

Copyright Issues, Rights Management, and Licensing Programs for Digital Collections by Historical Institutions

By Fred Poyner IV

Collections serve both the public interest and the institutions of which they are a part. This model offers the most to be gained by both sides. Where the question of how copyright, rights management, and licensing of collections comes into play, there is a great deal of debate, legal application, and decision making that ultimately influence how institutions choose to manage their collections.

In seeking answers to how institutions may best address both their needs and those of their public constituents, a whole host of questions arise. How do collection images presented online offer a visual resource for public audiences without presenting the possibility of infringement on copyright of the original works, or otherwise potential lost revenue, from an institution's image licensing program? Where does an institution make the distinction between what is fair use of collections and what is commercial use of these collections? What constitutes a licensing program for an institution, and how do collections play a role in this activity? How does the advent of the digital format and online mediums affect copyright law for collections, and what rights (if any) do institutions have to their digitized collection content?

CURRENT COPYRIGHT LAW

For starters, an overview of current copyright law as this applies to both “born digital” (i.e., created firsthand with digital technology) and “digitized” content (i.e., a scan or other digital copy of an original work) from history organizations and other sources is helpful. Basically, copyright is a form of protection that applies to any creative work that exists in a tangible, fixed medium. Some examples of creative works include literary publications, artistic works, and musical scores. For purposes of discussion, this definition also applies to materials that are created in a digital form, and stored or transmitted electronically.¹

In the United States, copyright law has its origins in the U.S. Constitution, Article I, Section 8, allowing Congress to provide for the power to define law for both copyright and patents. Current copyright law extends protection for the life of the creator, plus seventy years, for any work created after January 1, 1978. Works created before January 1, 1978 (before the 1976 law went into effect) are protected for a total of ninety-five years from the date of the original copyright.

In 1998, Congress again defined copyright in the Digital Millennium Copyright Act (DMCA, 1998, Title IV), which sought to establish protections for the owners of digitized works on the Web. But protection for digital materials can be complex when it comes to copyright and depends on several factors. For instance, in 2007, Viacom’s copyrighted digital videos began appearing on the video website YouTube. YouTube argued that as long as it removes the videos when asked to by copyright holders, it is not liable for violating copyright under the DMCA. Federal courts are still reviewing the merits of the case, and will decide if YouTube can even use this as a defense. How the materials are accessed—in this case, online—is one of the primary considerations when the question of a copyright violation is raised.²

In a more recent example, the question of how copyright applies is more a question of how the nature of digitized content should be regarded under the law. The *Wall Street Journal* reported that the National Portrait Gallery in London has filed a copyright claim against Wikipedia, for over 3,000 digitized works of art from its collection of Old

Master paintings and other art. Wikipedia’s position is that these works—and derivative digital images of them—are clearly in the Public Domain (i.e., their original copyrights have elapsed) while the Portrait Gallery’s position is the digital versions of its collections are creative works and therefore covered by the museum’s copyright.³

FAIR USE

The question arises here whether Wikipedia’s usage of the digital images comes under fair use, which is a broad area when it comes to copyright, and not defined specifically by the law. However, the 1976 Copyright Act does specify fair use as being “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, [and] is not an infringement of copyright.”

Does Wikipedia’s offering of digitized collections from another institution, via its own website, represent a form of fair use?

