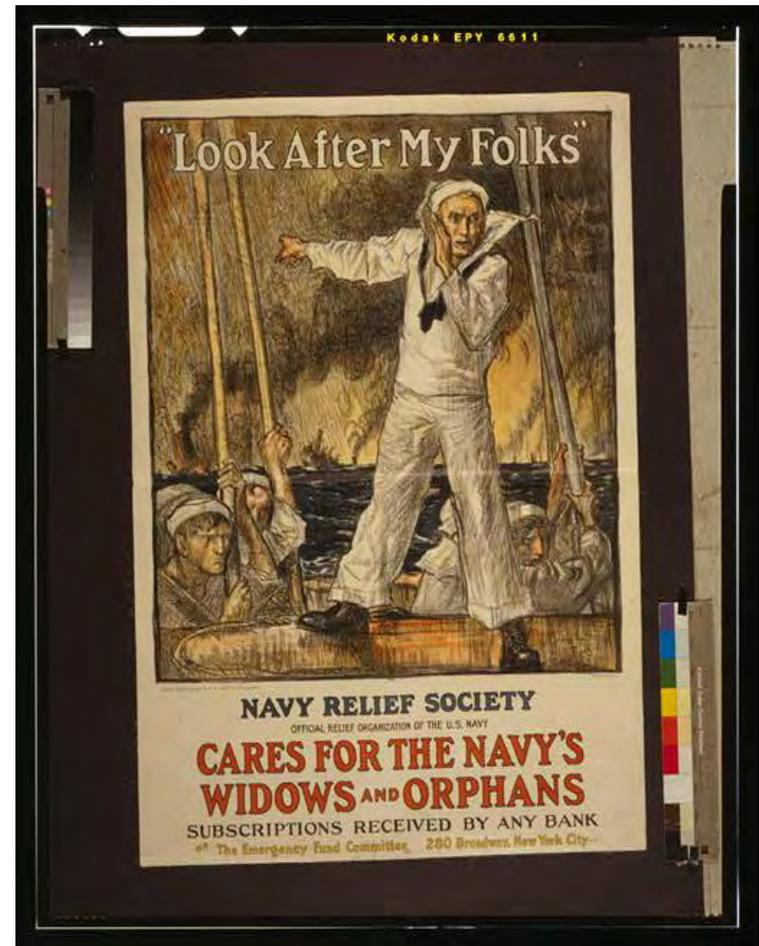
Copying – “Orphan” works

In the last 20 years of copyright, a library/archive may copy a work

UNLESS

based on reasonable investigation:

- The work is subject to normal commercial exploitation
- A copy can be obtained at a reasonable price, OR
- The copyright owner or agent provides notice



Copying for Other Libraries

- 1976 Act
 - Commission on New Technological Uses (CONTU)
- Operational definitions for statutory terms
 - “Direct or indirect commercial advantage”
 - “Isolated and unrelated reproduction”
 - “Systematic reproduction”
- Governs copying for interlibrary loans
 - 5-request rule
- Can provide digitized copies
- License may supersede



Does Fair Use apply?

