

ARCHIVAL RESPONSIBILITIES AND ROLES IN COPYRIGHT

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As a framework for today's presentations on privacy, publicity, and intellectual property rights confronting archivists and museum curators, we need to consider the multiple, and sometimes conflicting roles and responsibilities archivists have in relation to the copyright.¹

First, however, I should note what I believe are widely held basic assumptions about the purpose, function, and mission of archives and archivists. As with any other generalization, there may not be complete consensus, but I believe it can be said that the core archival mission and purpose is to be purveyors of recorded knowledge and thereby to ensure that the knowledge created and accumulated by past generations be joined with that of the present and so form a body of knowledge available for all of society to build a better future for the world at large. Archivists preside over the past so that others may examine it; and that we see our mission as the management of the documentary record for use by others who will form their own opinion and picture of the past. We work for the preservation of heritage, the assurance of accountability of institutions and government, effective access to corporate historical assets, and assurance of availability of records that protect individual rights. In pursuing this mission we will encounter copyright issues in many different settings.

As a profession, we are interested in supporting accountability of public agencies and institutions by facilitating citizen and scholarly access to governmental and institutional records. Because we understand that knowledge is cumulative and because we believe that our work

¹An underlying assumption of this paper is that the professional challenges and choices facing museum curators in relation to copyright are either identical or very closely parallel to those facing archivists. Insofar as the author, as a more than 25 year veteran archivist, can speak authoritatively only from the archival perspective, this paper will speak of "archival roles" in relation to copyright and assume that these are comparable to those of museum professionals. If those with greater museum experience take issue with this assumption, they are invited to start by considering the merits of the points made here to the archival setting and then to recast those issues into terms more relevant to museums. Meanwhile, the reader's indulgence is requested for the use of the short-hand term of "archivists" when collectively to curators and documentary specialists.

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must result in an ultimate utility, we know that the content of our archives and manuscript repositories must be copied, quoted, published, performed, broadcast, and otherwise disseminated such as via the Internet. We need to be able to support research work that disseminates historical information using the latest information technology and in fact engage in such dissemination ourselves whenever possible. In this regard, we are faced with a fundamental barrier when we examine the nature and operation of copyright law. That said, the tension between archivists as disseminators and copyright as a monopoly control regime is only one of several contexts in which archivists play a role in copyright. As a way to help understand the important role of intellectual property regimes in the conduct of archival and museum work, we can look to ten separate roles we play in copyright.

1. To be effective purveyors, custodians, or managers of a complete documentary heritage, archivists must work to earn the trust of records creators and copyright owners. We must be able to have their confidence that we are honest brokers to whom they may transfer information and expression and that we will work to make that content available to the public in an open, equal, and free manner. To do this, we need to be knowledgeable about how the extent of, as well as the limits to, the records creators' copyrights in the material we seek to add to our repositories.

2. We are, or we represent, creators and owners, and we often have owners' interests. Nearly all archivists are employees, but even if they are acting only in a volunteer or non-employment capacity they are agents of the institution, organization, or business whose records or cultural resource collections they manage. As such, they have a responsibility to protect the intellectual property rights of the employer although the role of archivists as copyright owners is a quite complex, and sometimes conflicted one. Such institutional intellectual property can

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include: material created to fulfill the core business purpose of the institution (e.g., for a university, courseware; for a hospital, medical records; software code for a “high-tech” business; or hymnals and missionary material for a religious society). Furthermore, archivists and museum curators preside over repositories of historical material that they, or their parent institutions, may wish to exploit. Typically, these materials might include photographs, textual manuscripts, or physical objects that use patterns indicate there may be sufficient interest in the items that the archives might earn some desperately needed cash by selling copies or even charging reproduction permissions fees to their users. Finally, as archivists make information about the content of our holdings available through finding aids, they become authors of copyrightable, and we and our repositories have an interest to control their distribution. At the same time, it would be contrary to a core professional goal if we were to use copyright ownership as a means to limit dissemination of information about our holdings, even more so because our finding aids clearly fit the “promote the progress of science” imperative of the Constitution’s copyright clause.

3. We have a responsibility to facilitate user access to material. Once the finding aids and our reference services have enabled users to identify and connect with specific documents relevant to their topic, we need to be able to assist in all legally allowed copying so that researchers can exploit information, evidence, ideas, and expression and use it for their research goals in the pursuit of new knowledge. For on-site users, this may be as simple as note-taking, an old-fashioned means of copying. But for remote users, this activity inevitably involves photocopying or other means of reproduction. When the work is not textual but musical, pictorial, or audio-visual, not only is the copying methodology more complex, but also the copyright issues are more daunting because these works have been given a privileged status

through successive amendments to the copyright law.

4. To highlight our collections and to educate the public, we may want to present documents to the public ourselves. While direct publication requires us to follow the same procedures as users, a more common approach is to place them on exhibit. Clearly, the “first sale” rights outlined in § 109 (c) support this educational activity for *in situ* “real” exhibits. However, if one wants to take an exhibit to a broader audience via web presentation or even simply conventional exhibit catalogs, there are further complications and restrictions stemming from the copyright owner’s exclusive rights under § 106. Similar problems can arise if we want to prepare print material such as a guide or catalog because printing thumbnails in a catalog are not ostensibly part of the exemption which allows display meaning we either have to obtain permission or find another supporting exemption.

