

Wrangling the Spectors of Privacy and Copyright in Digitization Projects

Or I ain't afraid of no obtuse legal doctrine,
but I'm still cautious.

Agenda

- Privacy
 - Legal Basics
 - Areas of Concern
 - Digitization Workflow
- Copyright
 - Legal Basics
 - Areas of Concern
 - Digitization Workflow
- Key Policies
 - Deed of Gifts/Digitization Permission
 - Takedown Notices/Processes

Privacy

Where's the Tea?





Privacy

The quality or state of being free from public scrutiny.

The quality or state of having one's personal information or activities protected from unauthorized use by another.

~SAA Glossary



Privacy: legal factors

1. Intrusion into one's seclusion or private affairs
2. Publicity of embarrassing, private facts
3. Places one in a false light
4. Appropriation of name, likeness, right of publicity

For a person of ordinary sensibilities

62A AJS Privacy §29, 31



Confidentiality

- *Confidentiality* is closely related to privacy, but not identical. It refers to the obligations of individuals and institutions to use information under their control appropriately once it has been disclosed to them. One observes rules of confidentiality out of respect for, and to protect and preserve, the privacy of others.

Privacy/Data Protection Project Encyclopedia
(University of Miami, Miller School of Medicine, 2005)

Defamation, Libel, Slander

- Truth is a defense against defamation, libel, or slander, but not against privacy
- A statement may be both an invasion of privacy and defamation



Origins of privacy as a legal right

- “The right to be left alone”
 - Warren and Brandeis. “The Right to Privacy”
Harvard Legal Review 4:5 (1890)
- Tort right: “a wrongful act or an infringement of a right (other than under contract) leading to legal liability.” COED 10th
 - Established by case law

Limited statutory right of privacy

Fair Credit Reporting Act
15 USC §§1681 to 1681t

Privacy Act of 1974
5 USC §552a

Right to Financial Privacy Act
12 USC §§3401

Video Privacy Protection Act
18 USC. §2710

Freedom of Information Act (FOIA)
5 USC 552

Computer Matching and Privacy Protection Act of
1988

5 USC §552a
PL 101-56, July 19, 1989

Family Educational Rights and Privacy Act (FERPA)
AKA Buckley Amendment

20 USC 1232g
34 CFR 99

Health Insurance Portability and Accountability Act
of 1996 (HIPAA)

Pub. L. 104-191

Legal Limits on Privacy

Purely personal

Only the individual allegedly infringed has a right

No third party right (family members, friends)

Generally ends at death

Except use of name or likeness as property right

Matters of legitimate public interest exempt

Observation in public may not constitute an intrusion

Public figures have less of a right to privacy

Areas of Concern

Here's what you need to know!



Digitization Workflow



Project Scope

Determining what the project will accomplish, audiences, and methods of access

Item Selection

Select items for digitization

Digitization

Complete digitization process, including capturing metadata and physical digitization

Quality Control

Check digital images and metadata for quality.

Access

Provide access through chosen access method.

Project Scope

- Think about issues with your chosen materials at the beginning of planning
- Adjust scope with those considerations in mind
- Research early



Item Selection

- Avoid materials with PII
- Have a framework for make decision about what constitutes a privacy violation.



Digitization/QA

- Last chance to catch any issues



Access

Copyright



US Constitution

Article I, §8

Congress shall have power . . .
.to **promote** the progress of science and **useful arts**, by securing for **limited times** to authors and inventors the **exclusive right** to their respective writings and discoveries



Copyright statutes

1

Copyright Act of 1790

- Term of 14 Years with one renewal

2

Copyright Act of 1909

- 28 year term; one renewal
- Governs works published prior to 1978 if their copyright expired before the new act became effective
- Required formalities: copyright notice and registration

3

Copyright Act of 1976 (effective 1-1-78)

- Extended term to life of author + 50 years, no renewal
- Eliminated many formalities (©, registration, renewal)
- 2 minimal requirements
- Incorporated Fair Use and Library Exemptions into Statutory law

Copyright statutes

Copyright Act of 1976

- Author owns copyright from time of work's creation
- All works now protected under federal law
- Ended perpetual copyright for unpublished works

