

Digitizing Hidden Special Collections and Archives: Amplifying Unheard Voices

Session 4: Rights, Ethics, & Re-Use
April 3, 2024



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- [Program Homepage](#)
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- [Application Guidelines \(make a copy, Google account required\)](#)
- [DLF's Digitizing Special Formats wiki](#)
- [Projects funded through Digitizing Hidden Collections, 2015-2020 and DHC: Amplifying Unheard Voices, 2021](#)
- [Registration for the Applicant Support Series Session 5, April 10](#)
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Questions and Answers

All questions asked in chat and via the Q&A box during the live webinar are copied below. Some questions were answered live during the April 3, 2024 webinar and are marked. Any questions answered live may include additional references or clarification. If you have any other questions, email the CLIR Grants team at hidencollections@clir.org.

Q: Life of the author starts at their death?

A: (Sandra Enimil): No, copyright term is the entire life of the author/creator plus 70 years. It is essentially that the person lives their whole life, they die, and then 70 years after their death, whatever they created during their lifetime goes into the public domain. When I started, we talked about how with the Statute of Anne in England (U.S. Copyright law is based on this statute), it was 14 years and you could renew it for another 14 years if you were still alive. What that indicates to me is that it was a right that was for the creator. So now the right is for the creator, and also for their heirs, and maybe even several generations of heirs, to benefit from something that the original creator created.

Q: Community meeting archives-- does the Board own the archives? Follow up clarification: yes, the cultural committee center archives contain meeting notes.

A: (Sandra Enimil): The meeting notes are likely created for the benefit of the community center. The entity should be the owner of those notes. If it is the organization's meetings notes, those are being created for the benefit of them. Whoever is writing them up is doing it for the institution, so the institution would likely be the author/owner of those notes.

Clarifying note: If there are concerns about ownership of the notes, the community can make clear that the notes are owned by the archive regardless of who is actually taking the notes.

Q: Thanks for this session! We have archival material created by the U.S. government, which contains some identifying information (address of business, people's age & distinct physical characteristics). How to square copyright (or lack thereof) with privacy with use?

A: (Sandra Enimil): So yes, this is not necessarily a copyright question. This is a privacy and ethical consideration question. If it's of concern that the archival material contains information that could personally identify people who may still be alive. What is that content? Is this something that the person's impacted might feel is too detrimental to be made available? I think there is a difference between the address of a business and someone's age or description of them. You might want to think about - is it important to have that? Is there a way to de-identify or suppress that information? It gets to a different question related to privacy and it definitely is something that you want to think more about. Think about how you make that available, even if it is possible that whoever might be impacted is no longer alive. Do they have a family or an estate that might be concerned about this content being made available about them? Especially if it's easy to identify particular people. Would there be an issue or concern for them having this content out there? If that is the intent. It might not be an intent for you to make it available online, but that is something that you want to think about.

Q: Creating an online exhibit or a physical space are the copyright factors the same?

A: (Sandra Enimil): The difference here is in the face-to-face. An online exhibit is not face-to-face. It is available for everybody who is able to access it online. In a physical space, only the people who come into the space can engage with the content and the physical exhibition. Now, something to think about here, even with a physical exhibition, is creating a catalog. Creating a catalog of content that appeared in the exhibition, it's closer to an online exhibition because the audience becomes broader.

If you're relying on fair use to make copies or to distribute content, you want to think about how your audience is much bigger than if they were coming to the facility to see this. If it's online or if it's in a catalog, you want to think if fair use will benefit you. Does it still make sense to rely on fair use? Or does it make more sense for me to try to get permission to include certain types of content? For fair use, you need to think about those four factors: the purpose of your use- what is the nature of the material being used? How much of it are you using? Is there an engagement and relation to the purpose? And is there an impact for the market of the person who created that content or the rights holder, if those are different entities? So if you put it into an online

bulletin or into a catalog, would that create competition for the rights holder? Would that create some issue for the rights holder to be able to also make money? That should impact how you're thinking about it.

Q: If an archive meets the requirements of section 108, can an archive make the copyrighted content publicly available on their website?

A: (Sandra Enimil): This is a great question. Section 108 is about copies and limited distribution, so making it available online is not necessarily what 108 is meant to address. It is geared toward personal research and study of an individual, or in some cases under Section 108, providing a copy to another library or archive in certain circumstances. If you are thinking about how I can make a copy and do broader distribution or display, you might have to think about whether fair use will allow you to make it available online. Just because you are able to make a copy for the purposes of preservation for an individual's research or study, doesn't mean that the access could become wider. You definitely want to see whether or not you can make an actual fair use case or allow someone to, with their copy, make their own fair use case or get permission to be able to do something beyond just making that copy.

