

BETWEEN AUTHORS AND USERS: ARCHIVISTS IN THE COPYRIGHT VISE

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ABSTRACT: The historical, social, economic, and political context of American copyright law is considered as a backdrop for archivists' role as both mediators and advocates on copyright. Effective administration of archives and service to donors and users require an understanding of the basics, including scope of copyright coverage, nature of exclusive rights, fair use, library and archival provisions, transfers of ownership, and expiration of term of copyright, with especial attention to the distinction between published and unpublished material.

In recent years, the general public has become much more aware of copyright issues, albeit often with erroneous perceptions. Nowhere is this reflected better than on the Internet, such as in comments made in an August 12, 1999, "alt." newsgroup discussion that followed a photographer's comment about a bill erroneously thought to be in Congress that "would allow photographers to copyright as many images as they wished."

The problem is that once you put these images on the internet, the images belong TO THE INTERNET. . . . Congress can pass whatever law they want. They are completely IRRELEVANT. Once those images have been downloaded off of your server, they are HISTORY. . . . I could take any image off the internet now and print perfect copies. As many copies as I want. Copyrights are history. What do you think all that blank videotape and audiotape they sell in the stores are for? STEALING copyrighted work.¹

Despite the fact that there was no legislation to this effect pending at the time and the fact that the writer misunderstood how copyright is established, the quotation illustrates the pervasiveness of misconceptions about copyright and the extent to which the very idea of copyright has been called into question in the current information age.

From time immemorial, archivists have been extraordinarily affected by broad societal changes emerging from technical developments in the mechanisms for recording and transmitting information. In fact, if it were not for such technological innovations as clay tablets, paper, moveable type, steel-point pens, carbon paper, typewriters, and electronic computers, archivists would have no work. Too often, it seems that the effects of information technology on archival work are considered only in the context of

how to utilize technology to access archival material or in terms of the problems that novel information formats create for longevity and access.

However, since at least the fifteenth century, changes in the machinery for recording and transmitting information have spawned legal and economic imperatives to control the quantity of new information suddenly enabled by the technology. These imperatives take the form of legislation and regulation of what has come to be called “intellectual property.” Such laws and regulations are created largely on behalf of commercial interests in protecting the authors’ and producers’ financial stake in the production of multiple copies of works intended for a mass audience. The result is that intellectual property laws inevitably dictate limits on what can be done to make archival material accessible for users.

Since the 1976 act, which first extended federal copyright to unpublished material in the United States, the formulation of rights bundled together under the heading of “copyright” has had a pervasive effect on how archival work can be done. Forty years ago, it may have been possible for archivists largely to ignore issues of copyright since unpublished materials were not subject to U.S. federal copyright law and the machinery for copying them was very cumbersome and expensive.² However, several developments over the course of the twentieth century—the broader interest of the public in copying and disseminating information, the highly capable machinery for copying and transmitting information, and the expanded coverage of copyright law—have made it absolutely essential that even the most junior of twenty-first-century archivists be familiar with copyright issues. Further, the drastic changes that are caused by commercially driven legislation in an era when the information and entertainment sectors are so important to the economy mean that professional archivists collectively need to be very active on the public policy front to ensure that archives’ and users’ needs are not overwhelmed inadvertently by legislative changes designed for commercial intellectual property.

Recent changes to the U.S. copyright law, especially those in 1998, are both the culmination of trends and a demonstration of the need for archivists to be ready to study all proposed future legislative changes and, when appropriate, to take public positions. This article will provide a historical/philosophical perspective on copyright for archivists and a brief guide to the archivally relevant aspects of the U.S. copyright law.³

Long before the American Revolution, several developments in England related to the introduction of printing, the Protestant Reformation, English Civil War, and the landmark Statute of Anne (1710), laid the foundation for what became American copyright law.⁴ The Founding Fathers dealt with issues of access to information and copyright in the Constitution and Bill of Rights. Believing in the importance of encouraging intellectual and industrial development, but also fiercely distrusting monopolies, they provided in Article I, Section 8 that Congress shall have the power “To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” As part of the same legal tradition, which was also concerned about the free exchange of ideas, the First Amendment provided a further check on these limited monopoly rights in its freedom of the press clause.⁵ The implementation of these principles has fallen to Congressional legislation—beginning with the first copyright act of 1790, subsequent major

rewritings in 1831, 1909, and 1976, and many other revisions such as those in 1998—and major court decisions from 1834 to the present.⁶

The legislative and judicial history of copyright in the United States, not to mention its relation to international treaties and laws of other countries, is complex, but not without significant effect on daily archival practice. We should begin by considering some general principles that should be manifest in archivists' administration of copyright.

