Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web

Owning the Past? The Digital Historian's Guide to Copyright and Intellectual Property

Introduction

In this chapter you will learn about:

- How copyright law is an ever-evolving set of principles, balancing the rights of producers and consumers, that must be actively engaged by historians
- The history of copyright law, and where it has left us today
- How the application of copyright can differ on the web from the print world
- Your legal rights—and ethical obligations—as both a producer and consumer of intellectual property
- Which written materials, images, audio, and video you can use on your website, and when

nce there was a real estate guide called "How to Buy and Sell a House." The author divided the book in two. From one end, he told you about purchasing a house. But if you flipped it over and began from the other side, the writer gave advice to sellers. The buying half warned you against the tricky devices that rapacious sellers might try. Simultaneously, he cautioned those reading the selling chapters about the underhanded behavior of shady buyers.

We could write a guide to copyright that similarly viewed the world as a Hobbesian marketplace of each person out for himself or herself. Those who create historical materials on the web are, indeed, likely to find themselves on both sides of the legal and ethical fence—creating intellectual property that they want to "protect" and "using" the intellectual property of others. Of course, some readers of this book will find themselves more often in one role than the other—museum curators, for example, probably worry more about protecting intellectual property than teachers mounting course websites.[1] But few people do digital history without both making a creative contribution of their own and benefiting from the creativity of others.

We prefer to view the web as a "commons," or a shared storehouse of human creations, rather than a "marketplace," and we align ourselves with the broad movement of lawyers and scholars, like Stanford University law professor Lawrence Lessig, who have promoted the notion of a "Creative Commons."[2] In this, we advocate a balance between the rights and needs of the "owners" and "users" of intellectual property, but a balance that favors the enlargement of the "public domain"—taken here to mean not just the formal realm of works with no legal copyright protection, but also more broadly the arena defined by fair use and the sharing and dissemination of ideas and creativity. To see intellectual work entirely as "property" undercuts the norms of sharing and collaboration that are integral to a field like history.

Such noble sentiments inevitably collide with the realities of the world. You may follow an ethic of community and sharing, but that doesn't help you if you come upon others guided by the impulses of Hobbes's state of nature. To prepare for that collision, you need to understand the regime of laws and courts, where such disputes sometimes get resolved. For historians, this encounter with the law often proves unsettling. They confront confusing rules and regulations that they seemingly must follow at the risk of lawsuits and fines. Historians, who know that pronouncements by fellow scholars are mere interpretations, sometimes mistakenly (and unwisely) treat copyright assertions by lawyers and other gatekeepers (e.g., the copyright officers of their universities or their journal and book publishers) as unvarnished truth. But copyright law, like history, is subject to conflicting interpretations as well as sharp contention between advocates of the rights of the owners of intellectual property and those seeking to enlarge the public domain.

To take a seemingly neutral position of deferential compliance with all copyright "rules" accepts one side in that argument and diminishes the intellectual commons. We believe that a more aggressive assertion of the rights and claims of that commons, when followed sensibly, does not entail excessive risk. In taking this stance, we depart from the conventional wisdom of dozens of copyright guides, whose favorite phrases are "do not," "ask permission," and "err on the side of caution."[3] Of course, we hasten to add (cautiously) that we are not lawyers, and we are not offering legal advice. Historians who go online will need to assess their own tolerance for risk and how they want to balance these competing claims. We encourage all historians, however, to explore how their actions, both online and off, might increase the common storehouse of documents and knowledge out of which much of our individual and collective work arises.

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[1] Some of the tensions between museums, which are worried about protecting revenue from reproduction and rights fees, and other cultural workers are evident in David Green, *The NINCH Copyright and Fair Use Town Meetings 2000 Report* (Washington, D.C.: NINCH, 2001), 11–12. We are greatly indebted to Rebecca Tushnet and Peter Jaszi for their patient and invaluable help on the complex legal issues raised by this chapter, although neither is responsible for our interpretations.

[2] For Lessig, see *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004). Lessig's important book appeared after our book was written, but it provides a lucid discussion of many of the issues covered in this chapter.

[3] See, for example, Brad Templeton, *Ten Big Myths About Copyright Explained*, ↪link 7.3a; Linda Starr, "Part 2: Is Fair Use a License to Steal?" *Education World*, ↪link 7.3b.

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A Brief History of Copyright

The idea of a balance between the rights of the creators of intellectual property and the social and cultural claims of sharing and community finds support in the early history of American copyright law. Noah Webster, who was trying to protect the revenues flowing from his best-selling *American Spelling Book*, successfully lobbied the Connecticut State Legislature to pass the new nation's first copyright law in 1783. It gave authors control over the printing and publishing of their work for fourteen years with the option of a fourteen-year renewal—the same time period embodied in the Statute of Anne, the 1710 British law that set many of the terms for subsequent Anglo-American copyright legislation. The Connecticut law balanced the rights of authors with the claims of the public domain by requiring authors to "furnish the Public with sufficient Editions," which meant that those benefiting from the law could not restrict access to their work.[4]

Article 1, Section 8, of the U.S. Constitution most fully embodies this effort to balance public good and private reward. It grants Congress the power to give "authors and inventors the exclusive right to their respective writings and discoveries," while also specifying that such rights be granted only "for limited terms" and with the purpose of promoting "the progress of science and the useful arts." It is, indeed, the only section of the original Constitution that states a purpose behind the provision. The 1790 U.S. copyright law followed this by limiting copyright to two fourteen-year terms, requiring deposit of copies, and identifying its larger purpose with the title: "An Act for the encouragement of learning."[5]

The new law did not, however, satisfy Webster. Like the Disney Corporation two centuries later, he wanted to keep the healthy revenue stream flowing from his blue-backed speller as long as possible. He and his allies failed to win perpetual copyright (a clear breach of the U.S. Constitution) but did get a series of extensions—an indication that much of the subsequent history of American copyright would increase the rights of authors and owners and decrease the claims of the general public. An 1802 amendment extended the law to cover print illustrations. The 1831 law doubled the initial copyright period to twenty-eight years (with a total possible term now of forty-two years) and added a clause allowing the widows and children of authors to file for renewal—a provision in tension with the notion that copyrights (and patents) are an incentive to the creators of new work.[6]

Nineteenth-century court decisions vacillated between supporting and restricting the rights of authors. In the 1834 case *Wheaton v. Peters*, the U.S. Supreme Court embraced the Constitution's more limited view of copyright and rejected the idea that it could be a perpetual right. But seven years later, it ruled in

Folsom v. Marsh that the Rev. Charles Upham, the author of a two-volume *Life of Washington,* had infringed the copyright of Jared Sparks's twelve-volume *The Writings of George Washington* by copying 255 pages of Washington letters from the longer work. Justice William Story ruled against Upham even though he had used only 3.8 percent of Sparks's work and the Washington papers were public, rather than private, property. In spite of Story's ruling, *Folsom* would later help to establish the concept of "fair use," the idea that limited borrowing from the work of others was acceptable when that borrowing produces something new and useful.[7] As we shall see, digital historians have many reasons to hold the principle of "fair use" close to their hearts.

Despite *Folsom*, American authors did not view the courts as their friend. Justice Robert Grier ruled against Harriet Beecher Stowe in her suit over an unauthorized German translation of *Uncle Tom's Cabin* in 1853. But seventeen years later, Congress revised the copyright law to give authors rights over translations and dramatic adaptations—a change that implicitly protected "ideas" and not just the specific expression of those ideas, as Grier had ruled and as copyright law formally insisted. Even more important was the passage in 1891 of the International Copyright Treaty. To the consternation of British writers like Charles Dickens, the absence of such a treaty had meant that American publishers routinely pirated English authors in cheap editions that paid them no royalties, and over time a growing number of American writers joined the campaign for international copyright.[8]

But, in the new century, the authors—now led by Mark Twain (who had become a fierce defender of authors' rights after his own works were pirated in Canada and Britain)—pressed for more. In 1906, Twain testified before Congress on behalf of a bill to increase the duration of copyright to the life of the author plus fifty years. The bill failed, but a compromise measure in 1909 broadened the scope of copyright to include all works of authorship and doubled the renewal period from fourteen to twenty-eight years. As the legal scholar Jessica Litman points out, the 1909 law emerged out of negotiations among "interested parties," especially "the beneficiaries of rights granted by existing copyright statutes." Missing from these negotiations was "the amorphous 'public,'" whose "interest in copyright and copyrighted works was too varied and complex to be amenable to interest-group championship" and the "push and shove among opposing industry representatives."[9] This dynamic of a vocal minority drowning out a voiceless majority would unfortunately persist for the remainder of the twentieth century.

Thus interest group lobbying also shaped the next major copyright law, which Congress passed in 1976 and went into effect two years later. It extended copyright protection in precisely the way Twain had advocated seven decades earlier—protecting works for the life of the author plus fifty years and works for hire for seventy-five years. For historians, perhaps the most important change was that it extended the length of copyrights granted much earlier for an additional nineteen years. A book published in 1923, renewed in 1951, and scheduled to come into the public domain in 1979, now had its copyright extended until 1998. But the 1976 law did give the public something in return—an enumeration of the "fair use" doctrine, which is a crucial bulwark for your work as a digital historian.[10]

But the narrowing of the public domain through the copyright law continued in 1998. On October 27, President Bill Clinton signed into law the Sonny Bono Copyright Term Extension Act (CTEA), which gave an additional twenty years of copyright protection to works published before 1978. The 1923 works whose copyright life had been extended from 1979 to 1998 by the 1976 law were now given protection for a total of *ninety-five years*—until 2018. On January 1, 1998, such classic works as T. S. Eliot's*The Waste Land* and Sinclair Lewis's *Babbitt* entered the public domain where they could be shared freely, published online, and made the subject of derivative works like plays and films. But a set of equally important works—novels by F. Scott Fitzgerald, poems by Edna St. Vincent Millay, and films by Cecil B. DeMille—scheduled to enter the public domain the following New Year's Day will now remain outside of it until 2018.[11]

In addition, the copyright term of life plus fifty years that Twain had boldly sought in the early part of the century now became life plus seventy years. Twain believed that the law should protect an author's children, but Congress should "let the grandchildren take care of themselves." Under the CTEA, grandchildren—and likely a few more generations—will benefit financially from their ancestor's creativity. The copyright of Mark Twain's *Autobiography*, which was posthumously published in 1924, will outlive his own granddaughter (who died in 1966) by fifty-three years.[12]

The bad news for the public domain that began on October 27, 1998, continued the next day when President Clinton signed another sweeping revision of the copyright law, the Digital Millennium Copyright Act (DMCA). Among other provisions, the Act bans circumventing or tampering with the copyright protection and encryption devices commonplace in software, DVDs, and CDs. The DMCA thus remarkably grants corporations the right to limit how we use digital products even after we have purchased them. As a result, we can't read an electronic book purchased for a particular reading device on some other device; nor can we easily play a DVD we own on a Linux computer. The DMCA especially poses problems for historians who work with film. It will, for example, restrict their ability to play film clips as part of an in-person or online history course because they might need to circumvent the encryption on a DVD (emerging as the standard format for films) in order to get the clips. Similarly, they cannot copy a section of a borrowed DVD for later study in the same way that they can photocopy a chapter of a book. Ideally, copyright law establishes a balance between rights holders and rights users—a give-and-take that rewards authorship but that also fosters the dissemination of knowledge for educational and academic purposes. As with almost all of the copyright legislation of the past two centuries, the DMCA tips the legal balance toward rights holders, particularly corporate ones.[13]

The same is true of two key cases—*Basic Books, Inc. v. Kinko's Graphic Corp*. (1991) and *Princeton University Press v. Michigan Document Services* (1996)—that ruled against the once-common practice of commercial copy shops making course packs for students. In theory, the Kinko's case, as a U.S. District Court decision, is not binding on other courts. Similarly, the U.S. Supreme Court has not affirmed the Princeton decision and five of the Circuit Court judges dissented.[14] Moreover, the cases involve only commercial entities and not scholars and teachers working in an academic setting; it is not clear, for example, that a similar case could be won against a university copy shop selling copies at cost. Unfortunately, university copyright policies, which determine what you can put in your course packet and which tend to be shaped by university general counsels who are often not familiar with intellectual property law and are focused on risk to the university, generally follow these decisions closely. These decisions may not be *the* law, but they may still be the law in your university and, as most instructors know, they have significantly raised the price of the course packets we assign to our students.

