The Role of Copyright in Selection for Digitization

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ABSTRACT

This article reports the findings of a study of the impact of copyright on what U.S. archival repositories select for digitization and the extent to which they seek authorization from rights holders. Based on the website content of 96 repositories, 66 survey responses, and 18 interviews, the findings reveal a wide range of practice. While American repositories are generally conservative in that they digitize holdings that present no copyright complications, there is evidence of a shift from an item-level copyright analysis approach to a bolder risk-assessment approach that may better achieve the archival mission to make holdings available for use. The article identifies tools to support a risk-assessment approach and suggests areas of further research to identify best practices.

KEY WORDS

Copyright and Intellectual Property, Legal Issues, Online Collections

Archivists have eagerly embraced the Internet as a means of increasing access to their holdings by digitizing them and making them available online. Archival materials have traditionally been available only on-site; the Internet provides endless possibilities for remote access by users unable to visit the archives. However, online access to the holdings themselves also presents challenges, not the least of which is copyright.

It goes without saying that archivists obey the law and respect the rights of copyright owners. However, archivists struggle to find the appropriate balance between their fundamental mission to make their holdings available for use and the constraints of relevant laws and contractual agreements. Dealing with copyright can be daunting. As Lorna Hughes said, "The management of intellectual property is potentially the greatest challenge to the development of digital collections."[1] A number of copyright issues must be considered in a digitization project. Key among them is what is selected to be digitized and made available online. Simply put, digitizing involves copying, one of the exclusive rights of the copyright holder; furthermore, making archival documents available online also involves the right to distribute and possibly to publish for the first time (if the works are unpublished, as much archival material is). Therefore, copyright matters raise concerns for repositories wishing to make their holdings available online.

Like all laws, the application of copyright law to any particular situation requires interpretation. Although archivists may encounter copyright in their graduate education, they lack the legal training necessary to interpret the statute and apply the case law in an informed way. As well, they may not have ready access to legal counsel. Furthermore, digital technologies have transformed the copyright landscape, and the operation of copyright in the digital environment continues to evolve in response to changing technology and situations that were inconceivable in the analog world. Repository staff responsible for digitization projects might yearn for certainty, but "perfect safety and absolute certainty are extremely rare in copyright law. . . ."[2]

As Hughes's statement suggests, copyright is often seen as a limitation on access to cultural heritage, especially in the digital environment. Empirical research is needed to investigate whether, and to what extent, institutional copyright practices inappropriately limit the cultural heritage that is made available online and, if they do, to identify solutions that will address the problem. This article reports the findings of an empirical study that investigated how copyright influences what American archival repositories select for digitization and the extent to which they seek authorization from rights holders.

Literature Review

While digitization manuals inevitably include a section on the daunting copyright issues involved in digitizing documentary heritage materials for online access,[3] relatively few empirical studies have investigated the copyright practices of archival institutions and their impact on selection. When it comes to selecting what to digitize for online access, Jean Dryden found that Canadian archivists avoid anything that presents complications from a copyright perspective, with the result that the extent and quality of documentary heritage available online is more limited than it need be.[4] Larisa Miller's speculation that fair use may be the solution to the copyright issues posed by mass digitization is not supported by recent research.[5] A study of academic librarians' employment of fair use in achieving the mission of academic and research libraries revealed that uncertainty about the fair use provisions and difficulties obtaining permissions limited digitization of entire collections. Consequently, librarians selected only the "safe" materials that did not necessarily serve researchers' needs, or they postponed digitization projects altogether.[6] The majority of materials available through the Europeana.eu portal (which brings together digitized content from 1,500 European museums, archives, and libraries) is in the public domain, which suggests that the participating institutions concentrated their first digitization efforts on materials for which copyright is not an issue.[7]

Some studies of institutions have attempted to obtain the necessary permissions to digitize materials in which third parties own the copyright. In separate case studies, Dharma Akmon and Maggie Dickson found that the efforts required to identify and locate rights holders to obtain permission to digitize and display individual items far outweighed the permissions actually obtained.[8] A European study of the costs of rights clearance for digitization found that "the cost of clearing rights may amount to several times the cost of digitising the material."[9] However, Katie Fortney's case study of the copyright issues involved in creating the Grateful Dead Archives Online website reported different approaches to copyright, depending on the type of material. Permissions were sought for materials created for commercial purposes (e.g., posters and photos), but a fair use approach was used for fan envelopes and tickets.[10] While archives' experience with building digital collections is rapidly evolving, copyright issues continue to pose a formidable challenge to the digital transformation of archival materials.

Research Design

This study investigated the following research questions:
- In what ways do copyright issues affect the selection of archival materials for Internet access?

- What resources do archival repositories devote to seeking authorization from copyright owners to make documents available on the Internet, and why?

The study population was a purposive sample of 96 repositories drawn from nearly 500 institutional members of the Society of American Archivists (SAA). The list of institutional members was reviewed to identify repositories whose websites were publicly available and included at least 100 digitized items from their holdings (to ensure that participating repositories had a certain level of experience with digitization and with making their holdings available online); 197 repositories met the initial criteria. To reduce this number to approximately 100, further criteria were applied to ensure that the research population represented a range of types of institutions and types of holdings (photos, textual materials, sound recordings, etc.) made available online. Ninety-six repositories were selected to serve as the research population for this study.

The findings were based on three sources of data: the website content of the 96 repositories, a mail survey sent to those repositories, and 18 interviews with repository staff responsible for digitization.[11] Using a checklist derived from the research questions, the websites were examined between January and June 2010. Given that the 96 websites varied widely in size, organization, and structure, it was possible to examine only a sample of the online digital resources;[12] therefore, the study is not a comprehensive analysis of all the digital content of these websites. Relevant website content included the digitized holdings themselves and descriptions of the holdings (particularly rights metadata) as sampled, as well as policy statements about selection and terms of use, procedures for ordering copies, and the like. For each repository, relevant website pages were printed, annotated, numbered, and stored in binders. The website data were systematically analyzed in relation to the research questions.

Responses to a mail survey sent to the 96 repositories in October 2010 constituted the second source of data.[13] Of the 96 surveys sent, 66 were returned, a response rate of 69%. The survey was also used to gather selection policies and procedures that were not available on repositories' websites. The quantitative data were analyzed and summarized as descriptive statistics. Qualitative data from open-ended questions were imported into NVivo, software that supports analysis of qualitative data.

The survey was also used to recruit interviewees; the final survey question asked respondents to indicate if they were willing to participate in an interview. Between January and March 2011, telephone interviews were conducted with 18 archivists to explore in more detail the copyright practices of their particular repositories. The interviews, which followed a semistructured script of open-ended questions, lasted between 40 and 60 minutes each.[14] The interviews were recorded and later transcribed and verified. The verified transcripts

were imported into NVivo, where they were coded (along with the qualitative survey data).

Findings

Digitization and Archivists' Perceptions of Copyright

Archival holdings are preserved to be used, and making holdings available is fundamental to the archival mission. Not surprisingly, interview data revealed that the main reason archival repositories put their materials online is to provide wider access to their holdings. While exploring the extent of concerns about users copying or downloading online holdings, 72% of interviewees reported little concern; their responses can be summarized in the statement, "Access is our business." This goal is entirely consistent with the archival mission to acquire, preserve, and make available records of enduring value. However, other data suggest that copyright is often invoked or interpreted in ways that limit access, thereby compromising the archival mission.

Before looking at the ways that copyright affects what institutions select for online access, it is important to set their practices in the context of archivists' perceptions of copyright, based on the assumption that institutional copyright practices are influenced by how staff members view and understand copyright. The survey asked respondents to state their level of agreement with a series of statements on a 5-point Likert scale, ranging from strongly agree to strongly disagree. Two questions looked at general perceptions of copyright. In response to the statement "Copyright is not a problem for archival repositories wishing to make their archival holdings available on the Internet," 80% disagreed or strongly disagreed. In other words, most respondents think that copyright *is* a problem. Only 9% agreed or strongly agreed that copyright was not a problem; 11% were neutral.