One underlying premise of archival work is that our purpose is to make accessible the information and evidence of the past for the benefit of as broad a community of users as possible.⁷ Although the SAA "Code of Ethics" does not specifically address copyright, it makes clear that archivists have professional responsibilities to both creators and users of documentary material.⁸ A reasonable extrapolation of this principle is that, for archivists to merit the confidence of society, we must respect the limited monopoly rights that the original authors/creators have in the documentary material we hold as we assist researchers in using historical records. Archivists should not work to profit from commercial exploitation of the intellectual property created by others that is now in their custody. Likewise, we need to make sure that our users are aware of their own obligations to respect intellectual property rights in the materials we hold.

To meet these competing interests, archivists must often serve as go-betweens. We need to inform users of the limits that exist on what they can do with the material they draw from our repositories. To support the needs of users, we also need to approach collection donors to secure ownership of intellectual property rights so that we may make material available readily and freely to future generations of researchers. We need to be steadfast in maintaining our middle position as brokers, not truly owners or profiteers of material, and we need to publicize forthrightly the fact that our role is to be brokers.

At the same time, however, as purveyors of the raw material for the transmission of knowledge and culture, we have a responsibility to support the use and accessibility of cultural works. Archivists, along with librarians, are in a unique position among those who work with intellectual property. We neither create nor truly consume (for some ultimate utility) the information we hold. In this position, we sometimes need to serve as independent advocates for the users. To do so, archivists must understand the nature of copyright and its impact on use so that when a researcher wants to utilize the information we hold in order to expand knowledge or benefit society, he or she will be able to do so without the encumbrance of the rusty chains of old rights holders. From this basic professional mission comes a mandate for us to advocate on behalf of the fundamental importance of a free information society.

These are the general principles that should drive our administration of copyright and shape our public policy advocacy on copyright issues in Congress and the courts. However, to determine exactly what needs to be done in daily archival administration, indeed, even to understand what the copyright issues are that affect archivists, one must look closely at the legislation and relevant court decisions. In the United States, copyright is legislated at the federal level, where the various copyright acts have been codified in Title 17 of the U.S. Code.⁹ In looking at Title 17 or at any of the various acts passed by Congress on copyright, one quickly sees a confirmation of that old adage that

making law is very much like making sausage—lots of disassociated parts pushed together and forced into a single, rather impolite shape. For confirmation, one need only look at the rather unlikely inclusion of protection for boat hull design as Title V of the 1998 Digital Millennium Copyright Act (DMCA) or the inclusion of provisions for small restaurants and bars to play music in the 1998 Sonny Bono Copyright Term Extension Act.¹⁰

Over the course of their careers, many archivists will find it necessary to read large sections of Title 17, although a good summary of the current provisions can be found in Michael Shapiro and Brent Miller, *A Museum Guide to Copyright and Trademark*.¹¹ The following is intended as a brief guide to highlight those provisions of Title 17 of most direct relevance to archival work.

Subject Matter of Copyright

We need to understand what types of material in our archives are and are not subject to copyright limitations. These issues are addressed by Sections 102 through 105 of Title 17. Copyright exists “in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated” Note that since the 1976 copyright act, the works need not be published, nor after 1977 does copyright need to be registered. Before the 1976 act, unpublished material was covered by common law rights that existed in perpetuity. In this regard, the 1976 establishment of a statutory nature of copyright privileges and limitations was a major step forward for archivists.

The scope of what constitutes works of authorship is quite broad: 1) literary works; 2) musical works and accompanying words; 3) dramatic works, including music; 4) pantomimes and choreographic works; 5) pictorial, graphic, and sculptural works; 6) motion pictures and other audiovisual works; 7) sound recordings; and 8) architectural works. However, copyright protection applies only to original works of authorship, and it explicitly does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.” Nor does copyright protection extend to any work of the U.S. government. By separate state action, many state government works are also not subject to copyright restrictions.