Fair Use – Four Elements

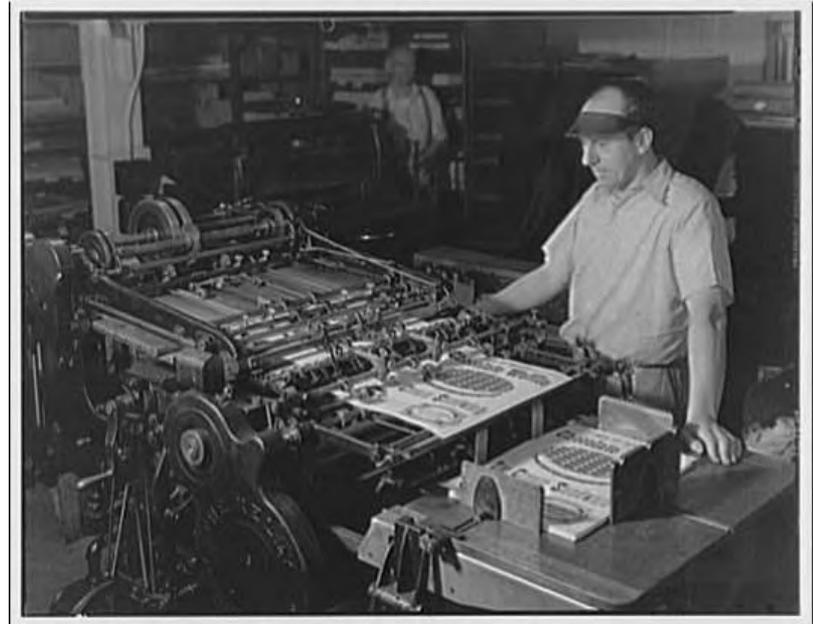
- The **nature of the use**, including whether the use is commercial or nonprofit and whether it is transformational;
- The **nature of the copyrighted work**;
- The **amount** of the portion used in relation to the work as a whole; and
- The **effect** of the use upon the potential **market** for the copyrighted work.



Still image from Eric Faden's "A Fair(y) Use Tale" video, used pursuant to Creative Commons attribution non-commercial share-alike license

Is digitization fair use? Not always.

- Nature of use:
 - Assume not-for-profit. Not all govt uses are fair
 - Maybe transformational if change context.
- Nature of work: depends
- Amount of work: Probably whole thing
 - Thumbnails generally ok
- Market effect: depends.
 - Best case is out-of-print orphan work.



4. Can you get permission?

- Determine what rights the archive has in the work (based on the acquisition agreement)
- Determine whether works are subject to copyright protection.
- Determine what uses the archive wants to make.
- Locate the copyright holder.
- Seek permission to use works that are still subject to protection.
 - Think beyond immediate need
- Document your process and the result so you won't have to recreate later.
 - metadata metadata metadata!



Permissions Research Process

- Examine a copy of the work for copyright notice, other identifying information
- Review any acquisitions documentation to see what rights you have or what special restrictions you must obey
 - Check the contract
 - Check with the donor or heirs
- Search Library catalogues
- Consult with knowledgeable colleagues