Q: Some of our digitization partners are concerned with getting permission from the heirs/descendants of the record creators of the archival collections that have been selected for digitization. Can you share cases where this would be good to do? There is a mixture of copyright for these collections— some were transferred to the institution and some retain the copyright for the individual/record creator.

A: (Sandra Enimil): I would never say you shouldn't get permission or try to get permission, but I am aware that you might not be able to. You might not hear back from folks regarding their work or from their descendants regarding their work. Folks might just not respond, or they are not interested, or the answer is no, but they don't want to tell you no. You want to think about the possible risk of making this material available if you digitize it. If you have a case where it's something that is falling apart and you need to do something to intervene to preserve this content. The preservation part, I think you are on good ground to be able to preserve it.

But, I know for some of you, there's interest, now that you've preserved it, in providing access to the preserved material. It is not necessarily the case that an exemption to copyright law, like fair use, can get you there. Some of the other things that you might want to think about is: Would there be an issue from a descendant or an heir if you decide okay, we've now preserved and digitized this work, now we want to make it available online? Would someone from the family or their estate come forward to say no, you can't do that and say you need to take it down? Would they do something through social media or in person to say this organization is doing this and we didn't want them to do it. You need to think about the risk. Is that something you want to engage with or not engage with? I think you should always try to get permission if it is important for you to do certain things and you're not sure that an exemption to U.S. copyright law covers what you are talking about. If you can get permission, you should do that. But you definitely have to be prepared, and I know some of you probably on the call are well aware that you

sometimes can't get in touch with the people who could give you permission, or could weigh in on what you're planning to do. I'm not saying you're just stuck, and you can't do anything, but you do have to think about what the possible risks are if you want to keep moving forward with an action. It may not be the case, but be prepared for a reaction or a response that may not align with what you want.

Q: Related to privacy concerns, in our collection we have materials from a community that has expressed concerns about revealing information about undocumented individuals/families. This isn't a rights question but rather an ethical one. Are there guidelines available for navigating this?

A: (Sandra Enimil): I don't have guidelines for this, but you should listen to the community. I think it is important and imperative to listen to folks who are expressing to you that this is an issue for them. If it is a community you are working with and you would like to continue working with, without taking into consideration what the community wants, I think it challenges your ability to continue to work with them. You want to think about what it means to keep this information in. Because we think it's important to be in? Is it important to the story and what you are hoping to convey or display? If it's not, then you need to think about how you can share without that information being shared as well. Maybe you need to remove certain perspectives or certain parts to be able to honor that request.

CLIR note: Consider referencing professional practice guidelines produced by museum, archival or library organizations.

<https://www.museumsassociation.org/campaigns/ethics/code-of-ethics/>
SAA, ALA, ATALM, etc.

Q: We received the excellent feedback in our initial application to fund the creation of a Governance Group with the grant to inform the accessibility of our digitized collection. Is it ok for our organization's access plans to shift based on the expertise of this governance group?

A: (Program Officer): This may be okay, but it is important to outline in the proposal any issues that you anticipate arising and how decisions about access will be made by the group, including what options you anticipate offering (total restriction, access on-site only, limited online access, full access to part of the materials and restriction of sensitive items, etc.). If it seems to reviewers that you really have no idea what issues might come up that might damage the competitiveness of the proposal.

(Sandra Enimil): When I was looking at grant applications, I'm always looking to see if there is acknowledgement of copyright and ethical considerations and that there is a plan of action. I want you to see that you are aware of an issue and you are thinking about how you can address it. I would give lower scores to applications that didn't even recognize there could be potential issues around legal, ethical, cultural heritage, or privacy concerns and they definitely did not have a plan. Part of me wanting to do this work is to provide what you should be thinking about.

I want to reiterate that you have something in place to show you have been thinking about the issue and you have a strategy, or you are working on a strategy, to manage it.

Q: There are some complicated questions in some of our materials regarding copyright; is it possible to include funds for a copyright consultant in our grant? If so, are there recommendations available for legal consultants?

A: (Program Officer): No, this is not recommended or fundable, unfortunately. It's not an allowable cost. An advisory group may offer input on ethical considerations but applicants are expected to outline the copyright issues at play in their proposals at time of submission.