In 1991, however, the U.S. Supreme Court ruled in a case that affirmed the principle that the copyright law protects the public domain. In *Feist Publications, Inc. v. Rural Telephone Co*., it decreed that the white pages of the phone book lack the originality to merit copyright protection. The conclusion may seem self-evident. Few people choose the phone book for their leisure reading. But previously the courts had held that the "sweat of the brow" invested in such compilations made them eligible for copyright protection even though the contents were factual and organized in an obvious way and copyright doesn't protect facts.[15] This decision significantly affects those creating online historical databases—like the Ellis Island passenger lists. The facts revealed in the databases are not protected by copyright no matter how much sweat from however many brows went into compiling and organizing them. The decision also affects other forms of historical work because history often involves considerable labor directed at uncovering facts. A film company that based a major motion picture on your scholarly monograph could argue that it doesn't need your permission because it worked from the "facts" that you uncovered.

A dozen years later, however, the U.S. Supreme Court ruled for copyright holders through a 7-2 decision

in the case of *Eldred v. Ashcroft*. Eric Eldred, the lead plaintiff, was the organizer of the Eldritch Press website dedicated to providing free books by such authors as Nathaniel Hawthorne and Robert Frost. Eldred sued to overturn the CTEA on the grounds that the twenty-year extension subverted the constitutional provision of "limited" copyright terms and did nothing to promote new creativity. Writing for the majority, Justice Ruth Bader Ginsburg maintained, "the copyright clause empowers Congress to determine the intellectual property regimes that, over all, in that body's judgment, will serve the ends of the clause."[16] In other words, the vagueness of the original section of the Constitution on copyright—granting Congress the right to give authors a "limited term" of ownership over their work—has now subverted the explicit intent of that clause.

Nevertheless, even the majority conceded that the term extension could be seen as "arguably unwise." A new court could reverse it, and thus the future of the copyright law remains a matter of active contention. Historians therefore need to recognize that there is no fixed body of rules, but rather a shifting terrain of interpretations of the law. Even more, they need to be active participants in shaping the copyright landscape to make it more receptive to the sharing of ideas and expressions.

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[4] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), 37–44; Edward Samuels, *The Illustrated Story of Copyright* (New York: Thomas Dunne Books, 2000), 12–13. Sometimes the Statute of Anne is dated to 1709—the date on the law itself. At the time of the law, however, the new year began on March 25, meaning that, based on the 1752 calendar (which reinstituted January 1 as the start of the new year), it was actually 1710. For more on history of copyright, see also Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, Tenn.: Vanderbilt University Press, 1968); L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens: University of Georgia Press, 1991); William W. Fisher, III, "The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States," ↪link 7.4. Massachusetts Bay Colony enacted a copyright law as early as 1672; the Connecticut law was the first passed after the Revolution. Our brief summary of copyright history is particularly indebted to Vaidhyanathan's fine book.

[5]Vaidhyanathan, *Copyrights and Copywrongs*, 45; Samuels, *The Illustrated Story of Copyright*, 14–15.

[6] Vaidhyanathan, *Copyrights and Copywrongs*, 45; *Circular 1a: United States Copyright Office: A Brief History and Overview* (Washington, D.C.: U.S. Copyright Office, 2005), ↪link 7.6.

[7] Vaidhyanathan, *Copyrights and Copywrongs*, 46–47; L. Ray Patterson, "*Folsom v. Marsh* and Its Legacy," *Journal of Intellectual Property Law* 5.2 (Spring 1998): 431–52. It can be argued that the Folsom decision has been misunderstood as establishing a fair use defense and that Justice Story did not use "fair use" in a modern sense. But, regardless of the original intent, the case has been used by courts to establish fair use.

[8] Vaidhyanathan, *Copyrights and Copywrongs*, 50–55. The rationale for allowing the translation was that the translator had produced a new and useful work rather than simply pirating it. The domestic manufacturing clause, which mandated that foreign works had to be produced from plates made in the United States if they were to receive copyright protection and which remained in effect until relatively late in the twentieth century, limited the degree to which foreign authors actually benefited from the treaty. Over time, however, the expense of creating plates in the United States diminished. On this, see Bill Colitre, "House Report No. 94-1476," *The Hypertext Annotated Title 17*, ↪link 7.8.

[9] Vaidhyanathan, *Copyrights and Copywrongs*, 35–80 (quote on p. 79); Jessica Litman, "Copyright As Myth," *University of Pittsburgh Law Review* (Fall 1991), 36, 51–52.

[10] Patterson argues that the law actually narrowed fair use by defining it because in specifying the terms of fair use for the first time, the law ruled out broader possible interpretations. But others maintain that the provisions are broad and not closely defined, and hence offer significant protection. Patterson, "*Folsom v. Marsh* and Its Legacy," 450.

[11] Jonathan D. Salant, "Disney Locks in Copyrights to Mickey, Goofy and Gang," *San Francisco Chronicle*, 17 October 1998, ↪link 7.11a; Dennis S. Karjala, "Some Famous Works and Year of First Publication (Subverted Public Domain List)," *Value of the Public Domain*, ↪link 7.11b. Digital archives are, however, allowed to put work online in the final twenty years of copyright if that work is not being commercially exploited. But the law does not establish a procedure for establishing whether or not a work falls into that category, and it does not apply to musical works and pictorial, graphic and sculptural works. Senator Orrin Hatch was actually the author of the CTEA; Bono's name was attached to the legislation after his death.

[12] Vaidhyanathan, *Copyrights and Copywrongs*, 79; "Nina Clemens Gabrilowitsch, 55, Twain's Last Direct Heir, Dies," *New York Times*, 19 January 1966, ↪link 7.12. The American Cancer Society now holds the Twain copyrights.

[13] Jonathan Band, "Digital Millennium Copyright Act Guide," *American Library Association*, ↪link 7.13a; *The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary* (Washington, D.C.: U.S. Copyright Office, 1998), ↪link 7.13b. For strong warnings on threat of DMCA, see Siva Vaidhyanathan, "The State of Copyright Activism," *First Monday* 9.4 (April 2004), ↪link 7.13c. For a good discussion of the implications for historians of DMCA (and other copyright provisions), see Gerald Herman, "Roundtable: Intellectual Property and the Historian in the New Millennium," *Public Historian* 26.2 (Spring 2004): 23-48.

[14] Richard Stim, *Getting Permission: How to License and Clear Copyrighted Material Online and Off* (Berkeley, Calif.: Nolo, 2001), 7/2.

[15] See Board of Regents of the University System of Georgia Office of Legal Affairs, *Regents Guide to Understanding Copyright & Educational Fair Use*, 37 (hereafter *Regents Guide*); Stephen Fishman, *The Copyright Handbook: How to Protect and Use Written Work*, 2nd ed. (Berkeley, Calif.: Nolo, 1994), 14/11–15. Another recent case that suggests that factual compilations lack the "minimal creativity" needed for copyright is *Matthew Bender & Co. v. West Publishing Co.,* 158 F.3d 674 (2d Cir. 1998), ↪link 7.15a. The European Union, however, has enacted a "database right" that might protect such compilations. Randal C. Picker and Alan Charles Raul, "European Union Database Developments: An Update on the Status of Intellectual Property Protections for Factual Compilations," *Cyberlaw@Sidley*, ↪link 7.15b; Jordan M. Blanke, "Vincent Van Gogh, 'Sweat of the Brow,' and Database Protection," *American Business Law Journal* 39 (Summer 2002).

[16] Linda Greenhouse, "The Supreme Court; Protected Works; 20-Year Extension of Existing Copyrights Is Upheld," *New York Times*, 16 January 2003; Amy Harmon, "The Supreme Court: The Context; A Corporate Victory, But One That Raises Public Consciousness," *New York Times*, 16 January 2003. For detailed coverage, see ↪link 7.16.

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Copyright and the Online Historian: Is the Web Different?

Digital historians want to know whether it makes any difference that they are working online. Do they have more or fewer rights or liabilities? The simple answer is that the law is the law; there is not a different copyright law in cyberspace. Yet, in practice, the answer is not so simple. In large and small ways, the web has reconfigured the legal landscape for historians.

We can see this by returning to some of the intrinsic features of digital history we discussed in the Introduction. The vast *capacity* of digital media potentially increases the scale of the legal issues exponentially. A typical historian publishing a book might deal with a handful of picture permissions and perhaps one or two requests to quote from protected material. By contrast, the CD-ROM *Who Built America? From the Great War of 1914 to the Dawn of the Atomic Age in 1946* that the Center for History and New Media developed in collaboration with the American Social History Project required investigating or negotiating the rights to more than nine hundred pictures, texts, sounds, and motion pictures.[17] The cost of simply negotiating and tracking those rights—especially paying for the time of the person doing the work—may have exceeded the $36,000 we paid in actual permissions. But capacity affects rights issues in a second way; one of the tests for "fair use" involves the "extent" of protected work that is used. Given the ease with which "more" can be incorporated into a digital work, the digital historian risks crossing one of the fair use boundaries. If the Rev. Charles Upham had published a digital life of Washington, he likely would have used more than 3.8 percent of the documents in Sparks's work.

Another advantage of digital media—the *flexibility* that allows you to combine sound, moving pictures, and images with text—poses a major new challenge to digital historians. The rights for images, sound, and moving images are often more complex and more expensive than for text. For example, "quoting" a photo is much harder than quoting a paragraph from Hemingway; you pretty much need the whole thing to make any sense of most images. Multimedia historians will probably spend a great deal more time fretting about legal issues than their text-based counterparts. The *manipulability* of digital data creates another, less common legal issue. You can edit digital images, sounds, and moving pictures much more easily than their analog counterparts. But what if their creators or owners don't want them to be altered? Such concerns are further multiplied by the web's most obvious advantage—its global *accessibility*. Photocopying Allen Ginsberg's 1956 poem "Howl" and giving it to your students may violate the rights of the Allen Ginsberg Trust. But an attorney from the trust is unlikely to be sitting in your classroom. Post the poem on your course website and that attorney can find the violation in two seconds.[18]

If you mistakenly use "Howl" without permission in a print classroom anthology, the publisher is likely to have the happy responsibility of dealing with the lawyers (although you would have probably signed a contract in which you guaranteed that you did not infringe anyone's rights). The openness of the web—the ability of authors to publish themselves easily—means that you hold an even greater share of the legal responsibility. But self-publishing brings some advantages. Authors sometimes mistakenly assume

that publishers share their same interests. But publishers don't want to get sued. And, as the owners of substantial intellectual property themselves, they generally identify with the holders of copyright rather than its users. When you publish yourself on the web, you have a publisher who identifies with you and understands your interests.

You also have a publisher who can respond quickly to any legal problems. Here it turns out that one of the key weaknesses of the web—its lack of *durability* or fixity—makes life easier for digital historians. Publishers avoid risk on copyright, in part because the remedies to copyright violations can be ruinous. Our colleague Lawrence Levine published a book with Oxford University Press, which neglected to get permission for the cover photo by Robert Frank. When the press belatedly contacted Frank's agent, he adamantly refused to grant permission and Oxford had to destroy the books and reprint them with a new cover photo.[19] If the photograph had simply graced your website's home page, it could have been removed in five minutes and with minimal expense. To be sure, this does not relieve you of all legal liability. But it might make a copyright owner willing to drop the matter rather than spend a lot of money on a lawsuit. The ease with which you can remedy inadvertent or questionable copyright violations on the web is the most important reason why historians should not worry excessively about many of the issues we discuss here.

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[17] *Who Built America? From the Great War of 1914 to the Dawn of the Atomic Age in 1946*, a multimedia CD-ROM (New York: Worth Publishers, 2000), produced by ASHP in collaboration with CHNM.

[18] Linda Starr, "Part 5: District Liability and Teaching Responsibility," *Education World*, ↪link 7.18. Whether this copying actually violates fair use would, however, depend on various factors, including whether it was done once and at the last minute rather than repeatedly and with enough advance planning so that permission could have been obtained.