What Are the Rights Enforced by Copyright?

Essentially, the idea behind copyright is that the creator of a work holds the exclusive right to limit the copying, presentation, and adaptation of a work. Section 106 details these creator’s rights as follows:

1. to reproduce the work;
2. to prepare derivative works;
3. to distribute copies of the work by sale, rental, lease, or lending;

4. to perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
5. to display the copyrighted work publicly, in the case of literary, musical, dramatic, choreographic, pantomimes, pictorial, graphic, and sculptural works; and
6. to perform the copyrighted work publicly by means of a digital audio transmission, in the case of sound recordings.

In addition, the Visual Artists Rights Act of 1990 added Section 106A to provide special rights for creators of visual art.¹² This one shadow of the continental European so-called "moral rights" protects the creator's right to claim authorship of the work, prevent the use of his or her name as the author of works he or she did not create, prevents any intentional distortion, mutilation, or other modification of that work, and prevents any destruction of a work of recognized stature; but these apply to visual works only and only for the lifetime of the creator.

The exclusive rights in Section 106 are quite broad and controlling, such that little practical use could be made of authors' works if these rights were not balanced by several limitations contained in Sections 107 through 120. These limitations are the center of concern for archivists and librarians because they both allow us to provide information to users and restrict us in exactly how we go about that work.

Fair Use

Although they are not addressed specifically to archivists and librarians, the fair use exclusions in Section 107 are likely to be the sections of the law that the archivist has to explain most to users. Essentially, Section 107 states a series of instances where infringement of the exclusive rights granted in Section 106 is permissible. Added by the 1976 copyright act, the fair use section appears relatively simple and is certainly brief enough to become part of every archivist's daily phrase book:

Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The key aspects to understanding the fair use provisions are the purpose and character of the use, which must be of an educational and noncommercial type; the nature of the material, with creative works enjoying more protection than factual ones; the amount used, which may not be such that it replaces the original; and the effect on the market, such that the use does not supplant the market for the work. The basis for each of the factors is the concept that for a use to be fair, it cannot adversely affect the compensation that may be due to an author, and that the use should be transformative, leading to the creation of new works. In considering the four factors to determine if an infringement constitutes fair use, it is absolutely essential to note that the courts have held that it is the *combination* of the factors, rather than the presence or absence of any single factor, that makes a use fair or unfair.¹³

Following a number of related court cases in the wake of the 1976 copyright act, archivists and manuscript librarians became very anxious about making copies for users.¹⁴ Indeed, the implications of cases, including one in 1987 in which a biographer of J. D. Salinger was prevented from including paraphrases from Salinger's unpublished writings, gave reason for concern that fair use could not be applied to unpublished material.¹⁵ A more thorough reading of subsequent court cases and legislative action suggests that worries that fair use could not apply to unpublished material were greatly exaggerated. The most important basis for setting aside the early worries about the implications of *Salinger v. Random House* is the language of the 1992 Fair Use of Copyrighted Works Act, which specifically rejected the Second Court of Appeals' rules and declared that the unpublished nature of material could not be used as a per se basis to find against fair use. In passing this law, Congress accepted the Supreme Court's 1985 ruling in *Harper & Row v. Nation* as a proper balance between encouragement of broad public dissemination and safeguarding the right of first publication, and it also criticized the *Salinger* court as having read *Harper* too narrowly.¹⁶ The relevance of the 1992 Fair Use of Unpublished Copyright Works Act is reinforced further by a later court opinion in the case involving a scholar's extensive use of unpublished manuscripts of author Marjorie Kinnan Rawlings in which the court applied the new law to uphold the fair use rights of the scholar.¹⁷

The interconnectedness of the four factors is probably the point that archivists have to emphasize most to users whose first reaction often is to look for a simple device or silver bullet to relieve them of pursuing permissions. However, archivists and users alike must remember that it is not the archivist who determines what constitutes fair use or what constitutes an infringement. Rather, a copyright holder first must claim infringement and, after considerable legal fees have been paid by both sides, it is the courts that makes the determination on the fairness of use.¹⁸ These concerns aside, the doctrine of fair use and its formulation into the 1976 law are exceedingly important to the fundamental objectives of archives and archivists.