Q: Can you explain copyrights for correspondence? Does each sender or recipient retain the rights to their side of the conversation?

A: (Sandra Enimil): Yes, this would be considered unpublished, unless people publish the letters at some point. But yes, if it is an unpublished work and if someone writes a letter to someone else, the author retains the copyright and anyone wanting to make a use beyond fair use in the U.S. would have to request permission from that author. If I write a letter to Sharon, I have copyright in that letter. Sharon has the physical letter, but I still have the copyright. If Sharon decides she wants to donate it to her alma mater in order for somebody else to make use of the letter that is beyond fair use or beyond some other statutory allowance, they should come to me to get permission.

Q: We want to make our collection accessible online, but are concerned about the unauthorized/commercial re-use of the collection, since we do not own copyright and cannot ask every creator for permission to share online. What are some strategies for balancing access and preventing unauthorized re-use?

A: (Sandra Enimil): Some strategies you may see from other cultural heritage institutions, libraries, archives, and museums who make content available, content where they do not have permission, and many of them are relying on fair use to be able to make that material available openly online. Many state that they are making the material available for scholarship or educational purposes. One of the things I would highly recommend doing is, whatever information you have about this content (and you may not have much), but you can have language that says "this material may be covered by copyright." Or some variation of this. Language that states people will need to contact the rights holder in order to re-use content beyond the scope of fair use or beyond any other kind of statutory exemption that might allow them to re-use it. You want to make clear you are not the copyright holder, if that is the case. If patrons want to do something besides looking at it on your website, they want to make sure they have permission or they have made a fair use case to make another use of that material.

With AI, as cultural heritage institutions, it is hard to control what people do online with those tools. Some things are beyond our control. If you have language that acknowledges that you don't control copyright and people who access your collections online and make reuses may be

infringing on copyright. You can show that they were informed about what you know about copyright for the material. I would recommend looking at different examples of cultural heritage institutions that have large corpus of content available online and see what language they use to make that material available, and how they talk about copyright and how they talk about re-use and model that language for your use to see how that might work for you.

Additional note: If you have an attorney or a general counsel's office at your institution, you should consult with them on the language you use.

Q: This question isn't specifically related to this grant, but related to copyright. I've often wondered, if we have historic photographs for instance that have entered the public domain can we still legally or ethically charge a use fee or licensing fee for them, even though they're in the public domain? I assume not, but that the user should still credit the image to our institution.

A: (Sandra Enimil): There are a couple things here. Even if this work is still covered by copyright, if you provide a copy to someone and let's say you are a library or archive and you are relying on Section 108 (remember you cannot provide a copy under 108 if you are aware of any possible commercial use by the party making the request) to provide a copy to someone who's made a request, you can charge for that. This can be considered cost recovery, not commercial or a commercial practice. If content is in the public domain, there are no rights attached to it. You can make copies without getting permission or relying on an exemption. You can provide copies without getting permission or relying on an exemption. In terms of charging beyond cost recovery for public domain content, that may fall into an ethical consideration. Regarding citation, there are expected citation practices. Citation moves in tandem with copyright, but is not copyright. There are citation practices that if you found something in an archive, you would cite for the thing itself, with whatever citation style is the norm for your field, and in archival practice, you acknowledge the particular place you accessed this content. There isn't a legal obligation to do that necessarily, but it is an academic/publishing expectation. I think it is also an ethical consideration that you would give credit and acknowledge where an item came from, and that can include the repository or institution you accessed it from.

Again, to charge to make copies of things as cost recovery is not considered commercial activity, necessarily. If you have things in the public domain, you can make shirts, bags, and buttons, and sell them. Whether you consider that to be ethical or not, it's not illegal to do. If you are making bags or shirts of content that is still copyrighted and there's a rights holder that also wants to make shirts and bags, you might impact their ability to make money and exploit the thing that they created. If that person is still alive or their heirs are still alive and they are not selling materials, this might be something where you would contact them to see if you can partner, collaborate and maybe split the costs and profits. If content is still covered by copyright that makes it a little different.

CLIR note: Planning to charge fees for access or use of deliverables paid for by the grant can sometimes be negatively viewed by reviewers so be very careful and strongly

justify your plans in the proposal. It's technically legal and allowable but if there is an expectation of profit, reviewers might wonder why they should prioritize the project.

Q: A producer poet of poetry/jazz live recordings just passed away yesterday. He deeded the physical reels and audiocassettes that contain over 100+ musicians, but he did not secure releases from the performers. We would like to create online access to some of the recordings that have national and area musicians on the tapes - would the rights statement badges work for online access? - I believe the Library of Congress uses disclaimer statements and puts the onus of copyright on the researcher.

