


From Red Light to Green Light: Copyright Issues in Digitizing Photographs in Library Collections



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Copyright Issues in Digitizing Photographs in Library Collections

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Agenda

1. Overview and legal risks
2. Public domain
3. Library and archive exceptions
4. Fair Use and permission
5. Other legal restrictions – getting to the green light

Legal Disclaimer

- Legal information
- **Not** legal advice!



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1. Overview and Legal Risks



Copyright

Other restrictions

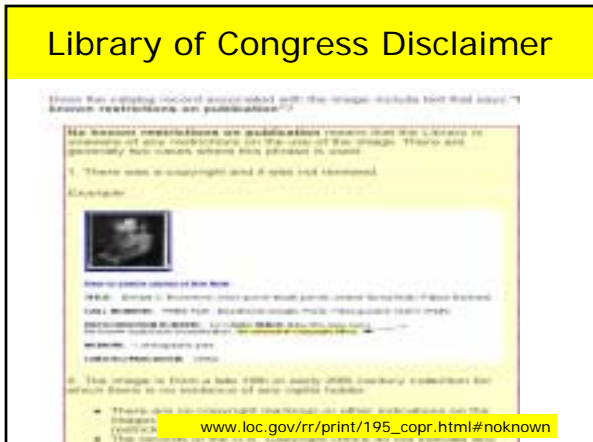
ADA, VARA, NAGPRA, HIPAA,
Deeds of Gift, Publicity

**Privacy, Censorship and
Obscenity**

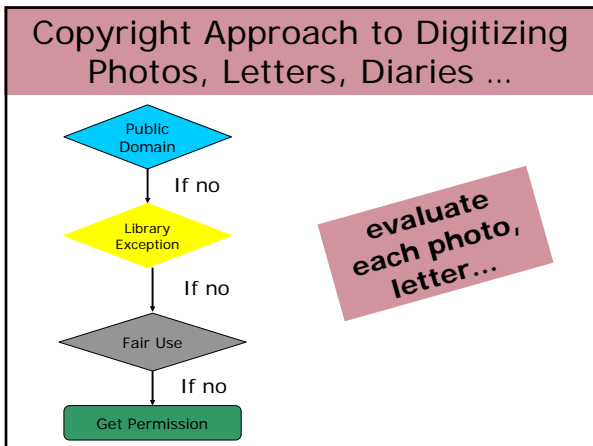
Example: Library of Congress on Flickr



Library of Congress Disclaimer



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2. Public Domain


- F**acts
- R**ecipes
- I**deas
- D**edicated works
- G**overnment works (U.S.)
- E**xpired works

Public Domain
FRIDGE

- F**acts
addresses, names, URLs
- R**ecipes
mere listings of ingredients
- Copyright Office Factsheet FL 122
- I**deas


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Public Domain
FRIDGE





Julia Pfeiffer Burns waterfall
Photo by Mary Minow 2007
Dedicated to the Public Domain

Dedicated works
Government works (U.S.)



Expired works

EXPIRED

Peter Hirtle Chart

FRIDGE
Today:
Life + 70 years

But many older works expired under earlier law

www.copyright.cornell.edu/public_domain/


Sonny Bono Copyright Term Extension Act 1998



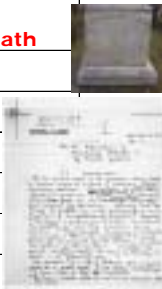
+20 years


Public Law 105-298, 112 Stat. 2827 (1998);
Upheld by *Eldred v Ashcroft*, Sp. Ct. Jan. 2003

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 **Unpublished Works**


| | Works made for hire 120 years | Personal Authors Life + 70 Year of Death |
|------|----------------------------------|-------------------------------------------------------|
| 2002 | NONE | NONE |
| 2003 | 1882 | 1932 |
| 2004 | 1883 | 1933 |
| 2007 | 1886 | 1936 |
| 2008 | 1887 | 1937 |
| 2009 | 1888 | 1938 |