Special Provisions for Archives and Libraries

Given the history of litigation leading to the 1976 law, it is not surprising that Section 108 incorporated provisions to deal with library copying, copying for library users, interlibrary loan, and preservation copying. The 1998 DMCA incorporated further revisions to the Library and Archives provisions that reflect both technological adaptations and clarification of issues in previous legislation, although difficulties remain for archival material not addressed adequately by Section 108.

It is important for archivists to understand the differences among the several subsections within Section 108 and the extent to which some are more appropriate for libraries and published material than for archives and unpublished material. Overall, the purpose of Section 108 is to articulate further limits on the exclusive rights granted to copyright holders in Section 106. To qualify for these exemptions, the archives or library must be open to the public or they must be available not only to researchers affiliated with the library or archives or with the institution of which they are a part, but also to other persons doing research in a specialized field. Furthermore, to qualify for the Section 108 exemptions, the copying cannot be done for any commercial gain, and all copying allowed by Section 108 must carry a notice that the work may be protected by copyright.¹⁹

With these qualifiers, Section 108 allows libraries and archives to make copies under several different circumstances. First, they can make no more than one copy of a work and distribute such copy. In the case of preservation copying, the 1998 revisions to the copyright act provided for slightly different conditions for archives as opposed to libraries. In the case of unpublished materials, Section 108 (b) allows an archives or library to make three copies of an unpublished work. Furthermore, unlike the 1976 act, which may have limited these copies to facsimiles, the 1998 act allowed the use of digital technology to make copies of unpublished materials for the purpose of preservation. Given the pressures of the digital arena, it is important to note that the section places a clear limit on the dissemination of digital copies: they "may not [be] made available to the public in that format outside the premises of the library or archives."

In the case of published materials, Section 108 (c) places greater restrictions on preservation copying. Although allowing three preservation copies and the use of digital instead of solely facsimile technology, preservation copying of published materials is allowed only if: 1) the original is damaged, deteriorating, lost, stolen, or obsolete and an unused replacement cannot be obtained at a fair price; and 2) any digital copy is not made available to the public in that format outside the premises of the library or archives. The 1998 act defined "obsolete" as "the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."

Sections 108 (a), (d), and (e) contain further general limits on the allowances they make for library and archival copying. The copying qualifies for the exemption if "the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and the library or archives displays prominently, at the place where orders are accepted, and includes on its

order form, a warning of copyright. . . .” Similarly, in the case of self-service photocopiers, a copyright notice must be posted (§108 f).

The Copyright Term Extension Act of 1998 added Section 108 (h) to allow digital or facsimile copying of published works in the last 20 years of their term, subject to some rather complicated qualifiers to this permission [§108 (h), 2, A–C]. However, since this permission applies only in the case of published works, it has limited relevance to archival concerns.

Note that the copying that archives and libraries can do on behalf of users, e.g., for interlibrary loan or reference, applies only to conventional textual materials and not to audiovisual, photographic, or musical works. The relevant portion is Section 108 (i), which makes clear that allowance for library and archival copying is not meant to apply to a “musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news” Thus, the allowance for archives to make reference copies for remote users, which is the backbone of correspondence-based reference service, applies for conventional manuscripts but not for much of the photographic, motion picture/videotape, and musical recordings that are increasingly popular parts of modern archives.

Ownership and Transfers of Ownership

Over the life cycle of collections, archivists need to be attentive to who owns the copyright in materials they hold. As with much else in copyright law, the only reliable answer to the question of who owns the rights in an item is, “It depends.” At its simplest, copyright belongs initially to the author or authors of the work. However, ownership becomes more complicated with joint works, where the coauthors are co-owners. Especially complicated can be the ownership of works made for hire, where the employer or other person for whom the work was prepared is considered the author and owns all of the rights unless there has been a separate written agreement to the contrary. Not every work authored by an employee is a work for hire; rather, this provision applies only to a work prepared by an employee within the scope of his or her employment or a work specially commissioned for use as a contribution to a collective work if the parties expressly agree in writing that the work shall be considered a work made for hire.