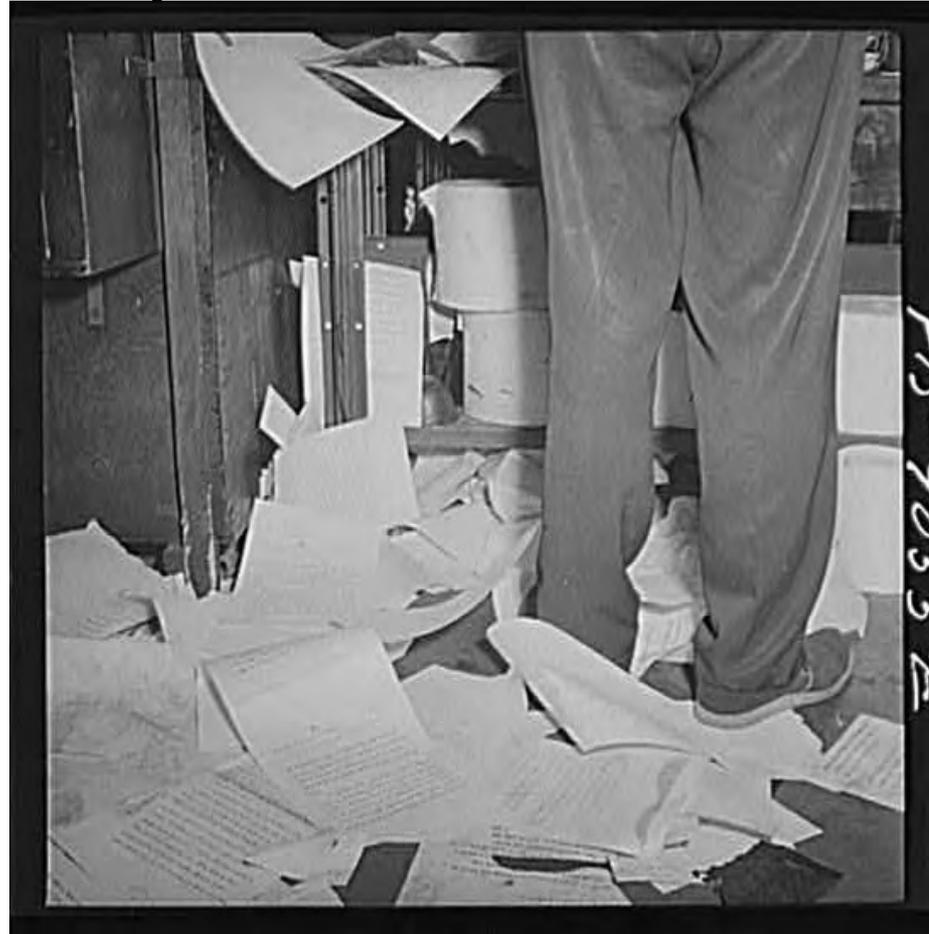


Permissions Research Next Steps

- Consult Copyright Office catalogs and other records
 - Copyright Circular 22
 - Copyright Offices Information and Reference Division of the Reference and Bibliography Section
 - Online databases
- Search the Internet
- Consult specialized indexes, databases, & organizations
- Great HOW-TO: Society of American Archivists Orphan Works Statement of Best Practices



5. What if you don't have permission?



Permission Process Isn't Easy

- Owners hard to identify
- Owners hard to locate
- Owners may never respond
- Owners may say no
- Owners may charge exorbitant fees
- Studies:
 - Dickson, *Due Diligence, Futile Effort: Pursuing Copyright Holders for the Digitization of the Thomas E. Watson Papers*. <http://hangingtogether.org/?p=625>
 - Covey, *Response to Notice of Inquiry about Orphan Works*
<http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>

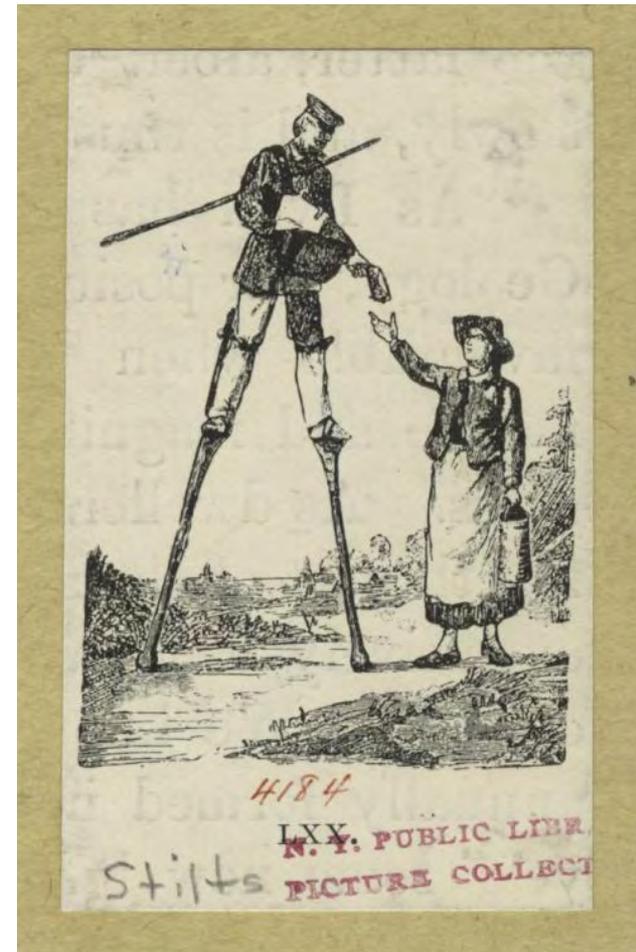


Image: public domain, courtesy NYPL

Orphan Works

- General understanding of orphan work: cannot identify or locate owner despite reasonable search
- Work with known owner who doesn't respond is not orphan work
- The mere fact it's an orphan work does not mean that you can use it
- Copyright Office study 2006
- Legislation came close in 2008, may be reintroduced
 - Safe harbor for good faith users, esp. nonprofits
 - Google Book Settlement: private attempt to address orphan works for books