 **Published Works
Frozen Years**

1923
1924
1925
1926
1927




 **Published Works
Unfreeze in 2019**

| Year | Published or Registered |
|-------------|-------------------------|
| 2008 | 1922 |
| 2009 | 1922 |
| 2010 | 1922 |
| ... | ... |
| 2019 | 1923 |
| 2020 | 1924 |



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Sect. 108 Libraries and Archives Threshold Requirements



Must:

- open to public or specialized nonaffiliated researchers

And:

- copies not for commercial advantage
- put copyright notice on copies

17 U.S.C. Sect. 108 (a)

Also: Libraries May Digitize Broad Class of Works for Preservation


Library Exception

On library premises

Any Format

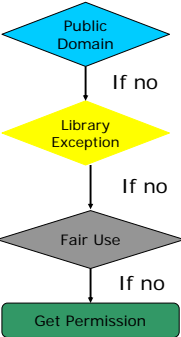
Any Year

Can't put on web



17 U.S.C. Sect. 108 (b)(c)

If Library Exception Doesn't Work...



```
graph TD; A{Public Domain} -- If no --> B{Library Exception}; B -- If no --> C{Fair Use}; C -- If no --> D[Get Permission];
```

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4. Fair Use

Damages may be \$0 for nonprofit educational institution, library, or archives if:

- *Believe *and*
- *Reasonable grounds to believe Fair Use



17 U.S.C. Sect. 504 (c)
see also fairuse.stanford.edu

Fair Use?

Court will use **PNAM** factors

Purpose

Nature of work

Amount

Market harm

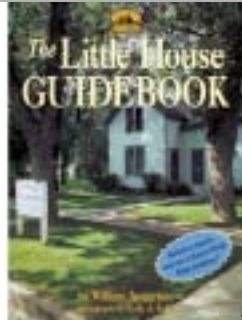
Fair Use-Summary

| | Likely Yes | Likely No |
|----------------|------------------------------------------|----------------------------------------------|
| Purpose | Nonprofit New purpose + | Commercial No new purpose |
| Nature | Reference, nonfiction Published + | Fiction, Art Music Unpublished |
| Amount | Small amt (relative to whole original) + | Complete work Heart of work |
| Market | Doesn't hurt market of original + | Hurts market or potential market of original |

evaluate item by item

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Example: Search Engine Thumbnail Images Ruled Fair Use



Photos by Leslie Kelly

Case: photographer sued image search engine

Court:

Purpose - commercial but transformative

Nature - creative

Amount - all but poor resolution

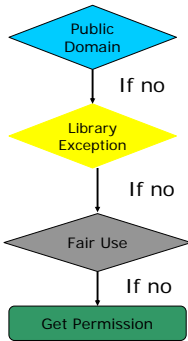
Market - little effect

Kelly v. Arriba-Soft, 280 F.3d 934 (9th Cir. 2002), see also *Perfect 10 v. Google*, Case No. 06-55406 (9th Cir. May 16, 2007); *Perfect 10 v. Amazon.com*, Case No. 06-55405 (9th Cir. May 16, 2007).


| PURPOSE | |  Kenneth D. Crews, Associate Dean of the Faculties for Copyright Management Indiana University Purdue University Indianapolis |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Favoring Fair Use | Opposing Fair Use | |
| <input type="checkbox"/> Teaching (including multiple copies for classroom use) <input type="checkbox"/> Research <input type="checkbox"/> Scholarship <input type="checkbox"/> Research in educational institutions <input type="checkbox"/> Criticism <input type="checkbox"/> Comment <input type="checkbox"/> News reporting <input type="checkbox"/> Transformation or Productive use (changes the work for new utility) <input type="checkbox"/> Restricted access (to students or other appropriate groups) <input type="checkbox"/> Parody | <input type="checkbox"/> Commercial activity <input type="checkbox"/> Profit from the sale <input type="checkbox"/> Entertainment <input type="checkbox"/> Self-promotion <input type="checkbox"/> Drawing credit to original author | |
| NATURE | | |
| Favoring Fair Use | Opposing Fair Use | |
| <input type="checkbox"/> Published work <input type="checkbox"/> Public or wide dissemination <input type="checkbox"/> Important historical educational materials | <input type="checkbox"/> Unpublished work <input type="checkbox"/> High creative work (art, music, poetry, film, play) <input type="checkbox"/> Novel | |

www.copyright.iupui.edu/checklist.htm

If You Don't Think It's Fair Use



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Get Permission

see also
Copyright Crash Course,
University of Texas
www.utsystem.edu/ogc/intellectualproperty/permissions.htm