Under current case law, the answer would be yes—but not as a result of fair use alone being the deciding factor, as illustrated in an earlier case law example.⁴

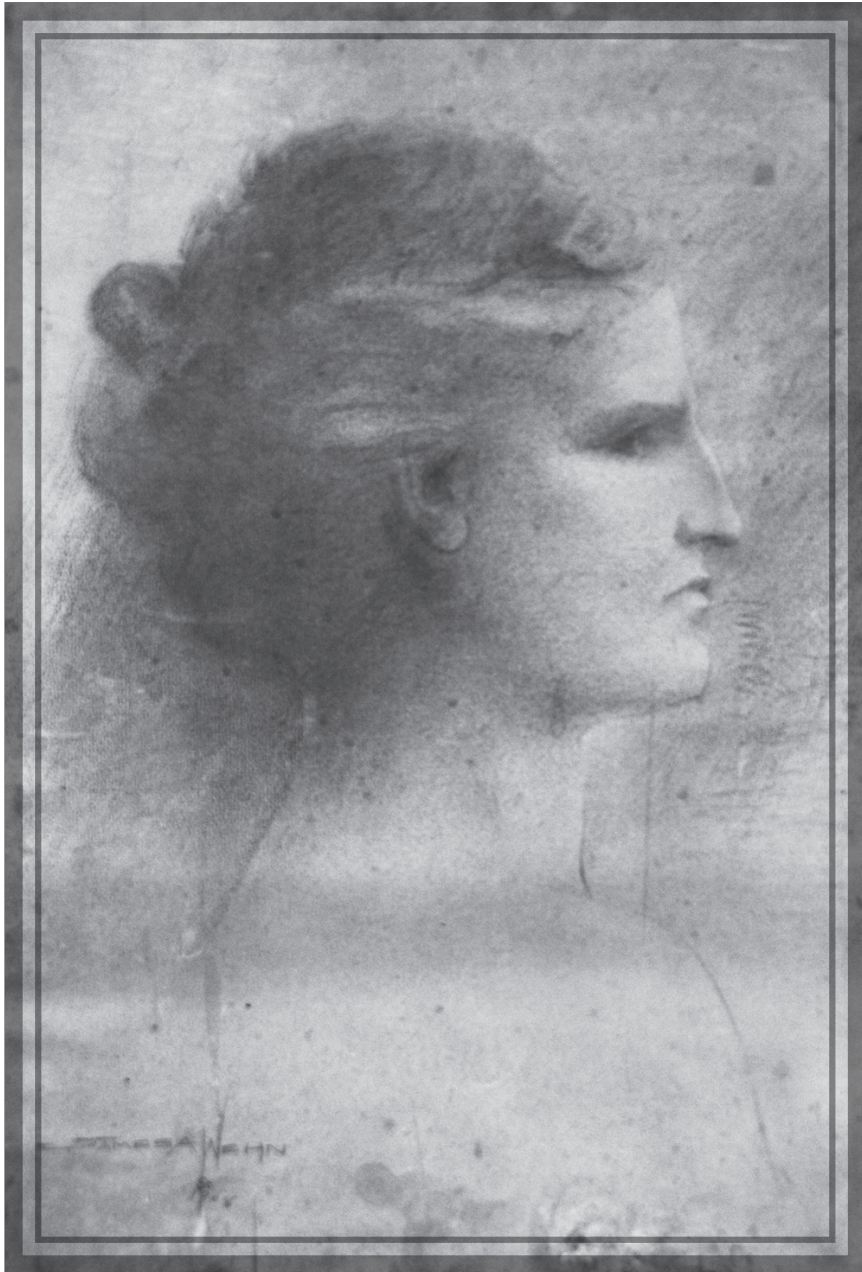
In November 1998, U.S. District Court Judge Lewis A. Kaplan ruled that in the case of Bridgeman Art Library against Corel Draw, 150 digitized artworks that Corel had included on a commercial clip-art CD-ROM

from Bridgeman was not a violation of Bridgeman’s copyright. The judge ruled that since the works were “slavish copies” of public domain works of art, these were not entitled to any copyright protection.⁵

In both the digital image cases cited above, one of the main questions around whether or not something has copyright protection, if it is in a digital medium, is whether the item is a creative work. The National Portrait Gallery would contend that given the photography time and expertise involved, the digital image is a newly created item, even though the original work may be in the Public Domain. Others, such as the Journal’s Felten, would make the distinction that some digital images are not creative and thus should not enjoy the same protection as copyrighted materials.