The responses to a related question were more ambivalent. When asked their level of agreement with the statement "The risk of legal consequences for copyright infringement involving archival material is low," one-third (33%) of those surveyed agreed or strongly agreed; in other words, they think that the risk *is* low. However, nearly half (44%) disagreed (they think that risk is *not* low). Nearly one-quarter (23%) had no opinion. Responses to these two statements suggest that archivists consider copyright to be a matter of some concern or anxiety, and an issue that incurs some risk.

The interviews revealed more detailed information about archivists' views of copyright. Interviewees were asked, "What do you think about copyright as it affects your job?" For discussion purposes, their responses have been placed in
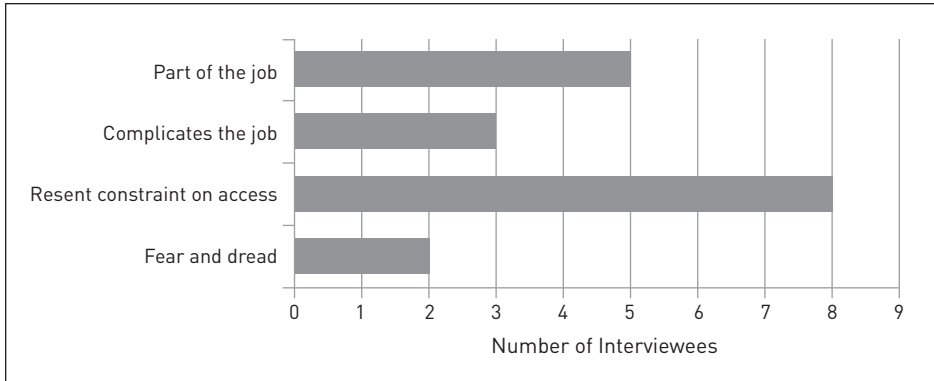
FIGURE 1. Interviewees' views of copyright as it affects their jobs (*N* = 18).

four mutually exclusive categories (see Figure 1), although other interview data suggest a more nuanced view of copyright.

Five interviewees considered copyright to be part of the job, one of the many issues that a professional archivist deals with. An aspect of this view is the need to educate oneself about copyright; as I2 said, "I've become probably more expert than I would like to be." For the next three interviewees, copyright may go with the job, but it is not a welcome component because copyright makes their jobs harder. As I3 said, "I find it very difficult." Although I15 enjoys "the intellectual challenge of copyright," he said, "Well, it certainly makes it [the job] complicated." Although only interviewees are included in Figure 1, a survey respondent (QN28) also falls within this category, saying, "The real result [of trying to track down every rights holder] is [that] the stuff will remain hidden for another 80 years so as to be sure we're not violating copyright."

By far the largest number resent copyright, particularly the way it constrains their mission to make their holdings more widely accessible. As I4 said, "A part of me . . . resents the copyright law," and I11 minced no words in stating, "It [copyright] is a royal pain." I7 summed it up succinctly when he said, "It really holds back your ability to [make holdings available] without spending enormous time and effort, which in the end equals money." A survey respondent (QN36) expressed it even more strongly: "If we try to clear every asset before making it available, we will fail our users. Copyright is the most frustrating aspect of my job." Two other interviewees found copyright downright scary. As I12 admitted, "I kind of live in fear because I'm the person that is responsible for the website and the digitization," and the very mention of copyright made him "uneasy." I17 said that copyright is "one of the questions that I dread getting."

The foregoing analysis deals only with responses to a direct question. However, these responses must be understood in the context of the entire interview and the survey responses, which reveal a more nuanced picture. For

example, I12 (who "lives in fear") works for an institution that has a high tolerance for risk when it comes to what is selected for online access. In other parts of the interview, he was very supportive of his institution's willingness to take risks to increase access. On the other hand, I16 (who thinks that copyright is just part of her job in a government archives) later described copyright as "fearsome" and noted that colleagues who work in other types of institutions (historical societies, special libraries, etc.) "are very scared when they hear the word 'copyright.'" For I4, who resents copyright because it constrains access, copyright also causes some sleepless nights: "Sometimes I can't go back to sleep at night because I worry that we've made the wrong risk decision, that someone really is going to come out of the woodwork and look at those 30 photographs we put up and . . . take us to court."

Archivists' perceptions of copyright can also be discerned by looking at what they would change about copyright law. Interviewees were asked, "What, if anything, would you change about copyright to make your job easier?" The responses are presented in Figure 2.[15]

That nearly half of the interviewees resent copyright because it limits access to their holdings is reflected by the fact that 11 of them think that the term of copyright protection is too long (particularly for older materials); two think that the Digital Millennium Copyright Act (DMCA)[16] presents particular problems that limit access. Five want to make it easier to clear copyright; they suggested specific changes, such as bringing back compulsory registration (so that owners who cared about their copyright would be more easily identified) and amending the law to address the orphan works problem (so that archivists would have a clear process for using works whose rights holders are unknown
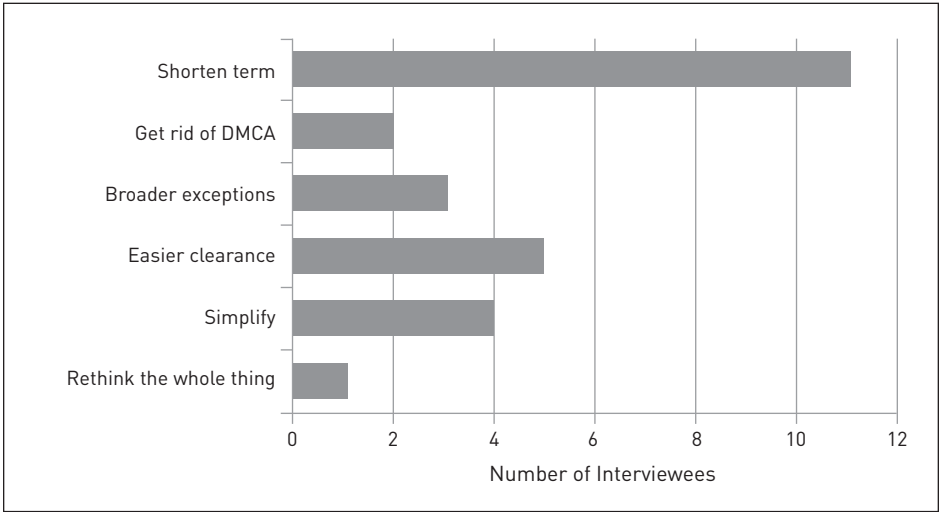
FIGURE 2. Interviewees' desired changes to copyright law.

or unlocatable). Three respondents want changes to exceptions that make it unnecessary to obtain permissions; for example, broader fair use provisions, a special exception for archives, and changes to Section 108 (characterized by I15 as "a total catastrophe").[17] Four think copyright is too complicated; they want easily accessible, authoritative resources they can use to answer their questions about specific situations. As I17 said, "It would be nice if there was one website out there that could explain every possible scenario and have a nice little graph and chart or even an interactive [tool that would] take you through a series of questions and it would be something that I could . . . direct patrons, students to." In the same vein, a survey respondent said, "I would love for copyright laws to be clear and understandable." I10 called for a complete rethinking of copyright because "this model is no longer working. . . . "

In sum, it appears that for archivists, copyright is something with which they have to deal, but they do not like it much. It is a source of concern (if not anxiety) and an impediment to access that interferes with their mission. Underlying these responses is a strict compliance, item-level, rules-based view of copyright. Participants appear to consider copyright in relation to the rules (for example, the duration of copyright or more generous exceptions) to be sure that they are complying with the law. They think in terms of the process of clearing copyrights; they just want it to be easier, either in terms of locating rights holders or having a process for dealing with orphan works. Whether or not the rules change, they also want clear guidance that tells them what to do in specific situations.