Copyright Term Extension Act of 1998 ("Sonny Bono Act") (CTEA)

- Added 20 years to the term of ALL existing and future copyrights (e.g. life of the author plus 70, 95 years from publication for corporate work for hire)
- Added some mitigation for libraries and archives in section 108 (stay tuned)

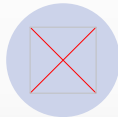
Digital Millennium Copyright Act

Music Modernization Act

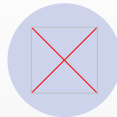
- Creates licensing, remedies, and copyright extensions for Pre-1972 recordings
- Before 1923 – Dec 31, 2021
- 1923-1946, 5 years plus 95 from publication
- 1947-1956, 15 years plus 95 from publication
- Others "fixed" prior to 2/15/1972, copyright ends February 15, 2067

United States Intellectual Property

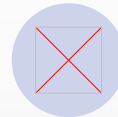
Protections for
content creators
and inventors



Patents: Tangible
things



Trademarks: Name
or symbol



Copyright: Written
and artistic
expression

Copyright statute

Federal exclusive jurisdiction (17 USC 101-122)

- All suits in Federal court
- States may only address issues peripheral to copyright
- But law that applies is that of the time the work was created, so state law applies until Federal law covers the issue (e.g. pre-1972 sound recordings)

Administered by the Copyright Office

- Certain Laws require rule making processes.
- Copyright Office Under Library of Congress

Judicial Precedent

- Judicial decision set much of our basic understand of Copyright Law

Key resource: www.copyright.gov

- Current version of code, news, cases

Copyright (Expressions of Ideas)

- Tangible expression of an idea
 - Writings
 - Music
 - Performances
 - Software
- Term of Copyright
 - IT'S COMPLICATED



Creator Exclusive Rights

- (1)**to reproduce the copyrighted work in [copies](#) or [phonorecords](#);
- (2)**to prepare [derivative works](#) based upon the copyrighted work;
- (3)**to distribute [copies](#) or [phonorecords](#) of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4)**in the case of literary, musical, dramatic, and choreographic works, pantomimes, and [motion pictures](#) and other [audiovisual works](#), to perform the copyrighted work publicly;
- (5)**in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to [display](#) the copyrighted work [publicly](#); and
- (6)**in the case of [sound recordings](#), to perform the copyrighted work publicly by means of a digital audio transmission



Exemptions to Copyright

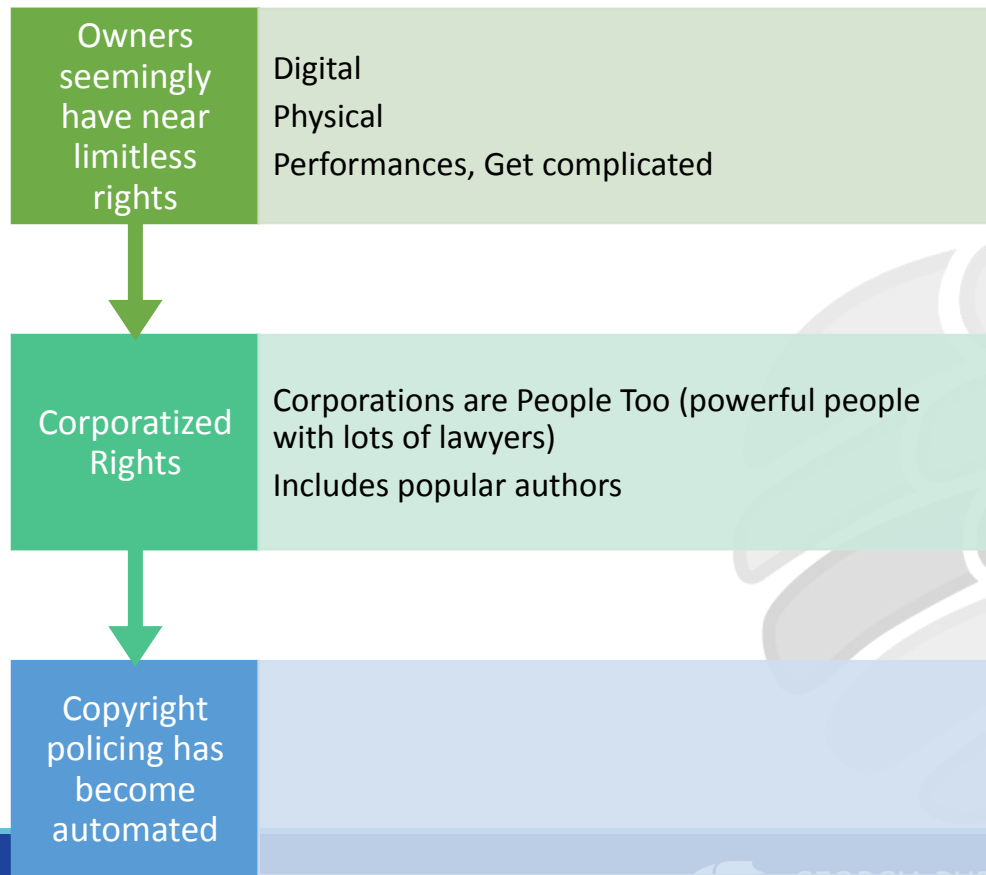
- Fair Use (17 USC 107)
 - Purpose and character of the use
 - Nature of the work
 - Amount and substantiality to be used
 - The effect on the market
- Reproductions (17 USC 108)
 - May make preservation copies of materials and not violate the law or impact the market