[19] Lawrence Levine, email to Roy Rosenzweig, 3 January 2004. For another recent case, where a publisher had to withdraw a published book from circulation because of alleged copyright infringement, see Richard Byrne, "Silent Treatment: A Copyright Battle Kills an Anthology of Essays About the Composer Rebecca Clarke," *Chronicle of Higher Education* (16 July 2004), ↪link 7.19.

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Protecting Your Intellectual Property

or an entirely different set of reasons, we don't think historians should spend much time agonizing about how to protect their own intellectual property rights. Recent laws and court decisions have significantly increased the protection for creators of intellectual property. You do not have to do anything to make yourself eligible for the protection of the copyright law. Contrary to popular belief, you no longer (since 1989) need to place a copyright notice on your work.[20]

If so, why does anyone bother? Well, for one thing, placing a copyright notification on your website isn't much bother. You simply write " © Charles Beard 2003" on the bottom of your home page. (If you can't get your software to create the symbol, you could write "Copyright" or "Copr." but not "(c)".) And for this minimal effort, you remind readers that you care about the rights to your intellectual property.[21] We recommend including a copyright notice but not one of those overly broad warnings that proclaims, "no part of this work may be used or reproduced in any manner whatsoever without express permission." Such notices go well beyond the copyright law, offer no additional protection, and implicitly challenge the doctrine of "fair use" that digital historians should cherish. Good copyright citizens—cooperative residents of the digital commons—don't try to grab rights they don't have. (Some, as we will discuss, even avoid claiming all of the rights to which they are entitled.) Bill Gates's online digital image repository, Corbis, includes copyright notices on thousands of public domain images. "These claims," says attorney Stephen Fishman, "are probably spurious where the digital copy is an exact or 'slavish' copy of the original photo." Some websites even slap copyright notices on famous public domain texts. At the bottom of a copy of Abraham Lincoln's Gettysburg Address, the *Atlantic Monthly* website adds the following: "Copyright © 1999 by The Atlantic Monthly Company. All rights reserved."[22]

Figure 41: Corbis, a commercial digital image repository, puts copyright notices (and digital watermarks) on thousands of public domain images such as dorothea lange's famous Migrant Mother photo, which was taken as part of the government-sponsored FSA photography project and is available for free through the Library of Congress website.

Even the most carefully placed or most threateningly worded copyright notice does not protect you if the work does not meet the requirement enunciated in the *Feist* case that copyrightable works reflect a minimal degree of creativity and originality. You can spend thousands of hours scanning and digitizing public domain documents—say, the entire *New York Times* from 1865 or all of Charles Dickens's novels—but, according to most lawyers, you can't copyright the results. Even if you modernize the typeface, correct the spelling errors, and reformat the spacing in a nineteenth-century novel, you have not met the law's standard of minimal creativity. The same—Corbis's copyright notices to the contrary—applies to scanned images of public domain photos. And it equally applies to the massive online historical databases—including the fifty million records in the Church of Latter-day Saints online compilation of the 1880 U.S. Census. Some of the most time-consuming work that digital historians are currently undertaking is not covered under copyright law. But we hope that other good citizens of the digital commons will respect and credit your labor even while they take advantage of the court's decision allowing them to make active and free use of it.[23]

If your work is, in fact, eligible for copyright, registering it (as well as placing a notice) makes it easier for people to find you (not usually an issue for online works) and gives you additional protection. You can't, in fact, sue anyone in federal court for violating your copyright unless you first register. You can, however, simply wait and register only if it becomes necessary. But if you wait, you can't recover as much in a suit. Only if you register your work within ninety days of publication are you entitled to

"statutory damages" and attorney fees rather than just actual damages. Statutory damages send a sharp message against infringement and can greatly exceed the financial harm suffered. Ocean Atlantic Textile Screen Printing found that out when it produced 2,500 t-shirts adorned with a copyrighted photograph by Ruth Orkin. They made only $1,900 from the shirts, but Orkin's daughter won $20,000 in statutory damages and $3,000 in attorney fees. Even more dramatic is the case of *UMG Recordings v. MP3.com*, in which the major recording companies won $25,000 *per CD* uploaded on the MP3.com system in statutory damages. Potential damages could run as high as $250 million.[24]

Of course, few historians have much prospect of collecting millions in statutory damages for violations of the copyright of their website. You should weigh the potential gains of a lawsuit against the time and expense in registering your website with the copyright office. Indeed, you may be surprised to learn that it is even possible to register a website. The cost is modest ($30), but the actual copyright deposit is complicated because the office acknowledges that, as yet, "the deposit regulations of the Copyright Office do not specifically address works transmitted online." In the meantime, they will accept computer disks or printouts—neither of which is easy to produce for a major website.[25] We recommend that until the Copyright Office simplifies the registration procedure (and perhaps not even then), you shouldn't waste your time registering your site.

In any case, most historians worry more about someone stealing their work for credit rather than for money. Historians considering putting their work online commonly express the anxiety that "someone will steal it." They fret more about the sin of plagiarism than the crime of copyright infringement. And plagiarism and copyright infringement are very different matters; Stephen Ambrose, who copied only short passages of text, could probably plead "fair use," even if we would not think of his use as "fair" in the moral sense we associate with eschewing plagiarism. To be sure, someone is more likely to steal your work if it is on the web than if it is in your desk drawer. But placing your work on the web actually gives you a better way of establishing that you are the original author than would be true of a paper that was delivered only orally at a conference. Moreover, historians are often most concerned about someone stealing their ideas, and the copyright law does nothing to protect ideas, only their formal and fixed expression. The most important goal for historians should be the circulation of ideas and expressions, and the web offers a wonderful new tool for such dissemination. We should focus more on getting others to pay attention to what we have to say rather than on ensuring that the proper individual gets the proper credit.

If you remain paranoid about wide and anonymous access to your work on the open web, you can restrict access through passwords or by Internet Protocol (IP) addresses (the unique numbers by which Internet connected machines are identified, the security approach used by many commercial and some nonprofit websites). A related form of noncopyright restriction is a license, which asks users to agree (in effect, contractually) to some conditions on their use of a website. These licenses have proliferated in recent years—in part as a response to the lack of copyright protection for electronic databases and more generally because, as librarian Mary Case points out, publishers believe they will be more successful in suing for breach of contract than copyright infringement. Such licenses can even try to restrict your use of public domain material. For example, HarpWeek presents public domain material from *Harper's Weekly,* but the license imposed on subscribers still limits access to and use of the site's content. Some attorneys question, however, whether licenses restricting access to public domain materials are legally enforceable.[26] Some historians—including the authors of this book—question whether such restrictions are in keeping with the original, open spirit of the web.

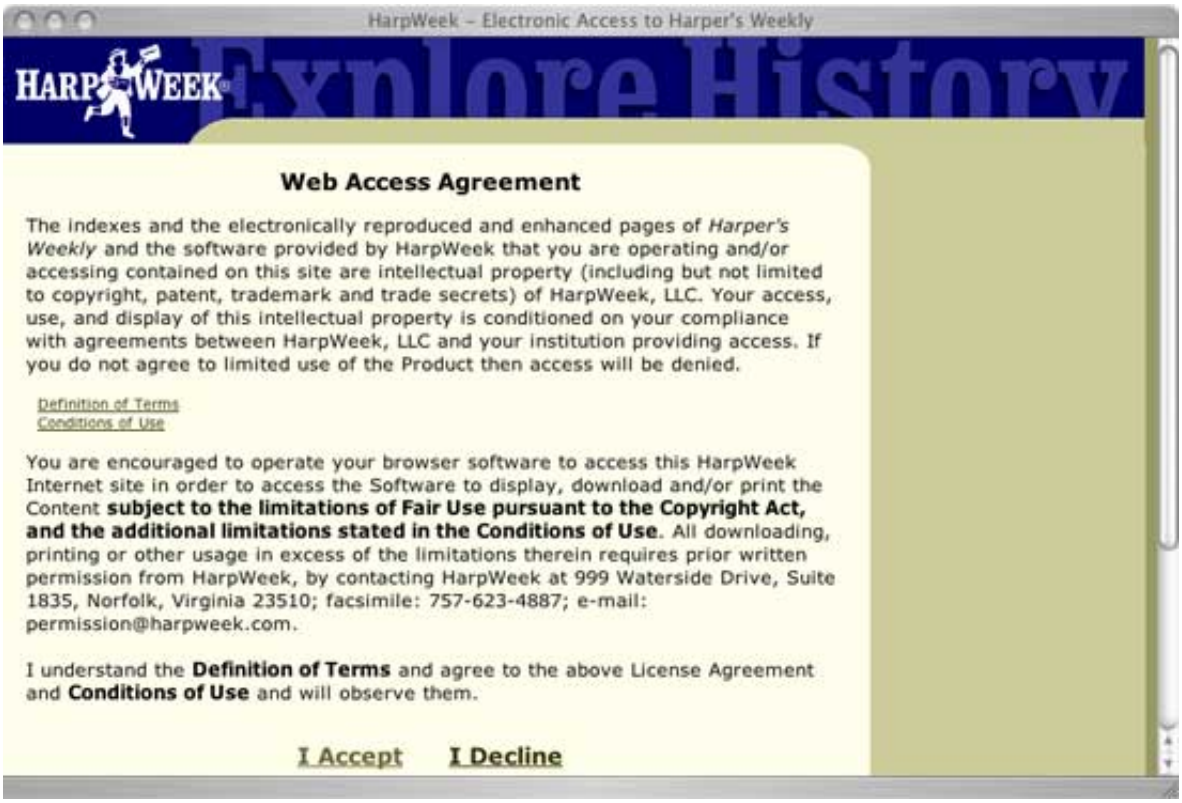

Figure 42: HarpWeek presents public domain material from the nineteenth-century periodical *Harper's Weekly*. But it asks users to click a button to signify their assent to "conditions of use" that restrict one's ability to use the material freely.

Our discussion here about *your* rights and responsibilities conceals a crucial ambiguity for many readers of this book. After all, digital history tends to be much more collaborative than traditional historical scholarship. You need to figure out upfront how to recognize adequately everyone's contributions—including those of students and volunteers—or risk facing later wrangles that can be much more unpleasant than disputes over copyright. In addition, many historians work for an institution rather than themselves. Museum curators, librarians, and archivists who create websites know that under the "work for hire" doctrine, their employers own the copyright to their creations.

But what about college instructors? For much of the twentieth century, academics have operated under the "teacher exception," which says that instructors and not their employers own the intellectual fruits of their labor. But many lawyers see the 1976 Copyright Law as marking the demise of the teacher exception. At the moment, however, most university policies accept the spirit, if not the letter, of the teacher exception, at least for traditional academic writing. But those who are concerned about this issue need to follow historian-turned-lawyer Elizabeth Townsend's advice to "Read *All* employer IP intellectual property policies carefully." This is doubly true for those producing course materials and websites, which Townsend describes as "an area in flux." Universities are more likely to claim ownership of websites, especially course websites, created with significant university resources such as the help of research assistants and instructional resources offices.[27]

Others, however, argue that scholars shouldn't bother worrying about property rights in their work. Corynne McSherry, another academic-turned-lawyer, wonders whether academic work should be owned at all and argues that scholars should instead maintain their realm as a world of gift exchange, in which ideas circulate freely, rather than a world of commodities that are bought and sold. She argues that the very effort to maintain the teacher exception may be self-subverting. When teachers aggressively insist on intellectual property rights to course materials, they foster the idea that courses are just another

commodity and instructors are just another kind of worker, which undercuts the basis of the "teacher exception" in the "idea that professors are special—that they're not like other kinds of knowledge workers."[28]

For those like McSherry, who view academic work as a matter of sharing, copyright law is more of a hindrance to the free circulation of historical ideas, interpretations, and sources. Those in this camp also see the insistence on property rights as conflicting with the ethos of sharing and cooperation that has been an attractive feature of the web and is embodied in the open source and free software movements, which generally oppose the private ownership of software. Much of this software (like the operating system Linux and the software Apache, MySQL, and PHP, which run much of the Internet) has been released under the "General Public License" (GPL) or a license compatible with the GPL, which was developed by free software activist Richard Stallman to ensure that software licensed under it—and any derivatives—remain permanently in the public domain.[29]

Some have tried to take the ideas behind the GPL and open source and apply them to other forms of expression—for example, to the words of historians rather than the code of programmers. One effort, called Creative Commons, is "trying to transfer some of the lessons from … open source and free software to the content world," in the words of executive director Glenn Otis Brown. "Copyright is about balance," he observes. "We hope Creative Commons . . . helps put copyright balance back in vogue."[30]

So far, Creative Commons has primarily encouraged copyright balance by offering free legal advice to those who want to promote an ethic of sharing and mutuality. With the help of some high-priced legal talent, they have developed a series of licenses packaged under the rubric "Some Rights Reserved." For example, their "noncommercial license" permits free use and distribution of work only for noncommercial purposes. Other historians, who put a priority on getting their perspectives widely disseminated, might select the "attribution" license, which allows any site to display their work if it gives them credit. If you are even more firmly committed to the free circulation of historical work, you might simply deposit your work into the public domain with no strings attached. Short of this more drastic step, you might find the "Founders' Copyright" option appealing—especially because it has the particularly historical twist of mimicking the arrangements established in the 1790 copyright law and guaranteeing the entry of your work into the public domain after fourteen years (or twenty-eight years if you choose to renew the copyright once).[31] Copyright radicalism in the early twenty-first century has come to mean embracing an eighteenth-century law.