Comparatively, digital photography for three-dimensional artifacts, artworks, and exhibitions is less open to interpretation, as these types of images are increasingly recognized as being more definitive

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This image is an example of a digitized artwork, where the collection from which it comes is wholly owned and licensed by the institution in terms of both the original artist copyright and property rights to the physical work. *Untitled [Drawing of a Woman]* by James A. Wehn, 1908, Washington State Historical Society, catalog no. 1973.52.761.

as uniquely creative works. There are a multitude of photographers working today with digital cameras, who clearly have a case for having their images covered under copyright protection. The same also holds true for audio and video recordings made using digital technology. Some of today's most vocal copyright advocates are from the music industry, where the copying and sharing of digital music files has been deemed copyright infringement by its commercial nature.

Another factor determining what copyright may apply to digital images and other media is the end use. "Fair use is a case-by-case determination...an activity

may qualify in one instance as fair use, while it would be an infringing activity in another context." To illustrate, if an institution has material in its permanent collection and wishes to offer these as images on its website, current copyright laws allow thumbnails or other digital images of these works online for viewers, even if the original works still have artist copyright in effect. However, while the fair use determination provides the legal basis for this activity, an institution may look to its own mission and standards when offering collections with potential rights issues to the public via digital technology and the Web. For example, the Brooklyn Museum has initiated a copyright clearance project for its entire offering of its art collection online. Their goal is to contact every artist (or artist rights holder) for works in their permanent collection, to ensure any digital images offered via the museum's website are done so without fear of violating the creative copyright of the artists represented. Since January 2008, the museum has cleared 2,500 works in its collection by seeking explicit permission from artists in the form of non-exclusive licenses.⁶

Other institutions in offering digital collections have recognized the impact

of copyright on this activity from the start. The American Heritage Center (AHC) digital collections program began in 2002, and clearance of copyright issues is noted as just one step in the process. In the case of AHC's program, national best practices were developed in partnership with the University of Washington Libraries and the Collaborative Digitization Program for digital imaging, metadata, and digital audio.⁷

The question of fair use can often be open to interpretation, especially where digital versions and the dissemination of these to public audiences are central

to the debate. If the over 3,000 images on Wikipedia were part of a paid subscription service, would the fair use standard still apply?

In examining the boundaries between what constitutes fair use and the reality of how intellectual property has proliferated in terms of availability on the Internet, author Andrew Keen points out that one of the virtues of the Internet—that much of the content is free for the taking—is fundamentally detrimental to the creative process where financial compensation to the creator of content is concerned:

“[W]e’d all obviously love knowledge to be free, it’s given, just as we’d love food or drink or this building to be free. But the reality of our economic system is that nothing is really for free. My biggest critique—not necessarily of Wikipedia, though Wikipedia would be included in this—of the Web 2.0 movement is it undermines the value of intellectual labor. It’s premised on the idea that there is some virtue in giving away one’s intellectual labor without monetary reward.”⁸

Keen raises a valid point, one which to a large degree does shape how an institution manages a licensing program, where fair use of its collections by the public is just one consideration in how much to make accessible, how this access is to be provided, and under what conditions.

Contrasting with the definition of fair use are editorial, transformative, and commercial end uses. Editorial use is similar to fair use in some ways, in that it can be for an academic or educational intention, but there is a component of finance that figures into this kind of use. The end product may be a book, newspaper, or other publication offered for sale, but with an editorial commentary as its basis for production. In transformative use, “if an individual takes a portion of a copyrighted work and uses it for another purpose, in other words transforms it, it is much more likely to be regarded as fair use.”⁹

Of these end uses, commercial use is perhaps the easiest to quantify, and as a result, often the least challenging to identify in cases of copyright infringement. In fact, one of the defining points to determining if fair use applies is the effect of the use on the potential market for or value of the copyrighted work. This is no less the case with digital images and other media. For example, “museum rights departments fulfill many textbook requests, at commercial rates, and would never consider these to be fair uses.”¹⁰