As managers of documentary material created by others, and often created by persons from outside the archivist’s parent institution, archivists are generally well aware that ownership of copyright is distinct from ownership of physical documents themselves (see Section 202). Thus, merely because a historical society, for instance, has been given a collection of old negatives and photographs does not mean that it can publish such material or grant copyright permission for others to publish any of the images. Instead, permission must be sought from the original creator or the employer if the photos qualify as works for hire.

Because the term of copyrights can endure for a very long time after the death of the author, many archives have found that serving users can be facilitated if the repository obtains a transfer of copyright ownership from collection donors through an explicit statement in a formal deed of gift. In order for the transfer of ownership to occur, it must conform to the provisions of Section 201, which essentially requires that the transfer be

made formally by “any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.” Section 204 provides that such transfers be in writing. Although obtaining such a conveyance in a deed of gift is a great help to future researchers, it often is of only limited effect. First, if the donor is not the author but only a next of kin, the donor may not be aware of some assignments of copyright that the author has already made, perhaps as a condition of employment or a condition of publication, such as for articles and books. Second, the transfer can apply only to those parts of the collection written by the author, such as outgoing correspondence, but not that authored by others, such as incoming correspondence.²⁰

Duration of Copyright

More than any other player in the mix of rights incorporated in federal copyright legislation, archivists and librarians have an especial responsibility to be concerned about the length of time that copyright protection endures. Chapter 3 of the copyright act outlines the duration of copyright. Since the first U.S. copyright act in 1790, the length of copyright has been steadily expanded from 14 years with one renewal possible, to the present: life of the author plus 70 years. In the case of works for hire, such as work-related material created by employees, the term is now 95 years from first publication or 120 years from creation. Insofar as archives frequently contain materials published before 1978, one should be aware that different rules apply to such materials that could already be in the public domain.²¹ For materials created but unpublished or unregistered before January 1, 1978, the term is also life of the author plus 70 years, but in no case does the term expire before December 31, 2002. Despite the very negative effect of the 1998 extension, a more damaging 1995 proposal (H.R. 989) would have delayed the expiration of such very old copyrights to 2012. So archivists, as advocates for their users, should remain very attentive in the period leading up to 2003, to guard against any new efforts to prevent the oldest copyrighted material from entering the public domain.²²

As agents for multiple future generations of research users of information locked in copyrights, archivists and librarians need to be advocates for copyright terms consistent with the U.S. constitutional provision (Article I, Section 8) that they be “to promote the Progress of Science and useful Arts” and “of limited term.” By definition, archivists in particular are responsible for works with permanent research value and that remain under copyright protection long after their commercial value has disappeared. This may also be long after there is any means to contact successive rights holders for permission to utilize an item in new works. Further, unlike published library material, archives contain vast quantities of material that have never had the benefit of public availability through issuance in multiple copies, but that still are locked in copyright restrictions.

The issue of copyright term illustrates the tension between commercial and consumer concerns versus cultural and educational values. One can appreciate why large commercial copyright holders, especially such entertainment complexes as Disney, would want to extend the term of copyright ever longer to allow more time to secure profits from old material. Nevertheless, the constitutional purpose of copyright and the funda-

mental notion of balance implicit in the Anglo-American notion of copyright since at least 1710 argue for adherence to the Constitution's clear mandate for limited terms.²³

The Challenges Ahead

Because copyright determines how widely information in all forms can be disseminated and because it has sweeping effects on what may be done with the evidence and information over which we preside, it should be a central professional concern to archivists. Thorough knowledge of the multiple issues such as original ownership, exclusive rights, fair use rights of users, and transfers of copyright should be a basic element in the education of a professional archivist. Furthermore, practicing archivists need to be attentive to public policy changes in the international and U.S. forums that affect their work and the users we serve.

The archivist's role is increasingly difficult because of the changing nature of our post-industrial society. As the economy has moved away from dependence on farmed, mined, and manufactured goods, it has promoted commerce in ideas and information. For sociological and political reasons, an especial importance has been assumed by the fixation of ideas and information into media that constitute diversions and entertainment. The success in creating a large market for entertainment information has not only defined the post-industrial era, but it has created political pressures to limit what at base does not want to be fenced in: the flow of information.²⁴ Although the cultural and educational information that is of primary concern to archivists and librarians has not been the target of such legislative efforts, the legislation designed to protect the intellectual property so central to the entertainment and information industries has not differentiated the commercial from the cultural and educational consequences of regulating the rights of creators and users of intellectual property.