Copyright as a Factor in Selection

Turning to the selection process, the first question in the survey was intended to discern the importance of copyright as a factor influencing the repository's decisions about what holdings to make available online. The list contained 9 factors (including copyright) that might be considered when deciding what to put online. Respondents were asked to check off all that they thought were important and to rank the top 4. Sixty-seven percent of the respondents thought that copyright was important enough to check off.

When it came to ranking, 47% of those surveyed thought that copyright was important enough to rank, but it was by no means the most important factor. The rankings were coded: the factor ranked first in each response was given a value of 4, the second-ranked factor a value of 3, the third a value of 2, and the fourth a value of 1, after which a total score for each factor was calculated. A "desire to increase web resources so that researchers can serve themselves" (157 points) was by far the top-ranked factor. The second-ranked factor was availability of staff resources (79 points), followed by copyright (69 points),

and then availability of grant funding to create online content (63 points). When deciding what holdings to select for online access, respondents think that copyright is an important consideration, but increasing online resources is a far more important factor. The high ranking of a "desire to increase web resources" as a factor in determining online content is consistent with archivists' resentment of copyright's constraints on access.

However, interview data revealed that copyright may be a more important factor than the survey results indicated. Nine of the eighteen interviewees stated that if an item was going to be a copyright problem (i.e., requiring staff time and effort to identify, locate, and contact rights holders to obtain permission to digitize and disseminate online), it was immediately removed from further consideration for online access.[18] In such cases, it could be argued that copyright is *the* most important factor and should have been checked off as important and ranked first in these responses. There is no way of determining if questionnaire respondents who were not interviewed adhere to a similar policy. However, if we assume that the interviews are representative, the interview data, when considered with the survey results, suggest that copyright should actually be ranked second overall.

## What Is Selected for Online Access?

From a copyright perspective, what do archivists actually choose to put online? One way to answer this is to look at their written policies on what they select for digitization. In response to the survey question "Does your repository have written policies/procedures/guidelines regarding what is selected for digitization and online access?," 30% of respondents reported that they do. Interviewees whose repositories do not have a written selection policy were asked why. Their answers indicated that policies are often determined informally, on a case-by-case basis, in response to the availability of external funding for a particular project, user needs, or a particular question that arose. Responses also indicated that policies emerged as digitization efforts evolved from pilot projects to mass digitization undertakings.

Twelve of the institutions studied include their selection policies on their websites; two others included their selection policies with their survey responses. With one exception,[19] these are high-level selection criteria for a broad range of digitization projects, not limited to archival holdings.[20] All but 1 included copyright as a factor in selection for digitization, but in different ways. In most cases, copyright is but one of many considerations. Even though 6 institutions listed copyright first, only 1 respondent (R27) explicitly stated that it is "the first question that must be addressed." Most policies indicate that the institution gives priority to materials in the public domain, materials in which the repository owns the copyright, or materials for which permissions can be

"readily obtained." While having to devote resources to obtaining permissions is less desirable, in only 1 case (R42) is the need to obtain permissions a "deal breaker," in that documents whose copyright is owned by third parties would not be scanned (with the result that the online collection would be incomplete). Another repository (R79) revised its policy in 2009 to take a completely different approach. During its first digitization efforts, extensive resources were devoted to attempting to obtain permissions from third-party rights holders. After evaluating their experience, the staff concluded that locating and obtaining permissions for all rights holders was unrealistic; they decided that future digitization projects would rely instead on fair use and a take-down policy.[21] Based on these documented selection policies, copyright is clearly a factor to be considered, although not necessarily the only one.

Another way to discern what institutions choose to digitize is to look at selection from the perspective of "copyright complications." Broadly speaking, materials can be divided into three categories: materials in the public domain (i.e., the copyright has expired or never existed, as in U.S. federal government documents), materials in which the repository owns the copyright, and materials in which a third party owns the copyright. The first two seemingly pose few complications. Materials no longer (or never) protected by copyright may be freely used by anyone, and if the repository owns the copyright, it can authorize the reproduction and dissemination involved in making the holdings available online.[22] Clearly, the third category poses the most copyright complications because permission must be requested from the rights holder(s).

Survey respondents were asked, "In selecting documents from your holdings to be included on your repository's website, which of the following [three
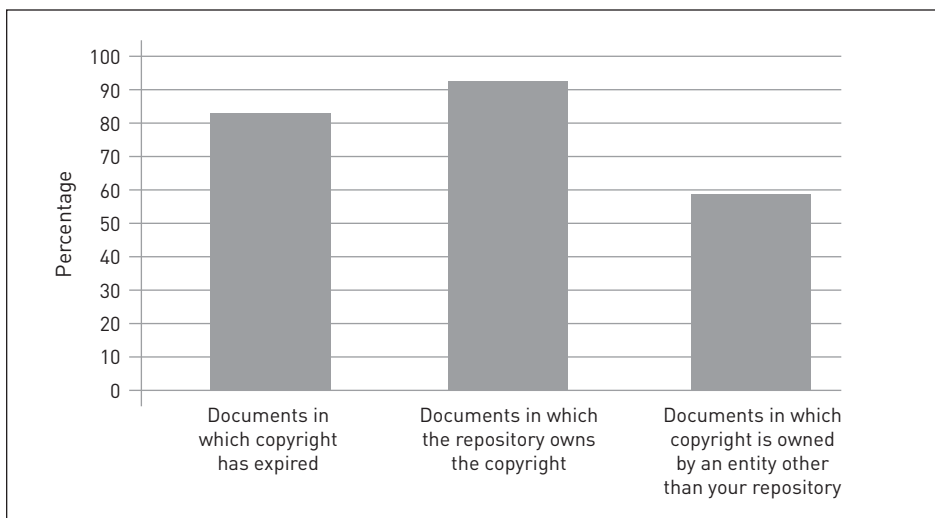
FIGURE 3. Selection by copyright status (*N* = 66).

categories] does your repository select?," and they were to check off all that applied. The responses are reported in Figure 3. Sixty-one repositories (92%) select documents in which the repository owns the copyright, fifty-five (83%) select documents in the public domain, and thirty-nine (59%) select documents in which a third party owns the copyright.

Also of interest are the combinations of categories most commonly selected, as shown in Figure 4. Twenty-nine repositories (44%) select from all three categories, and twenty-one (32%) select both documents in the public domain as well as documents in which the repository owns the copyright. Only 2 (3%) select only public domain documents, and only 4 (6%) restrict selection to documents in which the repository owns the copyright. That more (29) select from all three categories than select from the two "complication-free" categories alone or in combination (27) suggests that archivists are to some extent willing to deal with the complications of copyright.
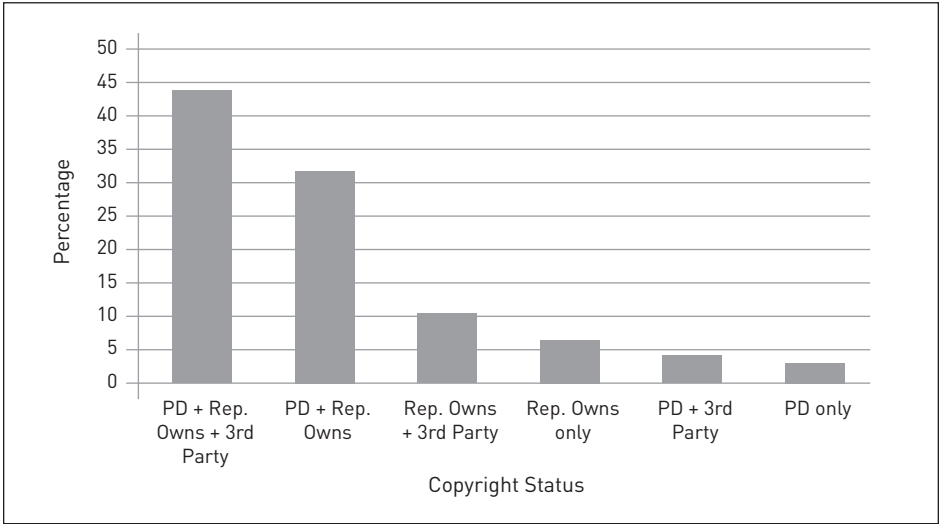
**FIGURE 4.** Selection by copyright status (*N* = 66).