LICENSING COLLECTIONS

Licensing for both born digital and digitized collections can serve as one way in which institutions can make their collections available to the public for a variety of end uses, while at the same time protecting the institution’s rights to the content. It is essential to articulate both property rights and copyrights to collections. One of the primary means of implementing a licensing program is through licensing agreements, which outline the terms and conditions under which someone can receive a digital image or other media from the institution, how the recipient of the content may use the media (if the purpose is beyond fair use), and what rights restrictions, if any, may apply.

While copyright law does provide guidance to help organizations define policies and programs for both presenting digital collections online to increase public accessibility and engaging in a licensing program as a resource for collections support, other considerations and measures can bolster both these areas. The following are offered as 12 Steps or Measures, which either separately or collectively can assist an institution in how it engages in a licensing program or offers collections content in digital formats online:

1

Define what copyrights or rights category a collection has within the institution. There are four categories in this regard that are the most common. The first are collections that are without rights restrictions. These may be in the public domain, either because their copyright has reached the expiration date, or they were declared public domain works by the original creator. Another term often applied to collections with no known copyright restrictions, is the Creative Commons License. In this category, an institution can license digital versions of collections for third-party use, through property rights to the original collections and the use of licensing agreements. Second, there are collections that an institution holds the copyright to for the original works through the donations process, as works for hire

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where the institution gains the copyright as a result of hiring an artist, photographer, or other creator to create digital collections on behalf of the organization. The third category represents those collections which the institution receives into its possession, for which it does not hold the original copyright. The institution has property rights or rights of ownership in these cases, but restrictions as far as existing copyright may still be in effect. Examples commonly include artworks or literary works within seventy years of an artist's death, or collections donated to the institution by third parties who do not hold the original rights. In these cases, museums and organizations can make digital versions available as thumbnails for fair use, and may be able to license digital versions to third parties, depending on whether rights clearances can be obtained by the institution for this purpose. The fourth category are those collections where the institution can address the issue of rights restrictions at the time of the donation, to accommodate both creators/holders of copyright as well as the institution's interests in licensing digital versions of the content for third-party use. While there may be special cases involving collections with rights issues, these four represent the majority of those types an institution will have to define, as far as how these apply to licensing activities and other end uses by the public.

2

Set donation policies and procedures that account for rights management for new incoming collections to the organization. One method for securing rights in this fashion is to include language in an institution's Deed of Gift document for new donations to its collections, specifically stating the donor is transferring rights to the items as part of the donation process, without restrictions on later use. Also, does an institution accept collections encumbered with rights restrictions? For image collections in particular, if these involve people who are not public figures, there may be concerns about whether the photographer has obtained model releases to photograph his or her subjects.

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3

For online digitized collections of images and other media, set safeguards such as low resolution (72 dpi resolution for image files), watermarks, and rights notices that allow public fair use, but restrict accessibility to images for other end uses, unless these can be documented using an institution licensing agreement. Likewise, for online presentation of collections, be sure to include metadata with the image record or image file itself, as far as the creator, creation date, provenance, citation, and other collection information. This step makes the collections more searchable, and gives context to the media.

4

Have a posted rights policy for collections on an institution's website and available for patrons to review during onsite visits, as well as a licensing program schedule of fees with licensing agreement terms for how digital collections may be obtained from the institution.

5

Have copyright restrictions, when these are known to be in effect with respect to digital versions of these collections. When considering licensing digital collections with restrictions for third-party use, advise the end user of the additional rights clearances that are involved, if this involves an artist or rights holder apart from the institution.

Institutions with special collections of photographs, ephemera, books, and archives may restrict use of cameras onsite by researchers, or set guidelines for what materials can and cannot be photographed or scanned digitally, even if the intended purpose is for fair use.