A: (Sandra Enimil): The disclaimer statements are what I was referring to earlier. This gets into a risk analysis, as well. There are layers of copyright, especially with music. You have sound recordings, there may be other rights, as well. For institutions interested in making this type of content available, you need to think about what you are going to do if a person wants to take it down, wants to sue you, or wants payment for this material, etc. What is your response to that? Think about what this means for your institution. The Library of Congress is the Library of Congress. They also risk being sued, but it may be less likely that people are going to sue the Library of Congress and it is more likely they will reach out to see if they can work something out. What does your language say of how users can engage with or access this content? Would it make sense for people to come into your space to be able to hear and listen to this content instead of making it available openly online? Would it make sense to do short snippets? To have that available and say, if you want to hear the whole thing, you need to come into our space to be able to engage with the content in its entirety. You want to think about the risk and your institutional mission. What might that mean for your institution?

Note: Also of concern, may be union/non-union performer/performance rights. Also consider if any content is in the public domain and whether there may be an impact from the Music Modernization Act.

Q: We will be digitizing newspapers from 1964-1974. Many of these articles have “work for hire” authors. Does this change how we might want to be thinking about copyright in terms of the “life + author” rule? Follow up --Are newspaper articles in a scrapbook under the same copyright/rights issues?

A: (Sandra Enimil): 1964 -74 falls into that black hole period of where you would want to research to see if that material is still actually covered by copyright. It is possible with a newspaper, unlikely but possible, that they didn't follow whatever formality was in place during that time period, and maybe that work has gone into the public domain. But you would have to do some research to figure out if that's true. If you wanted to scrap that and operate under the assumption that it's still covered by copyright, then you're right to think about whether the articles are considered work for hire. With newspapers, keep in mind that they often carried stories and photographs that were not written or taken by their reporters. They may have wire service articles, that's not work for hire. That is something that they contracted to include in their newspaper. You have to think about whether that article then belongs to the author or to the

organization that article originated from. You have to think about it a little bit more sometimes with newspapers.

And then, if there is content where the newspaper is the rights holder, you're thinking about institutional copyright. That term is different. It is 95 or 120 years. You have to think about when it was created, and whether the institution is considered to be the rights holder.

And then, in terms of newspaper articles in a scrapbook, there's still copyright, but what makes a scrapbook a little bit different is typically with a scrapbook, is someone cutting out different parts and different elements and putting together these different things to tell a particular story, And so sometimes you can look at that and think of it as more of a compilation. And you might want to think about whether fair use might apply to you being able to digitize and make that work available, if that's possible.

Q: Our collection and holding institution is in Canada. Do we need to explicitly refer to the relevant and equivalent sections of the Canadian Copyright Act to the US Copyright Act in our application?

A: (Program Officer): Yes, in your case the [Canadian Copyright Act](#) would apply. Canadian law is based on some of the same principles but is different in meaningful ways (“fair dealing” vs. “fair use”).]

Q: Our collections have a mix of materials that people collected overtime as scholars, i.e. pamphlets or flyers which have various, sometimes unknown creators. If attempts are made to track down the creator, can we claim that we did our due diligence?

A: (Sandra Enimil): Unknown creators or undated works might be considered “orphaned works,” and so it might be difficult to try to figure out who actually created the content or the copyright status of the works. Or maybe, it was published by a certain publishing company, but the publisher has gone out of business, and you haven't found an entity that succeeded them. Or you have a pamphlet that was made for an organization that's now defunct and no organization succeeded them. Who should you reach out to for permission or is there anybody to reach out to? For orphan works, there is a certain element of due diligence that you can try to do, and then you can document that to show you tried to retrace who should be the person to reach out to. Then it becomes a risk analysis to think about. Who would be harmed if we try to use it in these types of ways? Who might come forward to say something about how we're making this re-use?

In some cases with orphan works content, no one is going to come forward. But in some cases it might surface folks who have information about it and that could actually be used to build context and it could be part of relationship building. Or it could turn into something where someone says “that belongs to me,” which could be good or bad. In any of these instances, you need to do research, showing how you've tried to find more information, try to find the

appropriate rights holder, try to find out more information about the content. It helps with those cases.

Additional note: As you would with any content that is still covered by copyright, consider whether your use might be considered fair use. Fair use does not require permission from a rights holder to re-use.