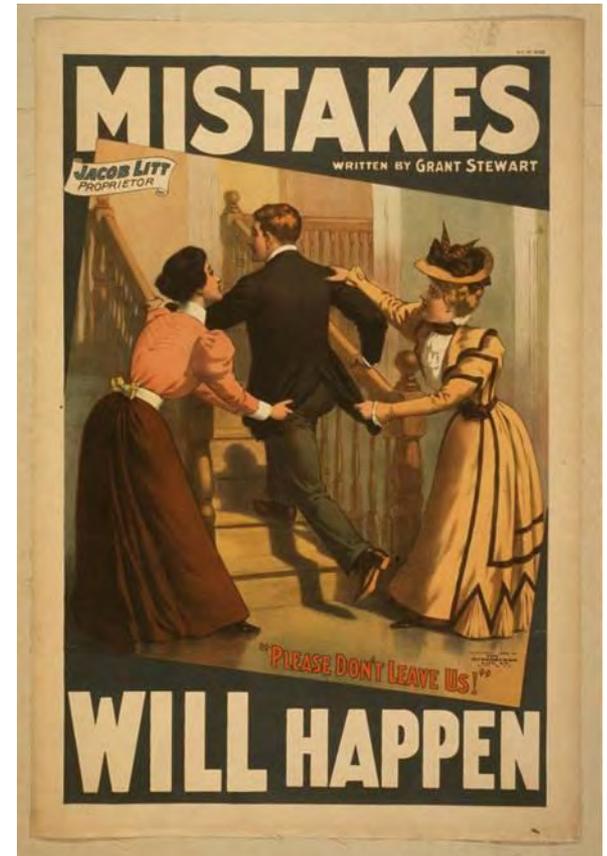
Risk Analysis

- Don't avoid digitization simply because there's a potential copyright
 - The copyright claim may not be valid
 - There may be an applicable exemption
 - You may have usage rights
- Risk management is a policy decision
 - *“Archival culture became rooted in a precautionary mindset. . . We are excessively deferential to unmade claims from unidentified rights holders who may not even exist.” -- Rick Prelinger*



Risk Management

- There is always a risk
 - Might be copyrighted abroad
 - Might not have permission of right person
 - Donor or seller may not be sole copyright owner
 - Layers of copyright mean multiple owners
 - Even if copyright is clear, issues of privacy, publicity, trademark, libel, content challenges
 - Might face meritless claims even if do everything right
- Institution assesses risk, decides what risks to assume and how much
 - *“Everyone should violate copyright, but they should do it knowingly”* Peter Hirtle