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[20] United States Copyright Office, *Circular 1: Copyright Basics* (Washington, D.C.: U.S. Copyright Office, 2000), ↪link 7.20. At least as far back as 1909, copyright *registration* has not been a condition of protection. See *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939). The one exception was that if the Registrar of Copyright asked you to register (in connection with copyright deposit) and you refused, you could also lose your rights. The 1976 law liberalized notice requirements (starting in 1978), but they remained in effect until 1989.

[21] According to Peter Vankevich of the Copyright Office, only putting the copyright notice on your home page is roughly analogous to the standard practice of only putting a copyright notice at the front of a book. But though only posting a notice on your home page is sufficient, he believes it is a good idea to put the notice on every page of your site. Peter M. Vankevich, interview, 24 November 2003.

[22] Fishman, *The Public Domain*, 17/11, 14 and 6/10. See also *Regents Guide.* On Corbis, see Kathleen

Butler, "The Originality Requirement: Preventing the Copy Photography End-Run Around the Public Domain" (paper presented at the NINCH Copyright Town Meeting: The Public Domain: Implied, Inferred and In Fact, San Francisco, 5 April 2000), ↪link 7.22a, which challenges the Corbis claims of copyright and the contrary position at the same NINCH town meeting presented by Dave Green of the Corbis legal department. "NINCH Copyright Town Meeting: The Public Domain: Implied, Inferred and In Fact, San Francisco, 5 April 2000," NINCH, Meeting Report, 2000, ↪link 7.22b. Kathleen Butler, "Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions," *Hastings Communications and Entertainment Law Journal* 21 (Fall 1998), 55–128. There are ethical and legal issues involved in taking digital copies of public domain documents that others have posted on the web. The legal issues involve whether they have made significant editorial changes that would entitle them to copyright. The ethical issues involve the credit that someone deserves for the "sweat of brow" in scanning the documents. For a long debate on this, see E-DOCS: Exchanges Among Jon Roland,Paul Halsall, and Jerome Arkenberg ↪link 7.22c.

23 Fishman, *The Public Domain*, 17/10–11. Some significant enhancements of the original data might be entitled to protection; let's say you provided annotations explaining the occupations listed in the census records. The proposed "Database and Collections of Information Misappropriation Act (HR 3261)," which is being advocated by large information conglomerates like Reed Elsevier, could change this situation by making the facts assembled in a database eligible for copyright-like protection and making it illegal to make commercially available "quantitatively substantial" portions of a database, although it could be subject to constitutional challenge if passed. See Lisa Vaas, "Putting a Stop to Database Piracy," *eWeek* (24 September 2003), ↪link 7.23a; "Your Right to Get the Facts Is at Stake," *Public Knowledge*, ↪link 7.23b; Sebastian Rupley, "Critics Assail Proposed Database Law," *PC Magazine* (3 March 2004), ↪link 7.23c. Note that "database" is an expansive concept, which includes websites themselves, as computer programmer David Brooks found out when another site—legally—appropriated much of his site on Vincent Van Gogh. Nancy Matsumoto, "When the Art's Public, Is the Site Fair Game?" *New York Times*, 17 May 2001, G6; Blanke, "Vincent Van Gogh, 'Sweat of the Brow,' and Database Protection."

24 *Circular 1: Copyright Basics*; *Engel v. Wild Oats, Inc.,* 644 F. Supp. 1089 (S.D.N.Y. Oct. 3, 1986), ↪link 7.24a; Michael Landau, "'Statutory Damages' in Copyright Law and the MP3.com Case," *GigaLaw.com*, ↪link 7.24b. Statutory damages currently range from $750 to $30,000 per work infringed, with a maximum of $150,000 per work for willful infringement.

25 U.S. Copyright Office, *Circular 66: Copyright Registration for Online Works* (Washington, D.C.: U.S. Copyright Office, 2002), ↪link 7.25a. The case for registering is made at "Copyright Registration: Why Register?" *Copyright Website* ↪link 7.25b. This is not unbiased, however, in its encouragements to register because the site offers to register your website for you for $99. According to Vankevich, the U.S. Copyright Office regularly receives several thousand applications each year to copyright websites. It has not decided how to respond to the constantly changing content inherent to the medium. Vankevich, interview.

26 Fishman, *The Copyright Handbook*, 2/11, 14/14, 17/15; Mary Case in "NINCH Copyright Town Meeting: The Changing Research and Collections Environment: The Information Commons Today, St. Louis, March 23, 2002," NINCH, Meeting Report, 2002, ↪link 7.26a. For example, HarpWeek requires you to consent to a "web access agreement," which says you will not "store the downloaded Content in any electronic/magnetic/optical or other format now known or hereinafter created for more than ninety (90) days." Although some question the enforceability of such licenses, they are valid in Virginia and

Maryland, which have passed the Uniform Computer Information Transactions Act (UCITA) giving priority to licensing over copyright. See, for example, "NINCH Copyright Town Meeting: Copyright Perspectives, Rice University, Houston, April 25, 2001," NINCH, Meeting Report, 2001, ↪link 7.26b. On UCITA, see "UCITA," *American Library Association*, ↪link 7.26c. Peter Jaszi describes efforts to protect databases through licenses as "quasi-copyright." Herman, "Roundtable," 39.

27 Townsend writes "the growing trend is to see the 'teacher exception' as created not by judge-made law its previous basis but by individual university policies." In other words, whether or not your work as a teacher is considered "work for hire" depends on what your employer says. Elizabeth Townsend, "Legal and Policy Responses to the Disappearing 'Teacher Exception,' or Copyright Ownership in the 21st Century University," *Minnesota Intellectual Property Review* 2.3 (2003): 210, 272, 277, 279–80, ↪link 7.27. Recent cases suggest the persistence of the exception for "books and articles," although textbooks based on course materials could be an ambiguous case. The "teacher exception" apparently does not exist within the European Union.

28 Corynne McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Cambridge, Mass.: Harvard University Press, 2001); Jeffrey Young, "Law Student Warns That Professors' Quest for Rights to Lectures Could Backfire," *Chronicle of Higher Education* (6 November 2001), ↪link 7.28. Townsend's article offers a sharp rejoinder to McSherry, whom she sees as discouraging "academics and from using the law and court systems to protect their work, demonizing those who do and accusing them of changing the tone of the university into a space fearing litigation." Townsend, "Legal and Policy Responses to the Disappearing 'Teacher Exception,'" 209.

29 "GNU General Public License," *GNU Operating System—Free Software Foundation*, ↪link 7.29.

30 D. C. Denison, "For Creators, An Argument for Alienable Rights," *Boston Globe*, 22 December 2002, E2; Kendra Mayfield, "Making Copy Right for All," *Wired News* (17 May 2002), ↪link 7.30.

31 "The Founders' Copyright," *Creative Commons*, ↪link 7.31.

Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web

Owning the Past? The Digital Historian's Guide to Copyright and Intellectual Property

Sharing the Property of Others: Copyright and the Public Domain

ost online historians will probably conclude that more conventional copyright practices best serve their purposes. But familiarity with the principles behind the Creative Commons reminds us of the ethos of sharing and cooperation that should underlie work on the web and of the need for balance in matters of copyright. (And we should already know that *all* historical work relies on the open sharing of ideas and sources.) An even more forceful reminder comes when you begin to think about providing content on your own website. Very quickly, you start worrying more about "what am I allowed to include of the work of others" and less about "how can I protect what's mine." Even the most fervent defenders of copyright start to appreciate the need for balance when they start to assemble a website that includes historical resources or the work of other historians.

The copyright problems of the online historian are both easier and harder than those of others working in the digital realm. On the one hand, because historians focus on the past, they are less likely to get entangled in the realms where rights issues are mostly intensely focused and policing is most vigilant—the MP3 music files of hot new bands. On the other hand, working with the sources of the past, especially the twentieth-century past, puts you up against some of the thorniest copyright questions—and the most difficult issues to research. The good news is that vast swaths of documentary evidence of the past are in the public domain (the realm free of copyright restrictions), and you are free to post that evidence on your website with no questions asked. But how do you know what sits in the public domain?

Let's start with some easy cases and broad categories. The law puts works by employees of the U.S. government done as part of their jobs in the public domain. Twentieth-century historians benefit from this exemption because so many historical topics have in-depth coverage in U.S. government records and documents. Even less obvious areas of cultural and social history find rich documentation in government records. For example, one of the most revealing collections in the Library of Congress's American Memory—the 160,000 photos from the Farm Security Administration and the Office of War Administration—is available online because a government project produced them. You can, for example, take any of those photos and use them on your own website. Interestingly, you can also purchase the "right" to use some of those same photos from Corbis—the digital equivalent of selling you the Brooklyn Bridge. Like your right to walk across the Brooklyn Bridge, you have the right to use these government-produced photographs however you choose. Always look first for a copyright- or royalty-free version before shelling out to Corbis or another stock footage company.

The same is true for everything published before 1923. Ironically, however, unpublished works from that

same period have more protection, the same as works newly created today—the life of the author plus seventy years. Thus, only if the author has been dead seventy years or longer (since 1934 as we are writing this in 2004) is the work now in the public domain. If tomorrow you discover an unpublished song written by Irving Berlin in 1912, you will not be able publish it on your website (unless you have permission from his estate) until 2059 because Berlin died in 1989. On the other hand, you can do what you like with his *published* 1912 song "Alexander's Ragtime Band." If you don't know when the author died (or if the work is anonymous, pseudonymous, or written for hire), it gets even more protection—120 years from the date of creation (see chart).[32]

When Works Pass Into the Public Domain in the United States

Unpublished Works

Type of Work	Copyright Term	What was in the public domain in the U.S. as of 1 January 2005
Unpublished work or unpublished works created before 1978 that were published after 31 December 2002	Life of author + 70 years	Works from authors who died before 1935
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship) *or* unpublished works when the death date of the author is not known	120 years from date of creation	Works created before 1885
Unpublished works	Life of the author + 70	Nothing will enter the

created before 1978 that were published before 1 January 2003	years or 31 December 2047, whichever is greater	public domain until at least 1 January 2048

Works Published in the United States

Date of Publication	Conditions	Copyright Term
Before 1923	None	In public domain
1923 through 1977	Published without copyright notice	In public domain
1978 to 1 March 1989	Published without notice and without subsequent registration	In public domain
1978 to 1 March 1989	Published without notice but *with* subsequent registration	70 years after the death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation
1923 through 1963	Published with notice but copyright was not renewed	In public domain
1923 through 1963	Published with notice but copyright was renewed	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Published with notice	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from

		publication, or 120 years from creation
After 1 March 1989	Notice no longer required	70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation

Source: This chart is based directly on one first published in Peter B. Hirtle, "Recent Changes to the Copyright Law: Copyright Term Extension," *Archival Outlook,* January-February 1999 and the modified online version at http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm#Footnote_1. Hirtle's chart is, in turn, based in part on Laura N. Gasaway's chart "When Works Pass Into the Public Domain," at <http://www.unc.edu/~unclng/public-d.htm>.