New Donations: Have Copyright Transferred to You

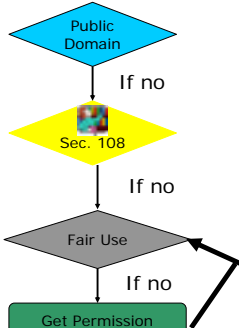


Society of American Archivists

Deeds of Gift brochure

www.archivists.org/publications/deed_of_gift.asp

After Evaluating Permission, Might Reexamine Fair Use



```
graph TD; A{Public Domain} -- If no --> B{Sec. 108}; B -- If no --> C{Fair Use}; C -- If no --> D[Get Permission]; C -- If yes --> A;
```

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5. Other Restrictions



Copyright

Other restrictions

ADA, VARA, NAGPRA, HIPAA,
Deeds of Gift, Publicity

**Privacy, Censorship and
Obscenity**

ADA: Americans with Disabilities Act

Make accessible, i.e.,
alt-text tags



www.w3.org/WAI/intro/accessibility.php

VARA: Visual Artists Rights Act

Limited edition paintings,
photographs signed and
numbered by artist

Artist rights of attribution
and integrity



Kids' Dress Up Time (1957) by Robert DeWeese
www.nea.gov/features/stories/2007-07/mt-yellow.html

17 U.S.C. Sect. 101; 106(A)

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NAGPRA: Native American Graves Protection and Repatriation Act



Tread carefully

See:
www.nps.gov/history/nagpra/

National Museum of the American Indian
www.nmai.si.edu/exhibitions/legends_of_our_time/main.html

HIPAA: Health Insurance Portability and Accountability Act



Slow down

Health records

www.hhs.gov/ocr/hipaa/

Deeds of Gift



Make sure no restrictions

www.archivists.org/publications/deed_of_gift.asp

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Publicity Rights



State law

California:
use of another's
photograph ...
for commercial
purpose

California Civil Code Sect. 3344; Civil Code Sect. 990

Privacy, Censorship, Obscenity



Nudity is not obscenity

Free speech can be
offensive, distasteful,
embarrassing


...and always trumps
privacy

© HeyGabe May 27, 2007. Some rights reserved
www.flickr.com/photos/heygabe/518933437/

**Not Protected under
Umbrella of First Amendment**

Digitization projects = close to zero

Child Pornography
Obscenity
Harmful to Minors



www.llrx.com/features/updatecipa.htm

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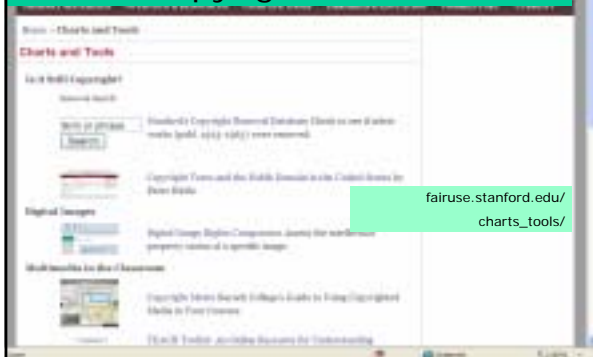
Privacy ... Close to Zero

Mother sued and lost
(Oklahoma law)



State laws: statutes and common law; *Oklahoma Natural Gas v. Larue*, 1998 U.S. App. LEXIS 21394 (10th Cir. 1998); see also www.infopeople.org/training/webcasts/6-20-02_say_cheese.html

Resources to Check Copyright Status



Summary



Copyright

Other restrictions

ADA, VARA, NAGPRA, HIPAA,
Deeds of Gift, Publicity

**Privacy, Censorship, and
Obscenity**