6

Recognize and plan a licensing program around the fact that different kinds of collections content have different kinds of rights restrictions. “The rules of fair use and copyright apply equally to non-textual materials like images, music, speeches, and moving pictures.” Photography with a digital camera, for example, can be copyrighted by the photographer, but if the photograph is of a two-dimensional artwork, there may be additional copyrights restrictions depending on whether or not the original work is still under the artist’s copyright. Music files are another matter, where sound recordings in digital formats are usually covered by an exclusion to the 1976 Copyright Act, which exempted sound recordings from federal law until the year 2067. Until then, state copyright laws established before 1976 are in effect, which did not have copyright expiration dates included, unlike the seventy years past the life of the creator that applied to images.¹¹

7

If an institution offers its collections on public display, or allows access to these for research purposes, the institution should have a policy in place as far as what the public may undertake in the way of digital image capture. Some museums—such as those with art collections—maintain a standard, in what photography in the galleries is not permitted, given the issue of maintaining rights over collections in terms of access. Institutions with special collections

of photographs, ephemera, books, and archives may restrict use of cameras onsite by researchers, or set guidelines for what materials can and cannot be photographed or scanned digitally, even if the intended purpose is for fair use. Because the original is often private property, the owner [institution] is not obligated to give patrons access to make a copy. However, consider a balance when making and enforcing policies that limit the public’s ability to use cameras (or other means) to capture collections. Does the institution want to be in a position where all personal cameras must remain out of a gallery space? Alternatively, can gallery signage be provided, which states photography may be done only for fair use? Can researchers be limited to using cameras for only low resolution formats, or non-image collections content, such as archives? If public access is allowed, how is it managed by the institution? Is there an agreement of some kind that researchers can sign indicating they are only making digital versions of collections for fair use purposes? These are all considerations to balance good relations with public audiences where access is concerned, against how this kind of access affects an institution’s ability to make its own digital versions of collections available through a licensing program.¹²

8

Document both licensing and public requests for digital collections by using a licensing agreement or standardized form for this purpose. The agreement should stipulate what images or other collections are being licensed, the end use (e.g., in a publication, as part of a website, or for research only), any licensing or service fees involved with the request; and the requirements for the terms of use (i.e., an institution’s credit line or citation format must be utilized, the use is for “one-time” use only, the digital media must not be shared or otherwise distributed). Both the institution’s representative or rights manager and the licensor making the request should each sign the agreement.

9

Be prepared to review public requests for digitized collections where the request is stated as fair use but may involve either editorial or commercial use types by their nature. In some cases, fair use may apply, or not, depending on how the collections are to be utilized. Requestors may not

agree with licensing, if this is applicable under an institution's licensing program or services for making digital versions of collections available for a fee. To help address these concerns, an institution may wish to have special discounts for nonprofit organizations, self-published authors or researchers, institutional members, or other categories of patrons, such as teachers or college students. These allowances help the institution to still make the collections available on a licensed basis for non-fair use applications, while continuing to foster goodwill with these audiences by making the collections more widely available.

10

Manage workflow for providing digital collections and digitized content with both public requests and internal requests in mind. The staff of an institution, such as departments for exhibitions, education, marketing, and institutional publications may rely on collections as a resource for programming content, images, and other institution support. However, providing digital collections for in-house uses has its own set of challenges. If one department—such as the one responsible for managing collections—does provide digital images and other media for use by other departments, how are these requests tracked? Are there rights issues to be considered, as far as copyright, if these departments are using collections beyond fair use applications? Are departments sharing digital collections with third parties outside the organization, and if so, how is this activity affecting an institution's licensing program, if at all? All of these considerations bear review, in terms of how they affect both policies and practices.