As Figure 3 shows, 83% of survey respondents reported that they select documents in which the copyright has expired.[23] They were then asked, "How is it determined that the copyright has expired in any particular document?" While the duration of copyright is generally based on the life of the author, 16 (30%) respondents who answered this question said that they determine copyright expiry through the age or date of the document, but they provided no details about how old something had to be before it was considered out of copyright. Seventeen others (32%) provided general rules based on the date of the document or (less common) the life of the author; for example, 1 person (QN11) wrote, "We use general guidelines—life of author + 70 years for manuscripts;

published before 1923; items not copyrighted (state documents)." It must be noted that not all repositories understand the rules correctly; for example, the copyright in documents published before 1923 has expired, but it appears that a number of respondents think that anything dated pre-1923 is in the public domain; others conflate the term of author's life plus 70 years with 70 years from date of creation.

Thirteen survey respondents (25%) consult external sources to guide them in their determination of copyright expiry, most commonly the "Cornell table,"[24] but also the U.S. Copyright Office and others. Some have particular strategies; for example, 1 respondent (QN8) reported using a rights checklist. A few outlined a series of steps; for example, 1 survey respondent (QN41) starts with external sources, followed by research, followed by consultation with legal counsel if necessary. While respondents were asked to be as specific as possible, few provided much detail, and it may have been unrealistic to expect detailed processes for determining copyright expiry. Nonetheless, these responses suggest that some archivists take a less than rigorous approach to the calculation of copyright expiry by applying general rules that may or may not be accurate.

Interview data generally supported the survey responses. Some interviewees have a somewhat shaky knowledge of copyright law as it pertains to the duration of protection. Although some institutions are likely to know the death dates of the authors of works, it is more often the case that the only information available is the dates of the documents. Consequently, many take a conservative approach to what they select to be confident that the copyright really has expired. As 1 interviewee (I17) said, "the only unpublished piece[s] that we have put up are some Civil War letters and diaries. And that one seemed to be again a no-brainer, and we did have biographical material on these people and we knew that most of them had been deceased since the 1920s and so we thought we were clearly OK with that."

As seen in Figure 3, 92% of survey respondents reported that they select documents in which the repository owns the copyright. They were then asked, "How is it determined that your repository owns the copyright in any particular document?" The findings are presented in Figure 5. Not surprisingly, the majority (31 repositories, or 51%) check donor agreements or acquisition records to verify that copyright has been transferred to the repository as part of the acquisition process. Twelve (19%) reported that the repository owns copyright because the records in question were created by the parent body. Fourteen respondents that acquire records of their parent body as well as those of external donors indicated that they rely on both means.[25] If we combine those who reported *only* donor agreements with those who said they consult donor agreements for acquisitions from outside the institution, then 45 (74%) acquire copyright as part of the acquisition process. If we combine the 12 who reported that the repository
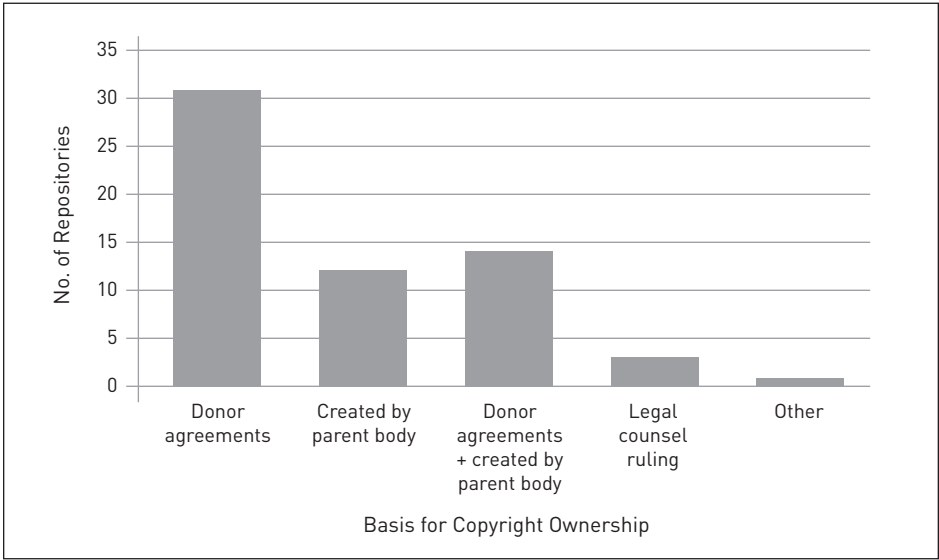
FIGURE 5. Basis for belief that repository owns copyright (*N* = 61).

owns the copyright because the records were created by their parent body with the 14 who select institutional records (as well as those in which copyright is transferred through donor agreements), then 26 (42%) think they own copyright because the parent body created the records. The remaining 4 (7%) rely on other means, including consultation with institutional legal counsel.

Repository ownership of copyright was further explored in the interviews. Most interviewees indicated that they attempt to get copyright assigned to the repository at acquisition, but they clearly understand that donors may not own copyright in everything they donate. For those who acquire the records of their parent bodies, they can assume that they own the copyright in what was created by the organization, but the repository will not own the copyright in records received from outside the parent body bureaucracy. However, as noted earlier, the belief of some interviewees that they own copyright in their holdings may not be well founded. One interviewee, for example, appeared to believe that when a citizen writes a letter to the government, the copyright in the letter (as well as the letter itself) belongs to the government.

That 59% of survey respondents select materials in which the copyright is owned by third parties is surprisingly high.[26] As 1 participant (QN72) said, "Lack of resources is one reason why we do not digitize copyrighted material. We have so much out of copyright that it would be wasteful to spend staff resources seeking copyright permissions." One possible explanation is the bifurcated nature of U.S. repositories: many institutions acquire only the records of their parent bodies, and others collect only external materials (or large amounts of external

materials in addition to their parent body records), and universities are in the latter category. Of those reporting that they select materials in which third parties own the copyright, 74% are university archives whose holdings are more likely to consist largely of external materials.

Obtaining Permission

Survey respondents who checked off that they select materials in which third parties own the copyright were asked, "Does your repository try to obtain the authorization of copyright owners to digitize their works and make them available on your repository's website?" Of the 38 who responded, 25 (66%) claimed that they try to obtain the authorization of copyright owners; 9 (24%) claimed that they do not; and 4 (10%) checked off both and added a comment like "Sometimes but not always." Why nearly one-quarter do not try to obtain authorization for the third-party items they select was explored in interviews. Of the 4 interviewees who reported in their surveys that they do not try to obtain permission from third-party rights holders, 3 stated that the mission to make their holdings available online outweighed the risk, particularly if the materials selected were not created for commercial purposes; the fourth does in fact obtain permission in particular cases. The others noted that they would probably do so in situations where a rights holder was likely to challenge them or if a cost was involved. As 1 person (I9) said, "If it's a piece of art or a photograph, more likely it would be, or something that was done by someone who was famous, then we will not use it because we can't . . . we just don't have the ability here to pay for using collections like that. There's no funds for that." At the moment, however, that particular institution has a lot of low-risk materials (public domain materials or materials in which it owns the copyright) to choose from, so staff do not need to consider third-party materials.

Other interviewees who do attempt to contact rights holders go ahead and put the materials online even if their efforts to locate the copyright holder are unsuccessful, as long as they consider the risk to be low. As 1 participant (I4) said, "Well, in this project a couple years ago with the photographs, I think that we could not locate the majority of copyright holders, and we simply put them up anyway, because we figured if we couldn't find them, probably the risk was low, they weren't conspicuous, a photographer or studio. So we put them up anyway." Others, however, do not go ahead: as a survey respondent (QN28) stated, "Almost never can we find the author's legal heirs (or date of death to determine copyright expiration) and so the items stay undigitized."