Areas of Concern



Exclusive Rights



What does that mean?

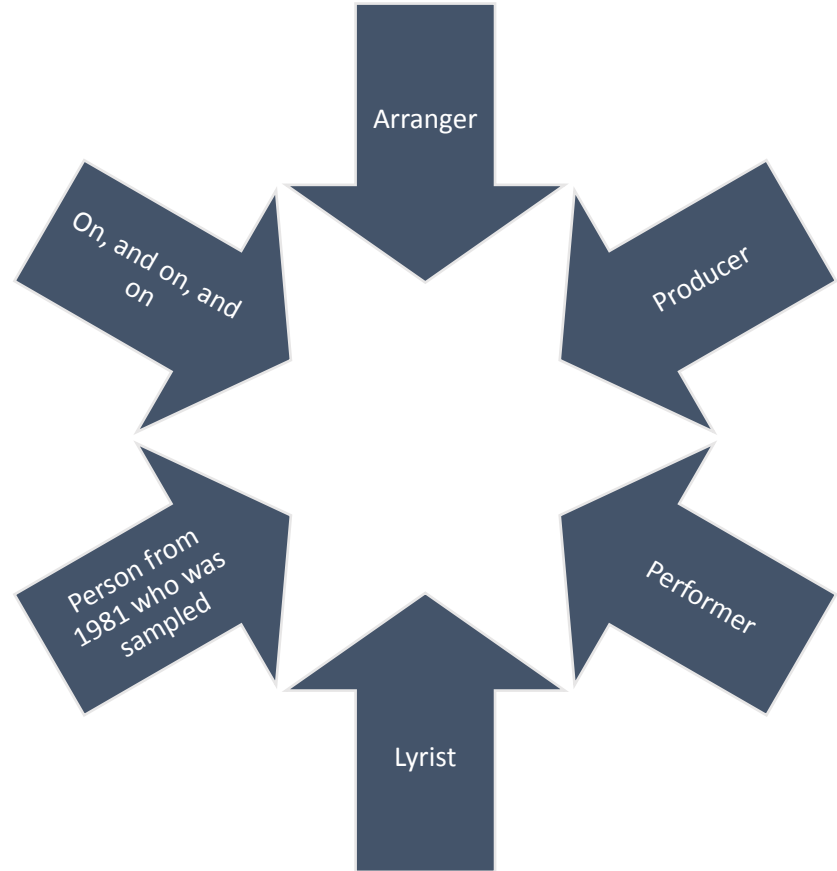
Archives maybe at a disadvantage in terms of copyright

Fairuse isn't prioritized as much as it should be

Potential push to have that sort of power

Online platforms are not really a safe space for archival materials

Audio Rights - Layers of rights



What does this mean?