5. In the grand enterprise in which we are engaged—promoting the expansion of knowledge and supporting the accountability of society’s institutions—archivists are highly dependent on the work of others to take what our repositories hold and transform it into a form for the public’s use. That is, we must engage users to do the research and to take archival texts and place them into new narratives and to assist them in navigating the obstacles of copyright. As important as it is to follow the law so we are not guilty of contributory infringement, we also have a responsibility, given the nature of the archival mission and the constitutional foundation of copyright, to assist these users in knowing how they can keep from being paralyzed by the limits of copyright and instead make responsible, risk-management based decisions. For example, we must be able to guide them to tools that say when a work enters the public domain

or explain how they can assess if their use could be defended as a “fair use.”²

6. One of the most signal of archival functions is that of preservation. Even most members of the general public acknowledge that archivists are involved in several technical processes to enable the content of historical documents to survive and remain accessible into the future. For both conventional paper as well as photographic, audio, and audio-visual materials, a fundamental preservation tool is copying, sometimes called “reformatting.” This activity can range from preservation photocopying, to making photographic interpositives and copy negatives from nitrate or diacetate film, microfilming, and video transfers. For “born-digital” materials, such reformatting can be a necessary, perhaps even routine, part of data migration as either storage media or software access systems approach obsolescence. Here too, on first glance copyright’s exclusive rights appear to preclude legally making such copies. But here too, the law also contains exceptions that allow certain kinds of preservation copying—indeed hard-fought exceptions by scholars, librarians, and archivists in the 1960s and 1970s. That said, these exceptions have their limits and do not fully address significant problems involved in ensuring future accessibility of digital works; moreover, when digital materials have built-in access controls provided by Digital Rights Management systems (DRMs), the recent addition of Chapter 12 provisions to the Copyright law creates criminal penalties for steps that are necessary for basic preservation of such records. Thus, archivists need to understand how our preservation responsibilities impinge on copyrights, how the law anticipates this need and provides some flexibility, but also what the law still does not allow, especially for digital materials.

²For example see: “Fair Use Checklist,” Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management, (Indianapolis: Indiana University Copyright Management Center, 1999, 2001): <http://www.copyright.iupui.edu/checklist.htm>. Peter Hirtle, “Recent Changes to the Copyright Law.” *Archival Outlook*. (January-February 1999). 4 page insert. [Includes a “works pass into public domain chart” also available at: <http://cidc.library.cornell.edu/copyright/>]

7. As players in the larger system of cultural property, public education, and intellectual property rights, archivists often must play the role of advisors and teachers to other players on the nature of copyright, its limits, and its allowances. We need to be able to inform authors and donors of what rights copyright gives them in the collections we solicit, as well as what rights are part of other legal structures. We need to inform our own institutional superiors and administrators what limits copyright places on programs and services they may wish us to provide. We must be able to inform researchers and users of archives what rights they do and do not have to make fair use and other copies of copyrighted works, as well as how they might distinguish between copyrighted and non-copyrightable matters. Finally, we must inform publishers, producers, and entrepreneurs of what we can and cannot grant permission for when they are bringing a project to completion.

8. An especially important role for the archivist is that we must keep copyright within its place and guard against its rules being used in other information areas. That is, in virtually all of the above noted roles, we have to understand how the monopoly of copyright, which extends more than three generations after death, does not extend to other areas of law or policy affecting the access to, and use of, copyrighted material. The rules of copyright should not be allowed to support the distinctly separate areas of privacy and publicity rights, patent rights, or trademarks and trade secrets. Each of these areas have their own separate domains of law and need not rely on copyright law for support. Likewise, we need to remember that the monopoly rights of copyright operate within the same general domain as the First Amendment. True, in *Eldred* the Supreme Court's reminded us that copyright concerns limits on expression, not limits on speech, thus to their view, copyright does not inherently limit free speech. Still, the fact is that creative works by today's and tomorrow's authors inevitably need to be constructed of elements from

earlier works, and the scope of what can be copyrighted has become ever more particular. In a digital age, as copyright controls are made ever tighter to fill technological gaps, the prospect exists that such plugs can impede creative speech, not just protect copyrighted expression. As we manage our documentary resources, provide guidance to researchers, and consider policy issues of common interest to the archival profession, we need to be attentive to how the combination of information technology and commercial intellectual property interests can impact, in the proper sense, citizen rights of freedom of speech.

9. When these several roles are examined together, it becomes clear that archivists have a unique role as explicators and monitors of the special issues that arise with unpublished materials works, which are generally “orphaned works” with little or no commercial value. That is, our inherent mission means we are have to attend to orphaned works—those documents that have proceeded through a life cycle out of current use and commercial value, or at least out of the use and value for which they were created, and have been assessed to have some potential long-term value generally for secondary purposes and third party use. In the large arena of public discussion of copyright issues and its inevitable perpetual tension between the interests of users and the interests of authors and owners, no other group is so definitionally charged with responsibility for issues relating to copyright over the continuum of time. Most certainly, we have this concern out of our need to support our users, but we are in the unique Janus-like position of simultaneously understanding how important copyright is for authors as well. We are able to see copyright in the context of time and able to shape institutional practice to serve the interests of both authors and users.

10. Finally, archivists have a role to play as students of copyright issues. We have an obligation to educate ourselves about copyright law, issues affecting our acquisitions, our ability

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to make material accessible and enduring, as well as our responsibilities to both creators and users. Without an understanding of these issues, we will be unable to achieve our mission and fulfill our responsibility to society. The presentations of today's speakers are a first step in that direction.