Little documentation about the extent to which repositories attempt to obtain permission is available online: 3 institutional websites include a blanket statement that they have made reasonable attempts to obtain permissions

from third-party rights holders for all digitized online holdings; another makes a similar statement at the item level, and a fifth provides a similar statement where appropriate for particular digital resources.

Survey respondents who reported that they attempt to obtain permissions were asked, "What strategies are used to locate the copyright owner?" Not surprisingly, of the 25 who answered the question, most start with acquisition records or information on the documents (e.g., photographers' stamps on the back of prints), but 12 also use various external online sources such as obituaries, directories of professionals and professional associations, and the WATCH database (Writers Artists and Their Copyright Holders) or its companion FOB (Firms Out of Business).[27] Google searches have proven helpful, and 1 person (QN70) noted success with Facebook ("Really! It yielded!"). On the other hand, 6 institutions go only as far as the obvious rights holders, such as a cartoonist or newspapers (for clippings frequently found in many collections). Only 1 respondent (QN2) explicitly noted that his institution documents its process.

Survey respondents were then asked, "At what point do you stop trying to locate the copyright owner?" Most gave general answers (e.g., after a reasonable attempt or "good faith" effort); however, some outline more precise rules (e.g., after 4 attempts, when no response had been received after 30 days, and the like). One noted that they had a checklist (adapted to suit the circumstances). However, another (QN20) stated, "We don't put too much time into it because we have such a huge quantity of material that we own the rights to. If we run out of that, maybe we'll get to the others."

Those who indicated that they attempt to obtain the authorization of copyright owners were asked, "What do you do if the copyright owner cannot be located or doesn't respond to your request for authorization?" They were given a number of choices and asked to check all that apply. Their responses are shown in Table 1.

Table 1. Actions Taken If Permission Cannot Be Obtained (*N* = 28)

Action	Number of Respondents
Do not use the document	17 (61%)
Substitute another document if possible	9 (32%)
Use the document with a disclaimer	14 (50%)
Use the document with no disclaimer	5 (18%)
Other	8 (29%)

That well over half do not use the document suggests that they are very risk-averse. One-third would substitute another document if possible. Yet half would use the document with a disclaimer (e.g., "Efforts to locate the copyright owners

were unsuccessful, but we will acknowledge any copyright owners who make themselves known"). However, examination of website data revealed only 5 repositories that invite rights holders who feel that their work has been used inappropriately to contact the repository so that the matter can be investigated and addressed. Only 18% would use the document without a disclaimer. Seven of the eight survey respondents who reported "other" strategies would use the document. Three would do so, claiming fair use but clearly placing responsibility for further uses on the user, two would be prepared to take the item down if challenged, 1 would restrict access to in-house use only, and 1 would indicate the copyright holder in the metadata, presumably including a note that it is the user's responsibility to obtain any necessary permissions.

Those who indicated that they attempt to obtain the authorization of copyright owners were also asked, "Where your repository has successfully located the copyright owner to obtain authorization for the use of a document, what has been their reaction to your request?" They were given a number of choices and asked to check all that apply. Their responses are shown in Table 2.

Table 2. Rights Holders' Reactions to Requests for Permission (*N* = 28)

Reaction	Number of Respondents
Pleased that the document is being used	22 (67%)
Declined permission	10 (30%)
Wanted payment	10 (30%)
Wanted credit line or other form of acknowledgment	21 (64%)
Unaware that they owned copyright	6 (18%)
Other	4 (12%)

That two-thirds of rights holders were pleased that a document is being used (and granted the necessary permissions) is consistent with other research.[28] As 1 interviewee (I7) said, "The overwhelming response to every request that we made was very positive. It was like, 'Oh, my gosh, I'm so thrilled that that's going to have a life up there,' and if it wasn't an individual with a personal connection, organizations were equally happy to just make things available. Which is why all the work that I did, and all the self-education I had to do about copyright, kind of annoyed me because of all of the time and effort that that took when the result really was that people were very willing." A similar number of rights holders wanted the item to be acknowledged in some way.[29] On the other hand, nearly a third either declined permission or wanted payment. One respondent who checked "Other" stated that the rights holder did not respond. As far as payment is concerned, only 4 of the 28 respondents reported that they had paid a fee to a copyright owner to make a document available on the

Internet, and of those 4, only 1 (QN89) had a policy: "It isn't quite explicit, but there's general consensus that we can't pay much over $100 for use."

When asked, "Has your repository ever been challenged by a copyright owner about putting a digitized copy of a document on your repository's website?," 47 (73%) of the 64 survey respondents who answered the question reported that they had not been challenged; 14 (22%) had been challenged (in one case on a privacy matter); 3 (5%) were not sure. The 13 who reported that they had been challenged on a copyright matter were asked to describe the most recent occurrence and how they dealt with it. The results are indicated in Table 3, which contains 17 occurrences because 4 institutions reported 2 situations. Although not asked specifically, 5 of the 13 institutions that responded provided information that indicated that they verify the claim before taking action.[30]

Table 3. Action Taken by Repositories when Challenged by a Rights Holder (*N* = 17 occurrences)

Action	Number of Occurrences
Remove from website	9 (53%)
Reduce quality	3 (18%)
Permission granted	2 (12%)
Other	3 (18%)

More than half reported that they would remove the item; however, nearly one-fifth would leave the item online and reduce the quality, for example, by displaying only thumbnails or by placing a watermark across the image. In 2 situations, the rights holder was persuaded to allow the images to stay online. As for the 3 other situations, in the first instance the claim could not be substantiated and the image presumably remained online; in the second the images remained online while competing ownership claims were sorted out and the appropriate credit line added; and in the third, the rights holder requested payment.[31]

This question was further explored in the interviews. Of the 13 interviewees who were asked if they had been challenged by copyright holders, only 3 responded affirmatively; 10 had not (although 1 of the 10 had removed videos from the website, not because of a challenge from rights holders but because staff were concerned). The actions of the 3 who had been challenged support the survey data, that indicates they took down the image(s) or reduced the quality (e.g., by posting thumbnails or by masking all but selected parts). As 1 person (I2) said, "We are going to rely on our take-down policy and we're willing to take down things whenever people bring them to our attention." Only 1 of the repositories (R84) includes its take-down policy on its website; it states

that the item in question will be removed from public view while the matter is investigated.

Risk-Assessment Approach

Much of the foregoing data appears to be based upon a strict compliance, item-level rights clearance view of copyright. However, interview data provided evidence of a different approach. Eight interviewees stated that they follow a risk-assessment approach that looks at broad factors such as date span of the materials, how well known the rights holders are, commercial value of the materials, likelihood of a challenge, and so on rather than an item-by-item copyright review. While interviewees were not asked directly about their reasons for adopting a risk-assessment approach, several noted that the cost of obtaining permissions on an item-by-item basis was unsustainable. As I9 said, "Quite frankly, when we try to address copyright issues with the staff, we don't have the time, the knowledge, [or] the resources to check the copyright on all of that [correspondence created by other than the donor or donor's family]." As well, some interviewees want to be more responsive to users who are interested in more recent holdings.

Even those who take a strict compliance, rules-based approach take risks in various ways. For example, QN22 reported that "In general, our approach to copyright is 'risk aversion' . . . [and we] focus heavily on materials we believe to be out of copyright or [for which] copyright was transferred to us in the deed of gift. [However,] as a test, we posted some images of James Dean and Marilyn Monroe from the collection of a Hollywood socialite, and no one has ever said anything." I17 has posted photos by a professional photographer who transferred copyright to the repository; however, knowing that the photographer did a great deal of commercial work, he is not sure that the photographer actually had the right to transfer copyright in what are probably works for hire, but the repository lacks the documentation to clarify copyright ownership of these images. I15 posted videos from a theater company; although he had the permission of the theater director, he suspects that there are other rights holders ("I think there are other copyrights that probably weren't cleared before those videos went online, but . . . what can you do . . ?"). Others are inadvertent risk takers because of a misunderstanding of copyright; for example, 2 interviewees base their policies on an ill-founded belief that they own the copyright in their holdings. As noted, no adverse legal consequences have resulted from these risk-taking behaviors.[32]

Discussion

It remains to summarize the findings in relation to the research questions posed by this study:

- In what ways do copyright issues affect the selection of archival materials for Internet access?
- What resources do archival repositories devote to seeking authorization from copyright owners to make documents available on the Internet, and why?