11

As a condition of third-party licensing, require a copy of the end product to illustrate how the digital collections content was utilized. This can be in the form of a copy of the book or magazine an image appeared in, a live link to a website where the content

is featured, a sample of the advertisement or media product that incorporated the collection material, or a copy of the film or video created on DVD or as a media file. This kind of follow-through helps an institution show how the public is using collections and by what methods: in print, online, as media productions, or through commercial products, to name a few.

12

Investigate and enforce violations of an institution's copyright and property rights, when it comes to collections represented or licensed to the public as digital media. This is a decision each institution has to make on its own, as far as how much time and energy to devote to those cases where someone has utilized collections under copyright or appropriated digital versions of these for purposes that go beyond fair use. Licensing agreements and programs can help address these institutional concerns in advance, by relying on contract law as far as how digital collections are provided for the public's benefit. Likewise, an institution should respect intellectual property of others. "Activities undertaken without permission, such as systematic photocopying of copyrighted works, duplicating videotapes, copying single-user license software, and other undetected and unreported infringement—without a favorable case-by-case fair use analysis—have no place in museum practice."¹³

A key component to any licensing program is an understanding of and appreciation for copyright law and related rights management issues.

CONCLUSION

In the end, an institution must decide how best to offer its digital collections for public use, and how access to these collections and whether a licensing program is defined as part of this access, and reflects the ideals, goals, and missions of the institutions. A key component to any licensing program is an understanding of and appreciation for copyright law and related rights management issues. Determining how the public will have access to digital collections via websites and online archives, as well as how direct interaction with collections for the purpose of digitization is managed as an institution activity are

both considerations in planning and implementing a successful licensing program. Finally, respecting the intent and logic behind the foundation of copyright law—to foster a creative spirit, while also protecting the rights of a creator to his or her works—is a mandatory, guiding principal in offering digital collections for multiuse by the public.

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FURTHER RESOURCES

Copyright Law of the United States of America. Copyright Office, Library of Congress <http://lcweb.loc.gov/copyright/title17/#top>.

Copyright, Intellectual Property Rights, and Licensing Issues. Berkeley Digital Library SunSITE <http://sunsite.berkeley.edu/Copyright/>.

Fair use sample statement webpage, Washington State Historical Society (WSHS) <http://research.washingtonhistory.org/collections/copyright.aspx>.

¹ Don R. Pember and Clay Calvert, *Mass Media Law*, 2009–2010 ed. (New York: McGraw-Hill Higher Education, 2008), 497.

² *Ibid.*, 529.

³ Eric Felten, “Whose Art is It, Anyway?” Opinion: De Gustibus, *The Wall Street Journal* (30 July 2009).

⁴ Daniel J. Cohen and Roy Rosenzweig, *Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web* (Philadelphia: University of Pennsylvania Press, 2006), 210.

⁵ *Ibid.*, 213.

⁶ Michael Shapiro and Brett I. Miller, Morgan, Lewis & Bockius LLP, *A Museum Guide to Copyright and Trademark* (Washington, DC: American Association of Museums, 1999), 9; Brooklyn Museum Navigates Complicated Copyright Issues, www.Clancco.com (14 January 2010): <http://clancco.com/wp/2010/01/14/brooklyn-museum-navigates-complicated-copyright-issues/>.

⁷ Mark Shelstad, “AHC Actively Creating Digital Collections,” *Heritage Highlights* (Spring 2008): 4. Information about best practices can be found at www.bcr.org/dps/cdp/best/digital-imaging-bp.pdf.

⁸ Excerpt courtesy of The Commonwealth Club appearing in *Sky*, “Thought Leader—Wikipedia vs. Encyclopedia,” (December 2008): 54.

⁹ Pember and Calvert, 510.

¹⁰ Shapiro and Brett I. Miller, Morgan, Lewis & Bockius LLP, 9.

¹¹ Cohen and Rosenzweig, 212.

¹² *Ibid.*

¹³ Shapiro and Brett I. Miller, Morgan, Lewis & Bockius LLP, 11.