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**F2: Copyright
Implications of
Digital Archives**

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AALL St. Louis, 11 July 2006

3 Areas of © Concern

- When creating digital archives
- When preserving digital archives
- When exploiting digital archives




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Digital vs. Analog?

Law is the same, but...

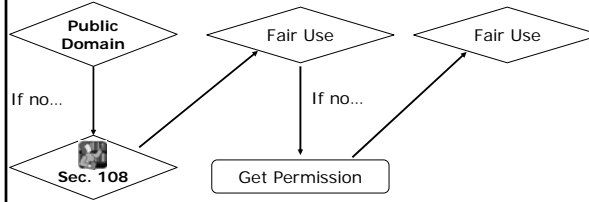
- Visibility is greater
- More perceived potential harm to © owner
 - “Napsterization”
 - Loss of replacement sales
- Fluid legal environment



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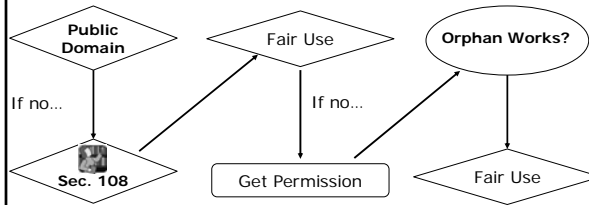
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1st Topic: © Issues in Digitization



Adapted from Mary Minow

© Issues in Digitization



Adapted from Mary Minow

Public Domain



The good news:

- © expires (eventually)
 - See copyright term chart
- New resources for renewals:
 - Print/scanned Catalog of Copyright Entries
<http://onlinebooks.library.upenn.edu/renewals.html>
 - Rutgers database
<http://www.scils.rutgers.edu/~lesk/copyrenew.html>
 - Copyright Office for post 1978

Public Domain



The bad news:

- Multiple layers of copyright
 - Example: NPS books



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Public Domain



More bad news:

- People claim © where none exists
 - Declaration of Independence, Boston Globe style
- Lawsuits happen anyway




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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.

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Recipes

**** 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.

A great source for the best historic recipes for classic Texas cooking. Perfect bound. ISBN 1-572161-13-2


Buy online at Amazon.com or call 1-800-728-9298 to order.

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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

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Section 108



- 3 limited digitization options
 - *Preservation* of unpublished items
 - *Replacement* of published items
 - *Digitization* in the last 20 years of ©



Unpublished Materials



- For preservation or deposit in another library
- Only 3 digital copies
 - Server copy, backup, copy to user?
- Limited to premises of library



Published Materials



- For *replacement* only
- Damaged, deteriorating, lost, stolen, obsolete format
- Only 3 digital copies
- Limited to premises of library
- No unused copy available



108(h) Exemptions



- Digitization and web accessibility in the last 20 years
 - i.e., 1923-1930
- Not subject to normal commercial exploitation
- Copy cannot be obtained at a reasonable price

108 Study Group



Section 108 Study Group

"The Section 108 Study Group is a select committee of copyright experts, convened by the Library of Congress, and charged with updating for the digital world the Copyright Act's balance between the rights of creators and copyright owners and the needs of libraries and archives."

Preservation under 108



General consensus that it matters:
"We're all agreed that the purpose of Section 108, to allow libraries and archives to preserve and provide access to our written cultural heritage, is important and should be facilitated."

Peter Givler

But how to do this while recognizing rights of all stakeholders?

Ideas up for Discussion



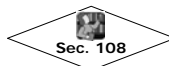
- More than 3 copies?
- Add "unstable," "fragile," or "at risk" to the law?
- Create a new "preservation only" exception?
- How to protect against misuse?
 - Limit who can do this: certified repositories
 - Storage in a "dark archives"
- What about DRM and TPMs?

Special Topic: Web Preservation



- Implicit permission to view web
- Uncertain if you can capture, index, or archive
- LC's approach:
"The Library collects Web sites only after it has received formal permission from Web site content owners to do so."

What About the Internet Archive?




... the Internet Archive largely ignores copyright law in the process of collecting its material, provides only a limited (and, arguably, effectively valueless) protection for the material once stored, and in effect disclaims any responsibility for what is done with the material by the end user, as well as any liability that the end user may incur in accessing the material.


Given the litigious nature of the US, it will be interesting to see if the Internet Archive's success in avoiding litigation over its activities will continue for much longer.

Andrew Charlesworth, 2003


“Google’s cache functionality enables users to access content when the original page is inaccessible. [A]cademics, researchers, journalists, and site owners [have praised] Google’s cache for this reason. In these circumstances, Google’s archival copy of a work obviously does not substitute for the original.

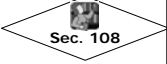
Field v. Google

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Preservation of Websites 

- Special exception for capture and preservation of website or online content?
- Limit to certain classes of content?
 - Non-commercial, publicly available, no robots.txt, opt-out provisions?
- When can there be public access?