Some copyright guides, which often err on the side of caution, advise you to assume that everything published after 1923 is covered by copyright. Not true. First, some works were published without proper copyright notice. Remember those © notices that we told you not to worry about? Well, before 1989, you *did* have to worry about them and published works that failed to include the © before that date have, by definition, fallen into the public domain. Keep in mind that such absences were not always accidental. The young radicals in Students for a Democratic Society who mimeographed thousands of copies of the Port Huron Statement in 1962 did not bother with a copyright notice, and you can publish it freely on your website. By contrast, Martin Luther King, Jr., copyrighted all of his speeches, and his estate—to the consternation of many—claims copyright to his "I Have a Dream" speech delivered the following year.[33]

Other authors critical of the status quo have struggled with the ethics of deriving commercial benefit from the ownership of their words. In some drafts of his will, Leo Tolstoy dedicated his copyrights to the public domain but then backed away in his final testament. In the late 1930s, according to Pete Seeger, Woody Guthrie distributed a mimeographed songbook that declared on one page, "This song is Copyrighted in U.S., under Seal of Copyright # 154085, for a period of twenty-eight years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do." Yet by the late 1940s, Guthrie had hooked up with an aggressive young music publisher named Howie Richmond who copyrighted Guthrie's songs, which today generate substantial revenues for the Guthrie estate. Richmond, in fact, went well beyond securing the rights to new compositions; he also became very rich from his discovery that he could copyright traditional songs like "Greensleeves," if he made significant changes in the words or lyrics.[34]

The second exception—works that did not have their copyright renewed—is even more important and less recognized. Until the 1976 copyright act, authors were granted a twenty-eight-year copyright and the ability to renew that copyright for a second twenty-eight-year term. Thus a book copyright in 1930 fell into the public domain in 1958 unless renewed that year. Those authors (or heirs) who did renew their copyrights have had them continuously extended by subsequent revisions of the law. Most famously, the Disney Corporation copyrighted Mickey Mouse in 1928 and renewed the copyright in the 1950s, which should have protected the rodent's copyright until 1984. But the 1976 law gave him another nineteen years of copyright life (to 2003). Thanks to the Copyright Term Extension Act, Mickey can lounge profitably under the Disney corporate umbrella for another twenty years (until 2023). The Disney

Corporation's copyright renewal in the 1950s was the exception rather than the rule. According to a 1961 copyright office study, fewer than 15 percent of all registered copyright holders renewed; for books and other texts, the percentage is half that.[35]

This very good news for historians of this period is tempered by the requirement that you must determine whether or not the copyright was renewed. You can do that by seeing if a later edition of the work includes a copyright renewal notice or by contacting the author or his or her estate and asking. But keep in mind that copyright holders—shockingly enough—have been known to lie about what they actually own. We once called *Atlantic Monthly* about permissions and were told that everything was renewed, but, in fact, they did not renew the copyright on anything from before July 1934. Finally, you can search the copyright records. Until recently, this required a trip to the Library of Congress or another major library for works copyrighted before 1978 or paying the Library $75 per hour to search for you. But computer scientist Michael Lesk and Carnegie Mellon University have recently created a searchable database of copyright renewal records for books published between 1923 and 1963. (After 1963, books were automatically renewed.)[36]

The situation gets murkier for works created and published outside the United States. Copyright terms within the European Union are generally similar to those of the United States (life of the author plus seventy years). Several other countries—for example, Canada, China, Japan, Russia, Australia, and Argentina—have terms of life plus fifty years. But numerous exceptions and qualifications exist. For example, works created by Americans during World War II get a 3,794-day extension in Japan.[37]

As if this isn't enough to drive you screaming from your computer, you need to figure out whether you should worry about the laws in countries where your website is accessed (i.e., the world), rather than located. Canadian attorney Christopher Hale maintains "the mere fact of accessibility may not constitute an infringement in the laws of other jurisdictions." Thus Project Gutenberg of Australia posts online copies of books like *The Great Gatsby* (1927) and George Orwell's *1984* (1949) that are still covered by copyright in the United States, although it (coyly) advises you not to read them if you are in a country where copyright remains in effect. But Columbia law professor June Besek cautiously warns (in a publication co-sponsored by the Library of Congress) that a digital archive "could be exposed to infringement suits if it were accessible outside the United States. Foreign copyright owners might be able to sue under the laws of a country where the presentation of the work was an infringement." On the one hand, the possibility of a nonprofit historical website being the subject of such a suit is remote. A French copyright owner would have trouble getting the Scranton Historical Society into a French court and would probably not bother, given that jurisdictional issues remain murky and that the historical society would not have any French assets that could be seized in a successful judgment. On the other hand, your university might react nervously to a threatening letter from a foreign rights holder, and you should try to respect foreign copyright laws as much you do your own.[38]

Another difference between U.S. laws related to intellectual property and those of many other countries is that those countries give authors "moral rights" that do not exist in American law. For example, authors, even if they have sold their work's economic rights, might have the right of "integrity," which prevents alterations of this work—for example, colorizing a film. In some countries, these rights continue beyond the end of copyright. If your project places you under non-U.S. law, you need to consult more specialized works on this topic or visit the UNESCO website, which contains the copyright laws of most countries.[39]

Even if you are working only in the United States, you need to be aware of one recent change that has affected the copyright status *within* the United States of many works originally published abroad. In 1994, the United States signed the General Agreement on Tariffs and Trade (GATT), and the

implementing legislation restored copyright protection to foreign works that had fallen into the public domain in the United States because their owners had not complied with copyright "formalities" here or because the United States had no copyright relations with the other country at the time the work was published. For example, Jean Renoir's masterful anti-war film, *La Grande Illusion* (1937), which had fallen into the public domain in the United States because the copyright had not been renewed, had its copyright restored in 1996 through GATT. Because the United States had no copyright treaty with the Soviet Union until 1973, all works published there before that date were in the public domain in United States. Now they are covered by copyright. These changes have particularly vexed historians like Paul Halsall who have developed extensive websites in world history and who, thus, want to include sources published outside the United States.[40]

Despite the vast quantity of material that has made it into the public domain, many historians will encounter materials for which copyright remains in effect. You will have two main options then: ask for permission, or consider whether you can make "fair use" of the copyrighted material. Asking for permission is the simpler of the two approaches to explain, although not necessarily simpler to carry out. But don't ask unless you are sure that you need permission. When people are asked, they often request a fee or impose restrictions—even if they don't have the right to do either. In the 1990s, when the Truman Presidential Library sought permission to include the *Chicago Daily Tribune*'s famous headline proclaiming "Dewey Defeats Truman" in an orientation video, the *Tribune* said "no." But, in fact, a three-word headline does not qualify for copyright protection, and the Library could have proceeded without asking.[41]

Of course, many copyright holders are more straightforward and generous than this, especially when the permission is for use by an educational project. The *Montgomery Advertiser* allowed us to publish a 1932 editorial at no charge in a history CD-ROM, even though the racist editorial did not portray the newspaper in the most favorable light. In the early days of the web, when much looser assumptions about copyright prevailed, Paul Halsall included in his online History Sourcebooks a number of older works that were still formally under copyright. After stricter adherence to copyrights became the web norm, Halsall wrote to the authors and offered to remove the texts. But he reports that most authors "have been most gracious" and allowed them to remain online.[42]

In other cases, the rights holder will ask you to pay a fee. Often they levy a modest charge for educational projects and nonprofit uses. Unfortunately, many publishers demand an annual payment for presenting something on the web, and that is a cost that is hard to cover in the long run even if you have a grant at the moment. For example, the *New York Times* charged us $150 to publish a 1927 interview with Charles Lindbergh on a CD-ROM. But when we later asked the cost to publish it on a public website, we were told that we would have to pay $300 *per year*, which they touted as a deep discount from their standard annual fee of $1,000.[43]

You may decide that your budget can't afford the *New York Times*, but at least you can track down the *Times* easily. Unfortunately, sometimes you will not find the rights holder so readily. You think that the text, image, music, or film might be under copyright, but you can't find anyone who claims to hold it. What do you do? Many publishers will tell you to forget about using it; historian David Kirsch got that response when he tried to publish a New York street scene in the *Business History Review* for which the rights holder could not be found. Kirsch had to settle for a much less revealing photograph. One of the most frustrating problems facing digital historians is dealing with what have been called "orphan works" whose copyrights have not expired but which are no longer available commercially and whose owners are, therefore, difficult to locate.[44]

On the web, however, you are the publisher. The buck (starts and) stops with you. Some history websites

follow a strict policy of not posting anything without explicit permission. But the Constitution Society, a libertarian group devoted to "principles of constitutional republican government," which maintains an extensive website of historical documents, makes "a reasonable effort to find someone to grant permission" but "if none can be found," they publish the material anyway along with a disclaimer. Even if the rights holder later shows up, most reasonable people won't sue you if you offer at that point to remove the material or pay them a fee. Of course, we can't guarantee reasonable behavior. So carefully document the efforts you make to find a rights holder.[45]

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[32] Peter B. Hirtle, "When Works Pass into the Public Domain in the United States: Copyright Term for Archivists," *Cornell Institute for Digital Collections*, ↪link 7.32, originally published in Peter B. Hirtle, "Recent Changes to the Copyright Law: Copyright Term Extension," *Archival Outlook*, January–February 1999; updated on 15 January 2003.

[33] Not, however, according to the Sixties Project, which includes this dubious warning: "This text, made available by the Sixties Project, is copyright (c) 1993 by the Author or by Viet Nam Generation, Inc., all rights reserved." See ↪link 7.33a. On Port Huron statement, see Kirkpatrick Sale, *SDS* (New York: Random House, 1973), 69. In 1996 the estate of Rev. Dr. Martin Luther King, Jr., sued CBS News after the network began selling a five-part documentary called "The Twentieth Century with Mike Wallace," which contained excerpts of King's famous 1963 Lincoln Memorial oration. The King estate claimed the speech was copyrighted; CBS, on the other hand, argued that it had the right to use the original footage, such as that of the King speech, that it records at news events. In 2000, CBS and the King estate reached a settlement in which CBS paid the estate an undisclosed sum. Because the case ended with a settlement, the larger legal issues in this case have not been resolved. David Firestone, "King Estate and CBS Settle Suit over Rights to Famous Speech," *New York Times*, 14 July 2000, A12. The Martin Luther King, Jr., Papers Project at Stanford University presents the "I Have a Dream" speech on its website but only in an encrypted PDF format and with an indication at the top (an unusually prominent spot): "©The Estate of Martin Luther King, Jr." See ↪link 7.33b.

[34] A. N. Wilson, *Tolstoy* (London: Hamish Hamilton, 1988), 492–95. The Guthrie quotation is widely disseminated (see, for example, ↪link 7.34a), but we have been unable to find (including through correspondence with the Guthrie Archives) any direct confirmation that such a songbook exists. Joe Klein, *Woody Guthrie: A Life* (New York: Alfred A. Knopf, 1980), 355–57. For a depressing tale about Richmond that shows why copyright laws do not always benefit "creators," see Rian Malan, "In the Jungle," *Rolling Stone* (25 May 2000), ↪link 7.34b.

[35] Dennis S. Karjala, "How to Determine Whether a Work is in the Public Domain," *Value of the Public Domain*, ↪link 7.35a; U.S. Copyright Office, *Circular 22: How to Investigate the Copyright Status of a Work* (Washington, D.C.: U.S. Copyright Office, 2002), ↪link 7.35b; Hirtle, "When Works Pass into the Public Domain in the United States," *Cornell Institute for Digital Collections*. According to historian Paul Halsall, smaller publishers were particularly unlikely to renew, as were publishers who had picked up a book from another imprint. Paul Halsall to E-DOCS, 22 November 1998.

[36] "Copyright Renewal Records," *Lesk SCILS Website* ↪link 7.36a. For a careful set of rules for determining whether an item is in the public domain, see "Project Gutenberg Copyright HOW TO," *Project Gutenberg*, ↪link 7.36b. Also see John Mark Ockerbloom, "Frequently Asked Questions: How Can I Tell Whether a Book Can Go Online?" *Online Books Page*, ↪link 7.36c; and "Information About

the Catalog of Copyright Entries," ↪link 7.36d. See also "Books from 1923 with U.S. Copyright Not Renewed," ↪link 7.36e. As of June 2004, the Copyright Office is considering digitizing its pre-1978 records; the records since 1978 are currently available.