Clearly, there is a wide range of practice; however, copyright issues greatly affect what archival materials are selected for Internet access. Survey data and the available selection policies indicate that copyright is a significant factor in what is digitized, but it is not the only factor. According to survey data, most institutions select holdings that present few copyright problems—materials in the public domain or materials in which the repository owns the copyright (even if some of the decisions about the expiry of copyright or the transfer of copyrights are based on ill-founded understandings of copyright law). Others, however, state that they take a risk-assessment approach, or they take risks in specific situations.

In terms of the resources devoted to seeking authorization from copyright owners, survey and interview data revealed that repositories avoid materials for which permission will have to be obtained from third parties because they lack the time and expertise to identify and locate copyright holders, and they have many materials that present few copyright problems. A surprising number are, however, prepared to devote considerable efforts to obtaining permissions. Where they have been unsuccessful in doing so, half do not use the document, although some may use it and rely on a disclaimer and a take-down policy.

What are we to make of these findings in terms of the broader question of whether the application of copyright is a barrier to online access to America's documentary heritage? The findings provide strong evidence that, consistent with their perceptions of copyright as something that impedes their ability to make their holdings available online, many archivists take a conservative approach to copyright issues when selecting for online access. They select the "low-hanging fruit"—public domain materials or materials in which the repository owns copyright—and avoid the risky materials such as twentieth-century records and audiovisual materials.

However, this approach is not sustainable, for various reasons. Not only will they run out of "safe" materials; there are also calls to digitize entire collections to present the materials in their context. Furthermore, pressure for ever-more digitized content and the realities of economies of scale support digitization of entire collections that contain the works of many rights holders.[33] Other factors,

such as the high cost of item-level copyright clearance and a desire to meet user needs for more recent records, are also pushing practice toward a risk-assessment approach rather than an item-by-item copyright review. However, evaluation of risk requires a good understanding of the law. If archivists are uncertain or apprehensive about copyright issues, they may have little tolerance for risk. Consequently, their approach to the copyright decisions required for their digitization projects may be more conservative than necessary, in ways that limit what goes online.

Nonetheless, this research suggests that a shift is taking place, from strict compliance with the rules to a risk-assessment approach. As archivists gain more experience with digitization, they may be willing to take greater risks, particularly if they have encountered no adverse legal consequences. However, practice varies widely, and tolerance for risk is a continuum. If such a shift is under way, it is far from complete, and a rules-based approach appears to be the norm, at least at the time the data were collected. While a rules-based approach obviously has an impact on the practices of the repository, ultimately the broader impact is on users. If the desire to increase online resources is the prime motivation in deciding what is selected, the negative consequences of a rules-based approach were eloquently expressed by the survey respondents who spoke of "fail[ing] our users" and "the stuff . . . remain[ing] hidden for another 80 years so as to be sure we're not violating copyright."

Copyright may never be straightforward, but the archival mission could be better served by reducing the level of apprehension and increasing archivists' confidence in dealing with copyright matters. This can be addressed by creating tools that represent best practices to date, further research to identify additional best practices, and providing copyright education and resources.

The Association of Research Libraries (ARL) has produced two Model Deeds of Gift that discuss the nature of the copyrights in donated materials and include a copyright transfer or a licence that allows a repository to digitize the materials.[34] ARL's *Code of Best Practices in Fair Use* includes a section on the application of fair use to creating digital collections of archival and special collections materials.[35]

If the trend is to digitize entire collections rather than cherry-pick the "safe" items, archivists need more tools to assist with risk assessment. Some such tools already exist. See, for example, "Well-Intentioned Practice for Putting Digitized Collections of Unpublished Materials Online" (WIP),[36] Kevin Smith's essay on copyright risk management,[37] the chapter on risk management in *Copyright and Cultural Institutions*,[38] and the Society of American Archivists' report "Orphan Works: Statement of Best Practices," which describes best practices regarding reasonable efforts to identify and locate rights holders.[39] Related to the development of risk-assessment tools is the need to study the practices

of repositories that are risk takers. If they have not incurred legal challenges, others could benefit from their methods and a body of best practices could be developed and shared with others.

In addition to risk assessment tools, archivists need to be more confident about their copyright knowledge and have authoritative sources of copyright information. This can be addressed on a number of fronts. Graduate archival education programs should include robust copyright content: not only the provisions of the law, but also how it operates in relation to the mission of cultural heritage institutions and the role of the archivist/librarian in administering copyright. The application of copyright in the digital environment continues to evolve. Timely, accessible, and authoritative continuing education programs are also essential to keep practitioners' knowledge current. The SAA's Continuing Education Program includes several copyright-related courses. A fruitful direction for further research would include a study of practitioners' needs and preferences with regard to copyright training, as well as a systematic investigation of alternative delivery modes and an evaluation of their effectiveness.

Many archivists want an authoritative, up-to-date interpretive guide to assist them in responding to particular copyright situations. Whether this should be the responsibility of professional associations or some other body, and the extent to which that entity would be prepared to go beyond generalities to avoid legal liability, are difficult questions for which no clear answers exist.

Conclusion

This is an initial study of an evolving area. At present, it seems that archivists' conservative approach to copyright matters when selecting what to digitize and put on their websites has limited the archival resources available online to older textual and still-image materials. The empirical research reported here demonstrates that archivists could be bolder in what they make available online to achieve their goal of increased access and unveil those collections that formerly remained hidden because of caution regarding copyright. A risk-assessment approach to copyright compliance and increased reliance on fair use are alternative approaches to digitization that increase access to the nation's documentary heritage, better meet the needs of users, and more effectively fulfill the archival mission.

Appendix A

Survey of Archival Repositories

A. **Factors in Digitizing for Internet Access**
  1. Your repository's website content includes documents from your holdings. Generally speaking, which of the following factors influenced your repository's decisions about what items to make available online?
     - Place an "X" in the first column after each factor that was important in the decision-making process. If a factor was not considered, or warranted only minor consideration, please leave the space blank.
     - Of the factors selected, rank the top 4 in order of importance in the second column, with 1 being the most important, 2 the next most important, and so on.
     - If there are other factors that influenced your decisions that are not listed here, please specify them under "other" at the end of the list below, and include them in your ranking.

	Important ?	Rank the top 4
1. Availability of technical expertise		
2. Feedback from researchers about what they want to see on the website		
3. Desire to increase web resources so that researchers can serve themselves		
4. Privacy issues		
5. Availability of staff resources		
6. Copyright issues		
7. Availability of grant funding to create online content		
8. Whether documents were arranged and described		
9. Physical condition of documents		
10. Other (please specify)		

B. **Selecting Documents for Internet Access**
  2. While many factors may be considered when selecting for online access, this section looks particularly at copyright issues. In selecting documents from your holdings to be included on your repository's website, which of the following does your repository select?
     - ☐ 2a. Documents in which the copyright has expired
     - ☐ 2b. Documents in which the repository owns the copyright
     - ☐ 2c. Documents in which the copyright is owned by a person or organization other than your repository

3. If you checked off 2a in Question 2, how is it determined that the copyright has expired in any particular document?

    _____
    _____
    _____

4. If you checked off 2b in Question 2, how is it determined that your repository owns the copyright in any particular document? Please be as specific as possible.

    _____
    _____
    _____

5. If you checked off 2c in Question 2, does your repository try to obtain the authorization of copyright owners to digitize their works and make them available on your repository's website?

    ☐ Yes
    ☐ No →   Go to Question 13

6. If you checked off 2c in Question 2, what strategies are used to locate the copyright owner? Please be as specific as possible.