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Access to Digital Copies 

- Can there ever be access outside of the premises?
- How do you define a user community?
- Limits on simultaneous users?
- TPM required?

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Future plans

- Still to come: copies for uses, document delivery, ILL
- Final report this year
- Possible legislation, public hearings, next year



Section 107

Fair Use

- Gray area: no agreement on what constitutes fair use
- Good news: the exemption for libraries and archives.

Statutory damages may be \$0 for nonprofit educational institution, library, or archives if

- * Believe *and*
- * Reasonable grounds to believe use is fair



Get Permission

Get Permission

- Locating copyright owners can be time consuming and expensive
- No central registry for owners
- How thorough do you need to be?
 - No accepted guidelines



Project WATCH suggestions

- Step 1. Ask the owner.
- Step 2. Ask the Copyright Office.
- Step 3. Ask other scholars.
- Step 4. Examine acknowledgements and notes sections.
- Step 5. Ask the author's publisher.
- Step 6. Ask an author's society.
- Step 7. Use genealogical sources.
- Step 8. Write to the author's last known address.
- Step 9. Ask your librarian to search national databases.
- Step 10. Search published references.
- Step 11. Publish a notice in the newspaper.

<http://tyler.hrc.utexas.edu/>



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Orphan works

- Can't get permission when
 - Copyright owner is unknown
 - Copyright owner can't be located
 - Copyright owner won't respond
- Copyright Office report (1/2006)
- H.R. 5439: Orphan Works Act of 2006
 - Reasonable search
 - Limitation on remedies



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"If all else fails, claim fair use"

"The Library of Congress has exhaustively researched the contents of this collection to ascertain any possible legal rights embodied in the materials. Items included here with the permission of rights holders are listed below. Many of the items in this collection are in the public domain..."

"Despite extensive research, the Library has been unable to identify all possible rights holders in the materials in this collection. Thus, some of the materials provided here online are made available **under an assertion of fair use** (17 U.S.C. 107)."

Prosperity and Thrift Copyright page
<http://memory.loc.gov/ammem/coolhtml/ccres.html>



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Helpful Exemptions

- 504(c)(2): no statutory damages when libraries believe use was fair
 - Covers reproduction only: not distribution
 - Other damages still possible
- 412(1): no statutory or attorney's fees for unregistered unpublished



2nd Topic: Digital Preservation

- Legal basis for regular preservation is uncertain
- Digital exacerbates the issue
 - Files are more at risk
 - © owners more nervous
 - Much material is licensed, not owned
 - Digital preservation technologies are **always** a potential infringement



Special Topic: Self archiving

Requirements for an Institutional Repository:

1. Faculty ownership of ©, or
2. Agreement of publishers (if © is transferred)
 - ROMEO site:
<http://www.sherpa.ac.uk/romeo.php>



Additional Self-Archiving Requirement

Preservation agreement with author

Example: DSpace Deposit License

<http://libraries.mit.edu/dspace-mit/build/policies/license.html>

"You agree that MIT may translate the submission to any medium or format for the purpose of preservation."

"You also agree that MIT may keep more than one copy of this submission for purposes of security, back-up, and preservation."



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Cornyn/Lieberman Bill

- *Federal Research Public Access Act of 2006* introduced 2 May 2006
- For research funded by NSF, NIH, NASA, etc.
- Mandatory deposit in OA repository within 6 months of publication
- Mandatory "long-term preservation of, and access to, published research findings."



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3rd Topic: © Issues When Exploiting Digital Archives

1. © works digitized w/o permission
 - Profiting from them removes any defense for © infringement
 - 107, 108 both assume non-commercial use
 - Reasonable payment for using orphan



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2. Digitized Public Domain Works

- Free to commercialize
- Difficult to protect
 - Digitized versions not © (*Bridgeman v. Corel*)
 - Requires “quasi-copyright” based on physical ownership



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Quasi-copyright (aka “Copyfraud”*)

- Based on physical ownership
 - Original materials
 - Digital files
- In order to have access material, agree to abide by rules
 - Prohibitions on further reproduction
 - Requirements for citation



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* Jason Mazzone, *Copyfraud*, Brooklyn Law School, Legal Studies Paper No. 40

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Problems with Quasi-©

- Contracts may not be enforceable
 - Library community opposed UCITA
- No contract with 3rd parties
- Must be willing to bring legal action
- In conflict with our mission

What is our business/mission that is to be extended into an online environment: Is it publishing? Research? Education? Access?
Commercial licensing of images? *Ken Hamma*

Alternative Approaches

- Use a CC license to share content
- Admit it is in the public domain

“Would it not, then, be reasonable to put high quality images of public domain art back into the public domain, unfettered and unrestricted for all? Would it not be in everyone’s better interest to make it easy to share these resources, such as using the Internet to provide access to them for public education and benefit?”

Ken Hamma

Summary

- Digitization
 - Proceed carefully!
- Digital preservation
 - Get required permissions when you can
- Exploiting digital archives
 - Accept/embrace some loss of control