37 Fishman, *The Public Domain*, 16/11. For a summary of laws, see Ockerbloom, "Frequently Asked Questions."

38 "NINCH Copyright Town Meetings 2002: Creating Museum IP Policy in a Digital World," NINCH, Conference Announcement and Agenda, ↪link 7.38a; Project Gutenberg, "Project Gutenberg of Australia: A Treasure-Trove of Literature," ↪link 7.38b; June M. Besek, *Copyright Issues Relevant to the Creation of a Digital Archive: A Preliminary Assessment* (Washington, D.C.: Council on Library and Information Resources and the Library of Congress, 2003), 16. Commercial operations with a legal presence in another country have further reasons to be cautious. In November 2000, Judge Jean-Jacques Gomez of the Paris Tribunal de Grande Instance ruled that Yahoo had to block French residents from viewing auctions of Nazi memorabilia or face fines of $13,000 per day because French law bans the sale or display of items that incite racism. But, a year later, a California court ruled that the French court could not tell Yahoo what to do. Lori Enos, "Yahoo! Ordered to Bar French from Nazi Auctions," *E-Commerce Times* (20 November 2000), ↪link 7.38c; "Yahoo! Bans Nazi Sales," *BBC News*, 3 January 2001, ↪link 7.38d; "eBay Bans All Hate Item Auctions," *ADLAW by Request* (7 May 2001), ↪link 7.38e; Troy Wolverton, "Court Shields Yahoo from French Laws," *CNET News.com*, 8 November 2001, ↪link 7.38f; Besek, *Copyright Issues Relevant to the Creation of a Digital Archive*, 13–16.

39 Fishman, *The Public Domain*, 16/14–15. In the United States, the Visual Artists Rights Act (Section 106a of the Copyright Act) provides some limited and narrowly framed "moral" rights. See "NINCH Copyright Town Meeting: Copyright Perspectives, Rice University, Houston, April 25, 2001," NINCH, Meeting Report, 2001, ↪link 7.39a. See also Melissa Smith Levine, "Overview of Legal Issues for Digitization," in *Handbook for Digital Projects: A Management Tool for Preservation and Access*, ed. Maxine K. Sitts, 1st ed. (Andover, Mass.: Northeast Document Conservation Center, 2000), 76–77, ↪link 7.39b.

40 Fishman, *The Public Domain*, 15/2; Paul Halsall, "GATT and Copyright Checking," email to E-DOCS, 2 April 1998. One crucial exception to the GATT rules is that it does not apply to books published at the same time in the United States. But, Halsall observes, "virtually no one can prove this one way or other." As attorney Besek concludes more generally, the "issues are complicated and worthy of more detailed study. A current court case, *Golan v. Ashcroft*, challenges the constitutionality of having works that were once in the public domain being returned to copyright. See Stanford Law School, "Golan v. Ashcroft Case Page," *Center for Internet and Society*, ↪link 7.40.

41 *Regents Guide,* 3. The rejection of a fair use request does not, however, mean that you are not able to go ahead if you think you are exercising your legal rights. But it does mean that your actions are more likely to be scrutinized closely by the ostensible rights holder. On short phrases, see Richard Stim, "I May Not Be Totally Perfect But Parts of Me Are Excellent: Copyright Protection for Short Phrases," *Copyright & Fair Use: Stanford University Libraries*, ↪link 7.41.

42 Paul Halsall to E-DOCS, 22 November 1998; Jon Roland also reports good experiences in getting permission: Jon Roland, "Re: E-DOCS: Paul Halsell on Copyright," email, 11 February 1999. Lynn Nelson similarly notes that he has had good responses from copyright holders for materials he wanted to include in his Kansas-related collections after he explained the public service nature of the collections. Lynn Nelson, interview, 24 August 2003.

[43] Leigh Gensler, email to Joan Fragaszy, 6 August 2003. On issue of difficulty of getting long-term rights, see "NINCH Copyright Town Meeting 2003: Digital Publishing: The Rights Issues," NINCH, Conference Summary Report, 2003, ↪link 7.43.

[44] David Kirsch, interview, 2 September 2003. In France and Canada, you can simply pay a fixed fee to deal with these grey areas. Unfortunately no equivalent exists in the United States. But some publishers will accept your efforts as "good faith." On Canada, see Canadian Copyright Licensing Agency, "Unlocatable Copyright Holders," *Access*, ↪link 7.44a. Two current legal efforts are attempting to deal with the problem of the "orphan works:" the court case *Kahle v. Ashcroft*, which argues that the current system of unconditional copyright, which leads to orphan works, is unconstitutional, and the proposed Public Domain Enhancement Act, which would push unused works into the public domain by imposing a very small renewal fee. Stanford Law School, "Kahle v. Ashcroft Case Page," *Center for Internet and Society*, ↪link 7.44b.

[45] Jon Roland, "Re: E-DOCS: Paul Halsell on Copyright," email, 11 February 1999. On Roland, see ↪link 7.45a; on society, see ↪link 7.45b. Fishman, *The Public Domain*, 1/11 gives detailed advice on record keeping.

Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web

Owning the Past? The Digital Historian's Guide to Copyright and Intellectual Property

Fair Use

he alternative to asking permission (or at least looking for someone to ask) is deciding you don't need to ask because your use is "fair." But what's "fair" is a philosophical, ethical, and legal question with no easy answer. Many people mistakenly assume that there is a "law" that tells you what constitutes "fair use." Unfortunately fair use is, in the words of library law consultant Mary Minow, the "grayest area of copyright law."[46] Section 107 of the 1976 Copyright Act explains that "fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" and then lists the following four nonexclusive factors to be used in determining fair use (our parenthetical comments are added):

1. "The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes" (nonprofit educational uses are more likely to be fair as are those involving criticism, commentary, and parody);
2. "The nature of the copyrighted work" (uses of creative and unpublished works are less likely to be fair; uses of factual, published, and out-of-print works are more likely to be fair);
3. "The amount and substantiality of the portion used in relation to the copyrighted work as a whole" (the smaller and less "central" the portion used, the more likely it is to be fair);
4. "The effect of the use upon the potential market for or value of the copyrighted work" (using out-of-print works and works for which there is no permissions market is more likely to be fair).

Unfortunately no magic formula balances these four factors. Minow notes that "courts often weigh" the market factor more heavily than the other three even though a 1994 U.S. Supreme Court decision says that it is no more important than the others. And recent trends give more weight to critical uses—an advantage to historians who discuss the works they are using as examples. The University of Georgia copyright guide notes that the four factors are not even exclusive; other facets (e.g., the ability to locate the copyright holder) can come into play and fair use determination needs to be made "on a case-by-case basis in order to protect the constitutional rights of users." Some guides, however, offer various benchmarks (e.g., only use a certain number of words), but the Georgia guide correctly rejects that approach as "without statutory authority" and insists that such guidelines "cannot legally mean that copying in excess of the guidelines is infringement." Even the *Chicago Manual of Style*, which previously offered some rough quantitative guidelines, now acknowledges that such "rules of thumb" have "no validity" and exist largely to ease the burdens on "an overworked permissions department."[47]

The biggest mistake that historians make is to apply only one of the four factors, and say, for example, "I am nonprofit and educational" and that makes my use fair. But if you placed online the history textbook that you assigned to your students, you could not argue that the use is "fair" because you are directly competing with the textbook company. Does that mean you cannot post any copyrighted material online? It is probably all right for you to post a chapter from a copyrighted book but only if you restrict access to the website to just the students in your class. If you open it to the entire web (and world), you are infringing the "copyright holder's right of public distribution."[48] The situation gets more complicated if you provided restricted access to the same book chapter every semester. In that case, the fairness of your use might depend on whether or not the book was in print and readily available.

A further set of complications arises for those who want to take advantage of the TEACH Act, which was passed in 2002 to deal with the use of copyright materials in distance education. On the one hand, it expands the range of copyrighted works that can be presented online (portions of films and songs are permitted, for example) and locations to which such works can be transmitted in an effort to give distance educators similar rights to those open to instructors in a face-to-face classroom. As such, the TEACH Act offers what one legal scholar calls "the best legislative solution to the barriers that copyright law imposes on online education that educators can hope to achieve in the near future." But on the other hand, the law subjects you to some significant and stringent limitations. For example, only accredited nonprofit institutions qualify, access must be limited to enrolled students in the context of "mediated instructional activities," and institutions must take steps to "reasonably prevent" the unauthorized retention and dissemination of copyrighted works presented online.[49]

Though it is dangerous and unethical to play fast and loose with fair use, it is equally a mistake to proceed too cautiously. As historian David Stowe points out in a perceptive article, those who unquestionably agree to every demand from rights holders "simply institutionalize a property right that doesn't exist." And their unquestioning compliance undercuts the ability of others to claim fair use rights. "Without being exercised," Stowe argues, "the right to fair use will simply atrophy." Even the more cautious *Chicago Manual* warns against seeking permission where there is on the slightest doubt because "the right of fair use is valuable to scholarship, and it should not be allowed to decay because scholars fail to employ it boldly."[50]

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[46] Mary Minow, "How I Learned to Love FAIR USE," *Copyright & Fair Use: Stanford University Libraries*, ↪link 7.46a. Probably the best (but also the most complex) of those online copyright guides comes from the University of Georgia and reflects the influence of L. Ray Patterson, a leading copyright expert who teaches at Georgia's Law School and was also a member of the committee that drew up the guide. *Regents Guide*. Stanford University Libraries have recently revamped their pages on copyright and fair use, which contain some excellent materials. See, for example, Mary Minow's valuable discussion of fair use. See also Linda Starr, "Part 2: Is Fair Use a License to Steal?" Minow also offers valuable coverage of issues concerning libraries and the law (especially copyright issues) on her *LibraryLaw Blog*, ↪link 7.46b, which also has Peter Hirtle and Ralzel Liebler as contributing authors.

[47] Minow, "How I Learned to Love FAIR USE"; *Regents Guide*; *Chicago Manual of Style*, 15th ed. (Chicago: University of Chicago Press, 2003), 135. *Chicago Manual of Style*, 14th ed. (Chicago: University of Chicago Press, 1993), 144–48. Compare *A Manual of Style*, 10th ed. (Chicago: University of Chicago Press, 1949), 199. Questions of what is permissible in terms of critical commentary and parody continue to be litigated, as in, for example, the suit against Alice Randall's novel, *The Wind Done Gone*, which rewrote *Gone with the Wind* from a black perspective, for infringing the copyright of the

Margaret Mitchell estate. Randall's publisher, Houghton Mifflin, lost in the District Court, won in the Court of Appeals, and then settled. David Kirkpatrick, "Mitchell Estate Settles 'Gone with the Wind' Suit," *New York Times,* 10 May 2002, C6.

48 *Regents Guide,* 9.

49 Kenneth D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act* (Chicago: American Library Association, 2002), ↪link 7.49a; Kristine H. Hutchinson, "The TEACH Act: Copyright Law and Online Education," *New York University Law Review* 78.6 (December 2003), 2224, ↪link 7.49b. As Hutchinson notes, some administrators believe that this requirement about unauthorized retention would require universities to develop new technology to track what students do with the copyrighted material after it is downloaded. As a result, some universities have been reluctant to take advantage of the law and have continued to license materials, as they had done before (pp. 2233–34).

50 David W. Stowe, "Just Do It: How to Beat the Copyright Racket," *Lingua Franca* 6.9 (November–December 1995): 32–42; *Chicago Manual of Style*, 15th ed., 137.

Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web

Owning the Past? The Digital Historian's Guide to Copyright and Intellectual Property

Images, Music, and Movies

he rules of fair use and copyright apply equally to nontextual materials like images, music, speeches, and moving pictures. But some distinctive issues arise. For images, the most complicated problem involves art and photographs that are in the public domain but are not publicly available. A photograph or work of art may have entered the public domain, but you can't copy it if you don't have access to the original. Because the original is often private property, the owner is not obligated to give you access to make a copy.[51] Thus you generally need to request a copy from the museum and they will often insist that you sign a license agreement that restricts how you can use the copy.