    _____
    _____
    _____

7. At what point do you decide to stop trying to locate the copyright owner?

    _____
    _____
    _____

8. What do you do if the copyright owner cannot be located or doesn't respond to your request? *Please check all that apply*.

    ☐ Do not use the document
    ☐ Substitute another document if possible
    ☐ Use the document with a disclaimer (e.g., "efforts to locate the copyright owners were unsuccessful but we will acknowledge any copyright owners who make themselves known")
    ☐ Use the document with no disclaimer
    ☐ Other (please specify):_____

9. Where your repository has successfully located the copyright owner to obtain authorization for the use of a document, what has been their reaction to your request? *Please check all that apply.*

   ☐ Pleased that the document is being used
   ☐ Declined permission
   ☐ Wanted royalties or licensing fees
   ☐ Wanted credit line
   ☐ Unaware that they owned copyright
   ☐ Other (please specify):_____

10. When seeking authorization from copyright owners to digitize a document and put it on your repository's website, are copyright owners also asked to authorize further uses by visitors to your website? *Please check only one option.*

    ☐ Yes
    ☐ No
    ☐ Not sure

11. Has your repository ever paid a fee to a copyright owner in order to make a document available in the Internet?

    ☐ Yes
    ☐ No → Go to Question 13
    ☐ Not sure → Go to Question 13

12. If you answered yes to Question 11, does your repository have an explicit policy on this matter, e.g., conditions that must be met before agreeing to pay a fee, or limits on the amount of the fee?

    ☐ Yes (Please describe)
    ☐ No

    _____
    _____
    _____

13. Has your repository ever been challenged by a copyright owner about the use of a document on your repository's website?

    ☐ Yes
    ☐ No → Go to Question 15
    ☐ Not sure → Go to Question 15

14. If you answered yes to Question 13, please describe the most recent situation when this occurred and how you dealt with it.

    _____
    _____
    _____

[**NOTE:** Questions 15–18 have been omitted from this document because they relate to different research questions that are not discussed in this article.]

D. **Your Repository's Copyright Policies**

19. Does your repository have written policies/procedures/guidelines regarding what is selected for digitization and online access?

☐ Yes
☐ No

[**NOTE:** Question 20 has been omitted because it relates to different research questions that are not discussed in this article.]

If you answered yes to Question 19, I would be most grateful if you would enclose a copy of your policies and procedures with your completed questionnaire (or provide a link to a URL, or send electronic copies by email to jdryden@umd.edu). Be assured that your institution will not be identified in any reported findings of this study; the documents you make available will not be used for any purpose other than those related to this study, and they will be stored securely and destroyed or deleted seven years after the research is completed.

E. **Your Views about Copyright**

21. Please rate the extent to which you agree or disagree with the following statements.

	Strongly agree			Strongly disagree	
	1	2	3	4	5
a. Copyright is not a problem for archival repositories making archival material available on the Internet.					
b. The risk of legal consequences for copyright infringement involving archival material is low.					

[**NOTE:** Statements 21c–21k have been omitted from this document because they relate to different research questions that are not discussed in this article.]

22. What, if anything, would you change about copyright law as it affects your job?

_____
_____

F. **About You**

23. How many years have you worked in your present position?
    - ☐ Less than 1 year
    - ☐ 1–5 years
    - ☐ 6–10 years
    - ☐ 11–15 years
    - ☐ 16–20 years
    - ☐ 21–25 years
    - ☐ 26–30 years
    - ☐ More than 30 years

24. How many years have you worked with archival material?
    - ☐ Less than 1 year
    - ☐ 1–5 years
    - ☐ 6–10 years
    - ☐ 11–15 years
    - ☐ 16–20 years
    - ☐ 21–25 years
    - ☐ 26–30 years
    - ☐ More than 30 years

25. What is the highest level of education you have completed? *Please check only one.*
    - ☐ High school or equivalent
    - ☐ Community college
    - ☐ Undergraduate
    - ☐ Masters
    - ☐ PhD
    - ☐ Other (please specify): _____

26. In which type of repository do you currently work? *Please check only one.*
    - ☐ Federal/State archives/manuscript repository
    - ☐ Municipal/County/Regional archives
    - ☐ Religious archives
    - ☐ University
    - ☐ Corporate
    - ☐ Historical society
    - ☐ Museum
    - ☐ Library
    - ☐ Other (please specify):_____

27. Please use the space below to comment on any other aspect of the foregoing topics that you think may be of interest to this study.

Follow-up Interview

28. It is hoped that the data collection for this study will include interviews with respondents to this questionnaire who volunteer to be interviewed. Such interviews will provide the opportunity to explore in more depth issues arising from the questionnaire. Each interview session should take no more than 60 minutes.

Are you willing to be interviewed?
☐ Yes
☐ No

If yes, please provide your contact information below, and record the questionnaire number from the upper right hand corner of the first page. You will be provided with more detailed information about the interview session, and you will be given an opportunity to ask any questions that you may have about it.

Name: _____

Mailing Address: _____

_____

Email: _____

Telephone: _____

Questionnaire number: _____

Appendix B

Archivist Interview Script

The first area of discussion is your institutional copyright practices related to digitizing your holdings for Internet access.

A. **Factors**

   [If they checked copyright as a factor]

   1A. I see that you checked copyright as one of the factors that influenced your decision about what holdings to make available on your website. In what ways is it a factor?

   > How important is copyright in relation to the other factors that you checked off?

   [If they did not check copyright as a factor]

   1B. I see that you did not check copyright as one of the factors that influenced your decision about what holdings to make available on your website. Why is that?

   > How do you deal with copyright issues?

   2. Even though you did not check copyright as one of the factors, have you had to deal with copyright issues in making your holdings available for Internet access?

B. **Selecting Documents**

   I now want to ask you about how you select documents for digitization for Internet access.

   3. Is the ownership of copyright in a particular document a factor in deciding whether or not to include that document on your website?

   > From the perspective of copyright ownership, documents can be divided into 3 categories: those in which copyright has expired, those in which your repository owns the copyright, and those in which copyright is owned by a third party. Do you consider these categories when selecting documents to be digitized for Internet access? How?

   In dealing with archival material, it isn't always easy to be completely certain that copyright has expired, or to ascertain who owns the copyright. The next few questions ask how you deal with these situations.

   4. If you select documents in which the copyright has expired, exactly how do you determine that?

   5. If you select documents in which the repository owns the copyright, exactly how do you determine that?

6. If you select documents in which copyright is owned by a third party, do you try to obtain their authorization to allow you to put digital copies of their documents on your repository's website?

> If not, why is that?
>
> If so, what strategies do you use to locate copyright owners to obtain their authorization to make documents available on your website?
>
> When do you decide to stop trying to locate the copyright owner?

7. Tell me about a situation where you had difficulty locating the copyright owner of a document that you wanted to use. What did you do? What was the outcome?

8. Do you recall a situation where your repository was challenged by a copyright owner regarding your use of a document on your website? Tell me about that.

C. **Further Uses of the Documents on your Website**

I now want to ask about further uses of the documents on your website by visitors to the website.

9. Is your administration concerned that visitors to your website may copy or download images of archival material for uses other than research or private study? Why or why not?

[**NOTE:** Questions 10–13 have been omitted from this document because they relate to different research questions that are not discussed in this article. Findings relating to archivists' efforts to control further uses of online content are reported in Jean Dryden, "Just Let it Go? Controlling Reuse of Online Holdings," *Archivaria* 77 (Spring 2014) (forthcoming).]

D. **Copyright policy/procedures**

I now want to ask you some questions about your repository's copyright policies and procedures.

[If they indicated that they do NOT have a copyright policy]

14A. You indicated in your questionnaire that your institution does not have a documented copyright policy and/or procedures that guide you in making your holdings available for Internet access. Why is that?

> How do you deal with copyright issues?
>
> Who in your organization makes decisions about copyright matters?

[If they indicated that they have a copyright policy]

14B. You indicated in your questionnaire that your institution has a documented copyright policy and/or procedures that guide you in making your holdings available for Internet access.