Risk increases with level of access

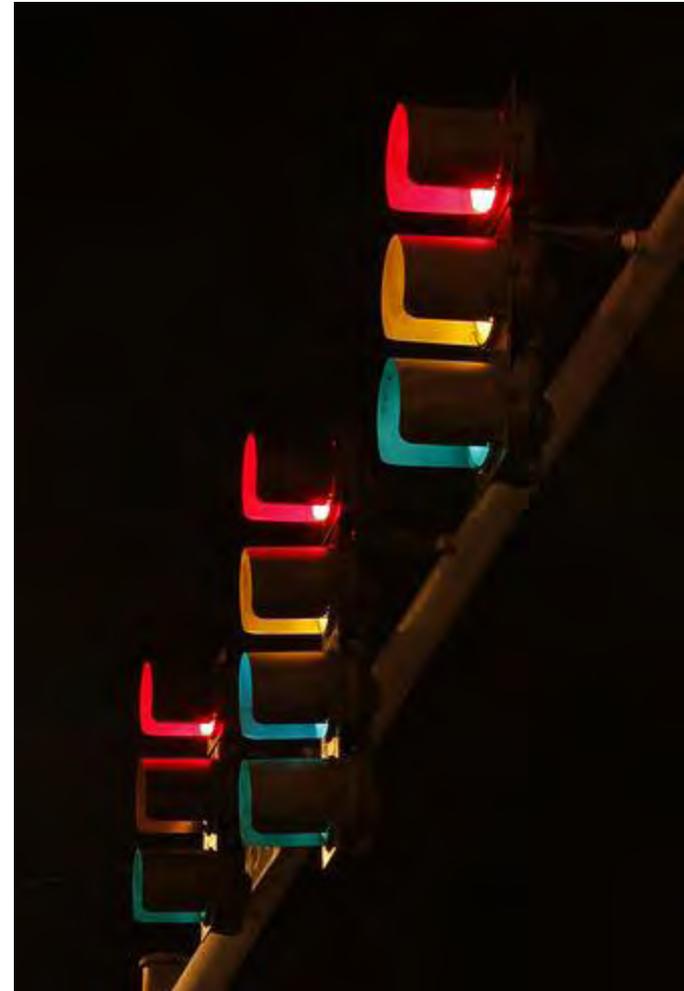
- Dark archive
- Premises only
- Enterprise only
- Interlibrary loan
- Researcher copies
- Passworded access to server
- Open Web
- Commercial exploitation (e.g. POD)



<http://www.flickr.com/x/t/0094009/photos/22750018@N05/4434362439/>

Ways to minimize risk

- Take advantage of the public domain, library exemptions, fair use, and public licenses like Creative Commons
- Comply with collections-based restrictions
- When you accept gifts or get licenses, get rights for users as well as the institution
- Make sure the releases, licenses, and permissions cover your proposed use
- Adjust levels of access
- Provide a mechanism for notices of infringement or abuse
 - Follow strict notice and takedown - but make it friendly!
 - “tell us more about the content” v. “complain about copyright violations here”
 - DMCA registration



Third-Party Digitization Tips

- Make sure you get a copy – and preferably in both a preservation format and an access format
- Make sure you maintain access rights both for yourself and your patrons
- Shift burden of rights clearance
- Shift burden of metadata creation
- Avoid restrictions on ownership, access, and distribution -- Don't allow public domain collections to be fenced off (at least beyond a short period)
- Avoid cherry-picking rather than digitization of whole series or collections
- Try to retain aggregation/pooling rights
- Beware gift horses: know the hidden costs to the archives of supporting the digitization
- Don't reinvent the wheel – talk to others who have entered into similar deals. NARA's a great role model.



KEY RESOURCES

- U.S. Copyright Office: www.copyright.gov
 - Circulars, FAQs
- CENDI copyright FAQs: www.cendi.gov/publications/04-8copyright.html
- American Library Association online tools
 - Section 108 spinner: <http://www.librarycopyright.net/108spinner/>
 - Copyright slider: <http://www.librarycopyright.net/digitalslider/>
- Hirtle et al., Copyright & Cultural Institutions Guidelines for Digitization, <http://ecommons.library.cornell.edu/handle/1813/14142>
- Hirtle, detailed chart on copyright duration: www.copyright.cornell.edu/public_domain/
- Indiana University Copyright primer: www.copyright.iupui.edu/
- LOC Prints & Photographs User Guidance: www.loc.gov/rr/print/195_copr.html
- NARA Digitization strategy <http://www.archives.gov/digitization/strategy.html>
- OCLC, Well-intentioned practice for putting digitized collections of unpublished materials online, <http://www.oclc.org/research/activities/rights/practice.pdf>
- Society of American Archivists, Orphan Works: Statement of Best Practices, <http://www.archivists.org/standards/OWBP-V4.pdf>
- Stanford Copyright Renewal database <http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>
- Me. Ioke@loc.gov