But can you use a reproduction obtained from a source other than the museum? Can you scan a copy of an artwork reproduced in a book and post it on your website? That turns out to be one of the most disputed, currently contentious issues in copyright. In the late 1990s, it became the subject of a court case that pitted the Bridgeman Art Library against the software company Corel. Bridgeman had paid for "exclusive rights" to license photographs of hundreds of public domain art works from major museums. Corel, however, took 150 images from the Bridgeman Collection and included them on a clip-art CD-ROM and made them available as inexpensive downloads from their website. Sounds like theft? In November 1998, U.S. District Court Judge Lewis A. Kaplan said "no." He ruled that the Bridgeman photos were not entitled to copyright protection. Bridgeman, he said, had sought "to create 'slavish copies' of public domain works of art. Though it may be assumed that this required both skill and effort, there was no spark of originality. . . . Copyright is not available in these circumstances." The Bridgeman photos were no more entitled to copyright than a photocopy.[52]

Some have concluded on the basis of Judge Kaplan's decision that any straightforward photos of public domain art can now be used freely, that you can, for example, scan them from art books and put them up on your website. Others advise caution. The decision does not apply to photos that go beyond "slavish" copies—ones that might highlight some particular feature. It also only applies to two-dimensional artworks because three-dimensional works like sculptures require many more decisions by the photographer. More important, Kaplan's decision reflects only one federal district court in New York; until a Court of Appeals or the U.S. Supreme Court decides a similar case, it will not be more widely binding. Yet even those like Stephen Fishman, who warn that "you could get sued for copyright infringement" for copying a reproduction of public domain art without permission, also concede that "you probably have a very good chance of winning."[53] Of course, you would probably prefer to do history than fight a lawsuit.

Some museums have responded to the Bridgeman case by having those who purchase permission to use their photos sign a "license agreement" limiting their use of it. But some lawyers wonder whether they can legally enforce these restrictions on those who obtain the images from a third party such as a college library.

Music poses significant difficulties both because the rights are more complicated and because the rights holders are often the most vigilant about enforcing copyrights and the greediest in seeking payments. Vanderbilt professor Cecelia Tichi spent $9,000 in permission fees just to quote lyrics in her book on country music. The $9,000 did not cover all of her costs because she also included a CD with her book, which required paying for the rights to use actual recordings.[54] These sound recording rights are entirely different from rights to the underlying words or composition. To make matters worse, the laws covering them are also different.

Copyright in words and music follow the same rules as copyright in books, articles, and photographs. But until February 15, 1972, federal copyright laws did not protect sound recordings. At first blush, this sounds great for those who want to set up a website that explores history through song. Doesn't this mean, for example, you can post any recording based on musical works published before 1923 or otherwise in the public domain? Unfortunately, no. Because there was no federal copyright law for recorded music before 1972, almost every state passed laws that criminalized the sale and distribution of sound recordings without permission. These laws did not have the expiration dates built into the federal copyright statutes. And, although federal law supersedes state law, the 1976 copyright act exempted pre-1972 sound recordings from the federal law for many decades. Until 2067 (thanks to this law and the subsequent CTEA), these earlier sound recordings will enjoy the protection they had won under state laws. Even one website that encourages aggressive use of the public domain offers the following "Rule of Thumb": "There are NO sound recordings in the Public Domain."[55]

As a result, history websites may not be able to make any significant use of the vast corpus of American recorded sound until late in the twenty-first century—a stunning loss to historical scholarship and teaching. There are a few ways around this, however. The first is a bit speculative and has to do with the difference between the earlier state laws and the current federal law and its impact on compositions published in 1922 or earlier. According to Georgia Harper from the University of Texas, "state law causes of action center on unfair competition for the most part. That is unlikely to affect archival and research activities." In other words, it may be that placing an early sound recording on an educational website would not be subject to any legal action.

If you are not willing to take a risk on this interpretation, you could still record the music yourself if the music (but not the recordings) is in the public domain. We did that with the music of the French Revolution for our website, Liberty, Equality, Fraternity: Exploring the French Revolution, producing our own version of "La Marseillaise" rather than paying to use an existing recording. Another safe strategy is to use U.S. government sound recordings. The Library of Congress, for example, has many recordings from 1930s-era arts projects as well as Edison company recordings, which have been dedicated to the public domain.

Finally, you can try to purchase rights to use a recording. But it may cost you dearly. For our CD-ROM on U.S. History from 1914 to 1946, we spent about $16,000 to use twenty-seven songs and that required time-consuming negotiations as well as dropping some songs because of the price. We also learned about the "most favored nation" clauses that most music companies put in their contracts. These provisions require you to pay them the highest price that anyone else gets. Thus, if you give in to one particularly greedy company, you have to pay everyone else the same rate of payment. In any case, most of these companies would not have agreed to making the songs available on the web at any price. And remember that even if you obtain rights to the sound recording, you still need to get the rights to the musical

composition, which generally come from a different set of rights holders and itself can combine rights to both lyrics and the music itself. Further complicating matters, whether you stream the song or allow it to be downloaded will affect whether you need performance rights (streaming) or reproduction rights (download).

In addition, though many small and obscure book publishers have disappeared and hence can't claim rights and royalties, major corporations, which aggressively enforce their rights, have taken over many small music companies. Okeh Records, which pioneered the "race" record market with the first recordings by African American blues singers in the early 1920s, was later taken over by the Columbia Phonograph Company, which was, in turn, taken over by the American Record Corporation, and then the Columbia Broadcasting System, and most recently, Sony. Thus, if you want to make use of now obscure blues songs from the 1920s originally released by Okeh, you will find yourself negotiating with Sony Music Entertainment Inc. and sending your payments to a multinational conglomerate, not the heirs of the original bluesmen. Still, in terms of the recording (as opposed to the musical composition), you may find some protection in the more limited scope of the applicable state laws.[56]

Some music sites such as the *Red Hot Jazz Archive* take the position that they are broadcasting music rather than offering it for download by presenting it only in a streaming format like RealAudio. "I see the archive," writes Scott Alexander, the creator of Red Hot Jazz, "as a radio station of sorts, and that I am just broadcasting these works, not distributing them." So far, no one has challenged Alexander's "broadcasts," but he acknowledges that he is operating in a "gray area of law." "I've talked to lawyers about it and paid them lots of money, and they gave me no answers," he notes. But, according to industry lawyer Linda Tadic, the law is black and white, and what Alexander is doing involves "reproduction and distribution" and not just "public performance." But Alexander probably has avoided legal challenges because he is presenting old music, much of it out of active distribution, and because he maintains a relatively low profile and avoids publicizing his site.[57]

Another ambiguity about online multimedia involves fair use, especially the third factor in the fair use test—the amount of the work being used. Because scholars have long quoted from textual works by way of criticism and commentary, the right to do so is well established. Although the specific length of what is permissible is subject to dispute and individual interpretation, the broad parameters are clear. You can place a paragraph of a copyrighted novel online; you surely can't place an entire chapter (except on a site that is limited to students in your class). But the digital environment makes it much easier to "quote" images and allows you to quote sounds and moving pictures for the first time. But how much can you quote? Because most recorded songs are short, it is probably difficult to offer a short enough excerpt to qualify. But a case can be made for very brief selections.[58]

The problem is more vexing for film scholars who even before the emergence of the web had struggled over whether they could use film stills without permission. The major studios charge huge fees for these "rights." Historian Mark Carnes reports that permission charges exceeded $40,000 for the stills in his book *Past Imperfect: History According to the Movies*. Even worse, the studios may use permissions as a form of censorship. Warner Brothers refused permission to use stills because *Past Imperfect* "treated negatively" several Warner films. The Society for Cinema Studies (SCS) argues that Carnes should not even have asked for permission. Its ad hoc "Committee on Fair Usage Publication of Film Stills" concluded in 1993 that although "the legal situation concerning the reproduction of film frames and publicity stills remains undetermined, … a long-standing common practice has been established that could be drawn upon in arguing any case for the application of fair-use guidelines to cinematic images." Moreover, they argue that those like Carnes who seek and pay for permission to use stills undercut the fair use precedent. "I would urge my colleagues in the field of history to avoid paying unnecessary permission fees for film images," Kristin Thompson, the author of the SCS report, wrote in response to

Carnes, "as it sets a precedent that endangers the ability of other scholars to use illustrations vital to their work." [59]

If you can include film stills on your website, what about film clips? Can online historians "quote" from the vast film record of the twentieth century? Film studios do not answer with one voice on this question. When we contacted Universal Studios about using a brief clip of *All Quiet on the Western Front* (1930) for an educational module about cinematic portrayals of World War I, the representative explained that the company charges a flat rate of $1,500 per fifteen seconds of footage. That rate does not vary based on the site's mission or purpose. Paramount, whom we asked about *Saving Private Ryan* (1998), said they would not license it for use on the web at any price. And Fox wanted us to pay $100 before it would tell us what a clip would cost. Warner Brothers, by contrast, said we could freely use three-minute clips from *The Dawn Patrol* (1938) and *Casablanca* (1942) as long as we used no more than two per film and streamed the clips rather than made them available for download because streaming limits the possibility of further circulation of the clips.[60]

We think that Warner Brothers' policy is good copyright citizenship, in accord with our understanding of fair use, and good for the legacies of their films. If you mounted a commercial website (that sold ads or required a fee to use) called "Great Moments in American Film" and included three-minute clips of five hundred American films, it would be difficult to meet the fair use standard. But let's say instead you developed a free, educational website on "Hollywood's View of American History" and included three-minute clips along with editorial commentary that showed how different films interpreted a key moment in U.S. history (e.g., Reconstruction in *Gone with the Wind* and the American Revolution in *Drums Along the Mohawk*). That would seem precisely in line with fair use. (Avoiding the most famous moments in a film also helps you meet the fair use test of "amount and substantiality.") A congressional report from the mid-1970s even acknowledges that fair use might apply to "the performance of a short excerpt from a motion picture for criticism or comment."[61]

The *Journal of American History* has embraced this perspective on fair use in its website Teaching the *JAH*, which explores how instructors can use scholarly articles from the journal in their classrooms. One section focuses on the 1943 film *Mission to Moscow*, a startlingly pro-Soviet film that served U.S. wartime diplomatic goals. The site includes a number of primary sources related to the film, including four short excerpts from the film itself. You could not readily teach about the film's impact without showing a few excerpts.

Is the *Journal of American History* engaging in fair use brinkmanship? The noncommercial and educational purposes of the site and the brevity of the clips work in their favor. Also weighing toward fair use is that the film is not currently marketed. But surely the most important reason why the *JAH* probably needn't worry about a lawsuit is the film's lack of economic value to its owner. *Mission to Moscow* did poorly even in its original run sixty years ago; a new release is unlikely. Would it be worth a lawsuit to defend such a "property"? On the other hand, the company might be much more likely to go to court against an identical use of *Gone with the Wind*, even though most of the same factors (except lack of current availability) would weigh in the *JAH*'s favor. The *JAH* did not formally request permission, and in our opinion they did not need to.

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[51] Fishman, *The Public Domain*, 5/6. If you walk into a museum and take a photograph of a painting created before 1923, you own that photograph and can use it as you like. Some museums argue, however, that your admission ticket is a contract that can include a clause restricting what you can do with a

photograph. See "NINCH Copyright Town Meeting: Chicago, March 3, 2001," NINCH, Meeting Report, 2001, ↪link 7.51.

52 *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999), ↪link 7.52. If the book was published before 1923, you are probably in the clear in any case.

53 Fishman, *The Public Domain*, 5/31-3. University of Oregon Professor Christine Sundt describes this as a question "desperately seeking" an answer: "If a work of art is clearly in the public domain—let's imagine for the moment a reasonably well-known (e.g., published) seventeenth-century painting by an Italian artist—but the museum owning the canvas requires that a fee be paid before the work can be illustrated in a publication, could the author ignore the requirement and bypass the museum if she already possesses a good quality illustration without publication rights?" Christine Sundt, "Permission Denied . . . Questions Desperately Seeking Answers" (paper presented at the Digital Publishing: A Practical Guide to the Problem of Intellectual Property Rights in the Electronic Environment for Artists, Museums, Authors, Publishers, Readers and Users, College Art Association, New York, N.Y., 2003), ↪link 7.53a. Kathleen Butler argues forcefully, however, that "photographic and digital reproductions are not original and therefore not copyrightable" in "The Originality Requirement: Preventing the Copy Photography End-Run Around the Public Domain" (paper presented at the NINCH Copyright Town Meeting: The Public Domain: Implied, Inferred and in Fact, San Francisco, 5 April 2000), ↪link 7.53b. But Dave Green of the Corbis legal department argued at the same town meeting that the Bridgeman case was misleading and it was only a "narrow holding." Keep in mind that generally speaking a work of art like a painting would be treated like an unpublished manuscript in determining whether or not it was in the public domain.