> What does your copyright policy cover?
>
> Does it cover all copyright activities in your institution, or just the digitization of holdings for Internet access?
>
> Did you have a documented policy before you began digitizing holdings for Internet access?

15. How are your institution's copyright policies and practices developed?

> Tell me about the process.

E. **Your Views about Copyright**

16. What do you think about copyright as it affects your job? Why?

17. What, if anything, would you change about copyright to make your job easier?

F. **Wrap-up**

18. Is there anything you would like to add, or comment on, that has not been covered?

Notes

1 Lorna M. Hughes, *Digitizing Collections: Strategic Issues for the Information Manager* (London: Facet Publishing, 2004), 286.

2 Association of Research Libraries, Center for Social Media, School of Communication, American University, and Program on Information Justice and Intellectual Property, Washington College of Law, American University, "Code of Best Practices in Fair Use for Academic and Special Libraries" (Washington, D.C.: Association of Research Libraries, 2012), 10, http://www.arl.org/storage /documents/publications/code-of-best-practices-fair-use.pdf.

3 See, for example, Stuart D. Lee, *Digital Imaging: A Practical Handbook* (London: Library Association Publishing, 2001), 18; Maxine K. Sitts, ed., *Handbook for Digital Projects: A Management Tool for Preservation and Access* (Andover, Mass.: Northeast Document Conservation Center, 2000), 77; Paula de Stefano, "Selection for Digital Conversion," in *Moving Theory into Practice: Digital Imaging for Libraries and Archives*, ed. Anne R. Kenney and Oya Y. Rieger (Mountain View, Calif.: Research Libraries Group, 2000), 11; Hughes, *Digitizing Collections*, 50, 54–67; Allison B. Zhang and Don Gourley, *Creating Digital Collections: A Practical Guide* (Oxford: Chandos, 2008), 22–24; Anna E. Bülow and Jess Ahmon, *Preparing Collections for Digitization* (London: Facet Publishing, 2011), 11, 49.

4 Jean Dryden, "Copyright in the Real World: Making Archival Material Available on the Internet" (PhD diss., University of Toronto, 2008), 155–90, 237–41, https://tspace.library.utoronto.ca; Dryden, "Copyright Issues in the Selection of Archival Material for Internet Access," *Archival Science* 8, no. 2 (June 2008): 123–47.

5 Larisa K. Miller, "All Text Considered: A Perspective on Mass Digitizing and Archival Processing," *The American Archivist* 76, no. 2 (Fall/Winter 2013): 532–33.

6 Prudence Adler, Brandon Butler, Patricia Aufderheide, and Peter Jaszi, *Fair Use Challenges in Academic and Research Libraries* (Washington, D.C.: Association of Research Libraries, 2010), 11–12, 16–17.

7   Jonathon Purday, "Intellectual Property Issues and Europeana, Europe's Digital Library, Museum and Archive," *Legal Information Management* 10 (2010): 174–5.

8   Dharma Akmon, "Only with Your Permission: How Rights Holders Respond (or Don't Respond) to Requests to Display Archival Materials Online," *Archival Science* 10, no. 1 (March 2010): 45–64; Maggie Dickson, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers," *The American Archivist* 73, no. 2 (Fall/Winter 2010): 626–36.

9   Anna Vuopala, *Assessment of the Orphan Works Issue and Costs for Rights Clearance* (n.p.: European Commission, DG Information Society and Media, May 2010), 5, http://ec.europa.eu/information_ society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

10 Katie Fortney, "Braving the Present: Experience and Copyright Risk Assessment for Digitizing Recent Historical Collections," *Imagine, Innovate, Inspire: Proceedings of the Conference of the Association of College and Research Libraries, April 10–13, 2013, Indianapolis, IN*, ed. Dawn Mueller (Chicago: Association of College and Research Libraries, 2013), 84–89, http://www.ala.org/acrl/sites/ala.org .acrl/files/content/conferences/confsandpreconfs/2013/papers/Fortney_Braving.pdf.

11 The codes used in this article when discussing the findings of the research refer to specific data from each source: repository websites are referred to as Rx, surveys as QNx, and interviews as Ix.

12 For the purposes of this study, a digital resource is defined as "a grouping of archival documents presented together on the repository website because of some relationship among them." The 1,554 digital resources identified in this study consisted of 807 virtual exhibits, 556 single collections, 131 illustrative essays, and 60 searchable databases.

13 Relevant sections of the survey are available in Appendix A.

14 Relevant questions from the interview script are available in Appendix B.

15 While 18 interviewees responded to this question, the total number of responses exceeds 18 because most wanted to change more than one thing. There is no correlation between desired changes and interviewee categories in Figure 1; interviewees in all categories wanted shorter terms.

16 Passed in 1998, the DMCA extended copyright's reach by making it illegal to circumvent technological protections measures that control access to copyrighted works, whether or not there is actual infringement of copyright. The DMCA also increased penalties for copyright infringement on the Internet.

17 In response to a question that asked them to indicate their level of agreement with the statement "Section 108 of the Copyright Act (which permits libraries and archives to reproduce works in their holdings for a user's research and private study) is adequate," only 20% of survey respondents agreed or strongly agreed; 47% disagreed or strongly disagreed; one-third (33%) were neutral.

18 Five of the nine had not checked off copyright as important when completing their survey; the other four had checked off copyright as important.

19 A small institution with only one digital resource.

20 The selection criteria were developed between 2003 and 2009.

21 Besides the selection policy of R79, which now relies completely on fair use to support selection for digitization, only 3 other policies mention fair use as a possible justification for inclusion in a digitization project, but only as a possibility less preferred than public domain materials, those in which the repository owns the copyright, or those for which permission has been obtained. Only 2 interviewees mentioned fair use as a justification for digitizing specific types of materials—newspaper clippings in one case and sound recordings (justified by state law) in the other.

22 As discussed later, the determination of whether the copyright has expired is not necessarily straightforward, and the belief that the repository owns the copyright may not be well founded.

23 A small number of government archives claim that much of their holdings are in the public domain because they are government documents that were never protected by copyright.

24 The Cornell table, which indicates when copyright in various types of works expires in the United States, is available at http://copyright.cornell.edu/resources/publicdomain.cfm.

25 Of those, 3 are government agencies whose records are not protected by copyright (they are in the public domain from the time they are created).

[26] Dryden's investigation of the copyright practices of Canadian archivists found that only 36% of those surveyed select materials in which the copyright is owned by third parties (Dryden, "Copyright Issues," 133–4).

[27] Henry Ransom Center, University of Texas at Austin, WATCH database, http://norman.hrc.utexas.edu /watch/about.cfm, and FOB database, http://norman.hrc.utexas.edu/watch/fob_about.cfm.

[28] See, for example, Akmon, "Only with Your Permission," 57.

[29] Of the 22 respondents who reported that rights holders were pleased that their work was being used, 17 also reported that rights holders wanted acknowledgment.

[30] Data from websites and interviews revealed that 2 additional repositories would verify the claim.

[31] It is not known whether the repository paid the requested fee.

[32] After discussing their repository practices, interviewees were asked if they thought that archivists generally could or should be bolder about what they put online. Most thought archivists should be bolder in their copyright practices to increase access. Of the 15 who were asked this question, 11 said yes (with varying degrees of conviction), 3 equivocated, and only 1 said no. If a bolder approach involves greater tolerance for risk, it appears that, collectively, archivists have a taste for more risk, even if individually they or their institutions may not be prepared to act upon it.

[33] Association of Research Libraries, "Special Collections in ARL Libraries: A Discussion Report from the ARL Working Group on Special Collections" (Washington, D.C.: Association of Research Libraries, 2009), 21–23, http://www.arl.org/bm~doc/scwg-report.pdf.

[34] "Model Deed of Gift" and "Model Deed of Gift, Including Mixed IP Rights," *Research Library Issues* 279 (June 2012): 5–9, http://publications.arl.org/rli279/.

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