Fair use, beyond 30 sec, is hard justify in the current legal environment

Music modernization act creates a system that encourages paying for rights



Remix Culture



Music



Food



”Criticism”



Reaction Videos



Dancing

What Does that mean?

Strict control of copying is not valued

Remix culture polices nonattribution

Cultural contexts are often lost due to remixing, and sharing

BIPOC individuals often have their content stolen and not attributed.

Digitization Workflow



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Project Scope

- Conduct a copyright assessment at beginning of a project.
 - What do you have rights to?
 - What don't you have rights to?
 - What could be a fair use case?
 - How risk averse is your organisation?
- Talk to your council if you have access to it.



Item Selection/Digitization

- Check your initial assessment as you select and digitize
- Choose appropriate rights statements from <https://rightsstatements.org/en/>



QA

- Check that appropriate rights statements have been selected
-



Access

Key Policies



Deed of Gifts and Digitization Permissions



License to Digitize (Copyright)

- Lets donor know materials will be digitized and digitally manipulated
- Let's donor know what they can expect
- Gives them some control over what they provide licenses to
 - Full Copyright
 - Full Copyright at a specific date
 - License for digitization, access and publication

License to Digitize (Privacy)

- Let's donor know what possible risks there could be
- Asks donor to identify where PII or possible privacy concerns
- Provides an opportunity to talk about privacy issues and explain them.

Example Text (Copyright pt 1)

I give permission for the property's display, use, preservation, and disposition. I also give a license for Shorten Name to digitize, provide access online, digitally alter, and use appropriate digital tools on digital records for preservation purposes unless specified in Section 4.

Example Text (Copyright pt 2)

Subsection B: Ownership

The Donor affirms, to the best of their knowledge that the following is true for the described materials. (Circle Appropriate Response(s))

The donor has some or all of the intellectual property rights of the described materials. Indicate below or through an attachment material that the owner has intellectual property rights too.

The donor does not control any intellectual property rights to the described materials

Another controls all or parts of the intellectual property rights of the described materials. Indicate below or through an attachment what materials below to the below-listed individual.

Name:

Subsection B: Ownership Transfer

I have checked this box, indicating that I wish to transfer, convey and assign to Shorten Name all Intellectual Property Rights that I control in the above-described materials, subject to the limitations, if any, stated below.

Limitations, if any: _____

I have checked this box, indicating that I do not wish to transfer Intellectual Property Rights.

Example Text (Privacy0)

Shorten Name will not accept restrictions for an indefinite period, and all restrictions will be applied equally to all users. Some or all of the Collections may contain sensitive materials and require time-limited access restrictions. The Donor's responsibility is to inform Shorten Name, as specifically as possible, of any material that requires redaction, embargo, or restriction due to sensitive or private information (social security numbers, medical records, etc.).

Shorten Name is under no obligation to determine which material may require redaction, embargo, or restriction. It is also the Donor's responsibility to outline any materials that need restriction. Shorten Name will discuss the appropriate restrictions and expiration date with the donor.

___ The Collections does not contain sensitive information, and access does not need to be restricted.

___ Some materials in the Collections contain sensitive information, and access to those materials should be restricted.

Take Down Notices

DMCA and beyond



Why take down notices

- Creates a mechanism for users to request removal of materials from online access
- Provides a buffer and legal “safe harbor” for institutions
- Lays out procedure for review of materials requested for removal
- Doesn't not affirmatively state that requested materials will be removed permanently.

Example statement

If you are a copyright owner and/or you believe that material found on our site infringes upon your personal right to privacy, you may contact the archive to request that it be removed from our online collections or restricted until you death. In your request please provide the following information:

Your Name

URL of material in question

Reason for requesting removal

The archives may remove the materials temporarily upon the receipt of your request, but this does not constitute a permanent removal. The materials maybe reinstated if the archives determine that providing access does not violate copyright, either under fair use or by some other reason, or does not violate any person's right to privacy.

Connect with us

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