54 Stowe, "Just Do It,"33.

55 Fishman, *The Public Domain*, 4/44-7; Music Library Association, "What Impact Do Differences Between U.S. and European Copyright Laws Have on Peer to Peer (P2P) File Sharing?" *Copyright for Music Librarians*, ↪link 7.55a; Robert Clarida, "Who Owns Pre-1972 Sound Recordings?" *Greater Philadelphia Old Time Radio Club*, ↪link 7.55b; Public Domain Information Project, "Sound Recordings," *PD Info: Public Domain Music*, 2003, ↪link 7.55c; Georgia Harper, "Copyright Law and Audio Preservation" (paper presented at Sound Savings: Preserving Audio Collections, Austin, Texas, 24–26 July 2003), ↪link 7.55d. A more confusing question involves whether music also benefits from the exemption granted in the CTEA for works not in commercial exploitation and in the last twenty years of their copyright. Harper points out that the law is ambiguous and poorly drafted on this point.

56 "Okeh Records," *Wikipedia*, ↪link 7.56a; David Edwards and Mike Callahan, *Okeh Album Discography,* ↪link 7.56b.

57 "Information About Red Hot Archive," *The Red Hot Jazz Archive* ↪link 7.57a; Scott Alexander, interview, 10 February 2004; Linda Tadic, "Intellectual Property Versus the Digital Environment: Rights Clearance," NINCH, Town Meeting Report, 2001 , ↪link 7.57b. When Charles Haddix set up *Club Kaycee*, ↪link 7.57c, a website that "serves up the sights and sounds of the Golden Age of Kansas City Jazz," the Harry Fox Agency waived any claims and ASCAP agreed to charge a flat annual fee as long as they didn't provide any music produced after 1970. Haddix told us that the deal he got with ASCAP wouldn't be possible now: "We kind of got into it under different circumstances than today. There was no file sharing at the time. It was not a big issue. Now they wouldn't have cooperated with us, not in this environment." Haddix, interview, 12 February 2004. Even so, Haddix may not be entirely covered

because he would need the performance rights for the sound recording, which need to come from the record company, and ASCAP provides only the performance rights for musical work. As with *Red Hot Jazz*, record companies are less likely to pursue *Club Kaycee* because it is not presenting recordings that are currently being sold. The royalty rates for webcasting of music have been the subject of much contention, although few historians are likely to be affected by this issue. See ↪link 7.57d.

58 These issues have been litigated in some of the lawsuits over "sampling." For example, a court ruled in 2003 that a six-second flute sample used by the Beastie Boys was permissible. Stan Soocher, "Song Sampling Is Found De Minimis," *Entertainment Law & Finance* (8 December 2003).

59 Mark Carnes, "Beyond Words: Reviewing Motion Pictures," *Perspectives* (May–June 1996), ↪link 7.59a; Kristin Thompson, "Fair Usage Publication of Film Stills: Report of the Ad Hoc Committee of the Society for Cinema Studies," *Cinema Journal* 32.2 (Winter 1993)," 3–20, ↪link 7.59b; Kristin Thompson to Editor, *Perspectives* (October 1996), 19. For a number of egregious cases of using permissions as a form of censorship, see Stowe, "Just Do It," 34–35. Two court cases do suggest possible fair uses in music. In a political ad, a candidate used fifteen seconds of his opponent's campaign jingle. The opponent sued: *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.,* 457 F. Supp. 957 (D. N.H. 1978). The judge ruled it was fair use because only a small fraction of the song was used and the purpose of using it was to further political debate. In Manhattan, a TV crew shot footage of an Italian festival, and their taping included a band's performance of "Dove sta Zaza." The ensuing news broadcast included a portion of the song. (*Italian Book Corp, v. American Broadcasting Co.,* 458 F. Supp. 65 (S.D. N.Y. 1978).) The judge ruled that this was fair use because only a small part of the song was used, the song was relevant to the news event, and the broadcast did not damage the composer or the market for the work. See "Summaries of Fair Use Cases," *Copyright & Fair Use: Stanford University Libraries*, ↪link 7.59c. Carnes rejects Thompson's argument and says that he checked with top executives and editors at leading commercial publishers and reports that "none said that he or she would publish a book with film stills and enlargements without first acquiring permission from the studios." Mark C. Carnes to Editor, *Perspectives* (October 1996), 35.

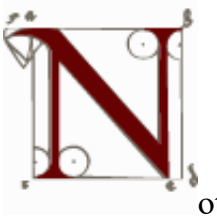
60 Larry McCalister, Executive Director, Licensing, Paramount, to Roy Rosenzweig, 12 February 2004; Julie Heath to Roy Rosenzweig, 2 December 2003. (Information on Fox is from recorded message on the Fox Still and Clip Licensing Department's telephone line.)

61 Thompson, "Fair Usage Publication of Film Stills," 5; Robert Clarida in "NINCH Copyright Town Meeting 2003." Whether an excerpt is "at the heart of the work" can be an important determinant of fair use. For example, a court ruled in 1982 that a one-minute-and-fifteen-second clip from a Chaplin film that was used in a television news report was not fair use because it was part of the "heart" of the film. Thus a compilation of "great moments" in film would be more likely to transgress fair use than a compilation that showed how films interpret American history. See "Summaries of Fair Use Cases;" Minow, "How I Learned to Love FAIR USE." Some relatively recent court cases suggest that the using brief film clips is fair use.

Digital History: A Guide to Gathering, Preserving, and Presenting the Past on the Web

Owning the Past? The Digital Historian's Guide to Copyright and Intellectual Property

Will You Get Sued?

 ot surprisingly, then, most of the active policing of the use of materials on the web focuses on materials that large corporations view as having great value. Most often, those efforts center on trademarks rather than copyrights. Firms like NameProtect, Cyveillance, and TrademarkBots troll the web looking for sites that violate their clients' trademarks. And "cease and desist" letters from lawyers about trademarks or other alleged infringements often have a very nasty, threatening tone. The website ChillingEffects.org calls this "Gorilla Chest Thumping" on the part of people who believe "that aggression is the best defense." Their advice is "take a deep breath" and "do not take it personally." In the case of trademarks, historians should know that scholarly and historical discussions involving trademarks will generally be considered "noncommercial" use and are fully protected by the First Amendment, although that will not stop a trademark attorney from sending you a threatening letter.[62]

The noncommercial nature of most historical projects generally protects you from several noncopyright legal hazards that other websites face. For example, in some states the "right of publicity" gives public figures, especially celebrities, the right to commercial gain in their own likeness, persona, and voice. Thus you can't create an advertisement incorporating Britney Spears without her permission. But because this right involves commercial gain, it is unlikely to concern most historians. Similarly, some websites have sued others for the practice of "deep linking," linking to interior information in their site in a way that bypasses home pages and other conventional entry pages that sites regard as important because they provide advertising revenue and establish their "brand." But this seems unlikely to apply to noncommercial history sites. We often receive requests for permission to link to portions of our site. We always say "yes," but in our view you don't need permission to link any more than you need permission to list a book in a bibliography. Two other areas of litigation—defamation and invasion of privacy—generally apply only to living people and are not of concern to historians who focus their attention on the dead past and dead people. But contemporary historians may need to consider whether they are portraying living people in a negative light. If you digitized a cache of letters from the 1960s that talked about contemporaries as "drunks" and "thieves," you could be liable for invasion of privacy or defamation—both of them likely to be more serious concerns than copyright infringement.[63]

The other particularly active area of policing of the web involves—as everyone knows since the advent of Napster—music. Major music companies have devoted large resources to tracking and prosecuting the trading of digital music files. Though such activity clearly exceeds fair use (if the music is not in the public domain), the fallout from the music company hysteria has spilled over to affect more legitimate uses of music online. For example, OLGA, the On-Line Guitar Archive, which allows guitar enthusiasts

to share files that show how to play songs, has faced threatened lawsuits from recording industry giant EMI and the Harry Fox Agency, which represents more than 27,000 music publishers.[64] Its travails indicate the kinds of problems that a nonprofit history site would encounter if it ran afoul of a large corporation. We may be right in our public domain and fair use claims, but do we have the money to fight multinational bullies? A two-minute clip from Disney's 1995 film *Pocahontas* might both nicely teach something about popular understandings of the colonial period and be permissible under "fair use." But we would not advise going up against Disney's lawyers unless you have some top-notch pro-bono legal talent in your camp.[65]

Nevertheless, even the most rapacious corporations have better things to do than to prosecute nonprofit history websites—surely not the most popular stance to take. And though their pockets are considerably deeper than yours, they still have to weigh the costs of a suit, especially because *your* lack of deep pockets means that they are unlikely to recover much money. "You have to prioritize," says one attorney who enforces the online intellectual property rights of large corporations. The web-based publication *Education World*, which takes a generally cautious stance on the use of materials online, acknowledges that you have only a "slim" chance of winding up in court, especially if you promptly remove offending material upon notification by the copyright holder that your use is objectionable. Library law consultant Minow reassuringly points out that a court can eliminate any damage award for copyright infringement if you "work for a nonprofit educational institution, library, or archives and are acting within the scope of your employment" and if you "believed and had reasonable grounds for believing that your use was Fair Use."[66]

he courts, alas, are a long way from the commons where we began—and where we would prefer to stay. And we believe that you will stay out of the courts. In our wide acquaintance, we know of no digital historians who have wound up in court. We can only think of a few who have received so much as a threatening letter from a lawyer. Your best defenses against finding yourself in court are, first, the promotion of learning, which has been the larger goal of copyright since the days of the Founding Fathers, and, second, your own efforts to nurture the creative commons—sharing generously in building a public "space" that is vital to our past and future.

Of course, if that virtual public space and creative contributions to it are to last into the future, you had better take steps to preserve it. That is the subject of our final chapter.

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[62] Carlyn Kolker, "Employing Trademark Violation Detectives," *Internet Newsletter including legal.online* 7.3 (June 2002). See also Steven Anderson, "Law Departments Wrestle with Internet Infringement Issues," *Corporate Legal Times* (December 2000). Robert G. Gibbons and Lisa M. Ferri, "IP Policing a Priority Amid Profusion of Online Piracy," *National Law Journal* (4 October 1999), IN FOCUS; Legal Tech; B7; Chilling Effects Clearinghouse, *Chilling Effects*,↪link 7.62. Companies like Coca-Cola, which values its brand name at $34 billion, take a very dim view of trademark infringement. American Memory's website on Coca-Cola ads carries the warning: "Unlike most of the materials presented on the Internet as part of American Memory, materials in *Fifty Years of Coca-Cola Television*

Advertisements: Highlights from the Motion Picture Archives at the Library of Congress are subject to copyright and other legal concerns such as publicity rights. These materials are presented here with the permission of The Coca-Cola Company for private educational, scholarly, and research uses."

63 Privacy and defamation are complex and vast topics, and you should consult more detailed sources if your work touches on these issues. For a brief summary, see Levine, "Overview of Legal Issues for Digitization," 83–86. For a summary of legal cases on linking (many of which involve trademark issues of no concern to historians), see "The Link to Liability," *Mondaq Business Briefing* (20 January 2004). See also Richard Poynter, "Reasons to Think Before You Link," *Financial Times,* 24 June 2002.

64 *The On-Line Guitar Archive*, ↪link 7.64.

65 If you do find yourself looking for legal help, American University, Harvard, and Stanford all have student law projects focusing on intellectual property.

66 Attorney quoted in Anderson, "Law Departments Wrestle with Internet Infringement Issues"; Starr, "Part 2: Is Fair Use a License to Steal?"; Minow, "How I Learned to Love FAIR USE."