

Ethical Access for Digitized Cultural Heritage: Copyright and Fair Use

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Copyright

Exclusive rights

- Reproduction
- Distribution
- Display
- Performance
- Derivative works

To the author
For a Limited Time

Public Domain

Unpublished works

	<u>Term</u>	<u>Now in the public domain</u>
Unpublished works with known authors	Life of the author + 70 years	Works from authors who died before 1949
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1899
Unpublished works when the death date of the author is not known	120 years from date of creation	Works created before 1899

Public Domain

Works Registered or First Published in the U.S.

Before 1924		None. In the public domain due to copyright expiration
1924 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1964 through 1977	Published with notice	95 years after publication date
Created after 1977* (all sorts of complications about works published between 1963 and 2002) https://copyright.cornell.edu/publicdomain		70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
Works prepared by an officer or employee of the United States Government as part of that person's official duties.		None. In the public domain in the United States (17 U.S.C. § 105)

1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1924 through 1963	Published with notice but copyright was not renewed ⁸	None. In the public domain due to copyright expiration
1924 through 1963	Published with notice and the copyright was renewed ⁸	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Created after 1977 and published with notice	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1978 to 1 March 1989	Created before 1978 and first published with notice in the specified period	The greater of the term specified in the previous entry or 31 December 2047
From 1 March 1989 through 2002	Created after 1977	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
From 1 March 1989 through 2002	Created before 1978 and first published in this period	The greater of the term specified in the previous entry or 31 December 2047

Fair Use: The Statute

Notwithstanding the provisions of sections 106 and 106A , the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair Use: Transformative Use

Under the first factor, courts often ask if the use is transformative - has the material been used to help create something new or merely copied verbatim into another work?

Was value added to the original by creating new information, new aesthetics, new insights, and understandings?

When a use is transformative under the first factor, the other factors can become less important. Why?

Fair Use: ARL Code of Best Practices in Fair Use



It is fair use to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts.

The fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses.

Adding criticism, commentary, rich metadata, and other additional value and context to the collection will strengthen the fair use case.

<https://www.arl.org/wp-content/uploads/2014/01/code-of-best-practices-fair-use.pdf>

Orphan Works

A work where the author, heir, or other rights-holder cannot be located

- Still protected by copyright (unless copyright term expired)
- No one to ask for permission to use

Strong Fair use argument –

1st factor - non-commercial use

2nd factor – neutral

3rd factor – use as much as need since

4th factor - no market harm

Always be sure to provide a way for a copyright claimant to reach you!

Even when collections are in the public domain or a good fair use argument can be made for digitizing and making them accessible, remember privacy concerns.

- Student Records/FERPA/HIPPA
- Social Security Numbers
- Other sensitive information

- Third party privacy and copyright (e.g. letters)