Given the difficulty that archivists and users have faced in trying to locate rights holders as they seek to publish the results of their research, we would all be better served by allowing copyrights in unpublished material to expire at an early date. Although archivists lost the 1998 battle on term extension, we made critical points that defined a high road for our interests. In late 2001, when the Digital Future Coalition filed an *amicus curiae* brief asking the U.S. Supreme Court to hear an appeal in the case of *Eldred v. Ashcroft*, which seeks to have the 1998 term extension declared unconstitutional, the Society of American Archivists (SAA) played an important role in crafting the brief.²⁵ As more and more aspects of copyright in a digital age have become the center of public attention, legislation, and litigation, archivists need to understand how their interests in copyright relate to those of other users of intellectual property. We must look forward to continued advocacy efforts so that the next time commercial interests want to add even more to the 70-year term or restrict "fair use" rights, we can at least work to exclude unpublished materials from being denied further to the public domain.

The prospects seem dim for any fundamental change in the conditions that gave rise to the 1997-1998 legislative actions. Information technology continues on an accelerated, centuries-long track for broader transmission and expedited copying, and the global economy is moving to greater dependence on information content. Furthermore,

regardless of what conditions we may believe are supported by U.S. constitutional provisions of copyright, in the global economy, international treaties, such as the Berne Convention, the World Intellectual Property Organization (WIPO), or even agreements within a body such as the European Union seem to overshadow national laws. Thus, U.S. copyright law is subject to rewriting according to those international agreements made by large players, often heavily represented by global content providers interested in designing intellectual property laws to protect their investments rather than to encourage broad dissemination or the promotion of science and the useful arts. Thus, although profitability—and the political stakes—become higher as we move further into the post-information entertainment age, our ability to have a distinctive American archival voice heard becomes more difficult.

Despite these challenges, the archival profession recently has become more active and effective in contributing to the debate over copyright. The SAA's involvement in the 1998 term extension legislation, the subsequent *amicus* brief in *Eldred*, and perhaps similar action in the parallel case of *Golan v. Ashcroft* are signs of how the profession must become more actively engaged in public policy as the center of archival interests—information and evidence—become the core of an international information economy.²⁶ To fulfill our core responsibilities to our parent institutions, to the historical records in our custody, and to our users communities, we will need to blend these roles with the need for advocacy—as professionals, lovers of learning, and citizens of the United States.

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NOTES

1. Emphasis in original. Readers familiar with Sections 102 and 302 of the Copyright Law will immediately recognize the poster's error: the copyright in a photograph subsists from the time it is created and fixed in a tangible medium of expression. Further, a search of the Library of Congress's Thomas Web site does not reveal any references to such legislation pending in 1999 about the "number of items which a photographer could copyright."
2. In the United States prior to the 1976 revision of the copyright act, unpublished materials had no federal protection, rather, they were covered as a form of common law property governed by state laws varying from jurisdiction to jurisdiction.
3. Note that the author is not a lawyer and is not presenting this text as legal advice. Rather, it is an outline of the legislation to explain issues that may be of concern in daily archival work. Readers who require a formal legal opinion should consult their institution's legal counsel office.
4. Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, Tennessee: Vanderbilt University Press, 1968): 20–150. In the 65 years following the Statute of Anne, a series of English cases clarified the meaning of the law for authors, publishers, and readers. Most important was *Donaldson*

- v. *Beckett* of 1774, when the House of Lords found that copyright was based on the Statute of Anne, not on common law, and they affirmed that an author's rights and those rights assigned to a publisher were not perpetual but limited to a fixed time. Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Massachusetts: Harvard University Press, 1993): 93–112.
5. The clause reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." See also Neil Weinstock Netanel, "Locating Copyright Within the First Amendment Skein," 54 *Stanford Law Review* (2001): 1–86.
 6. For a good discussion of the consumer and public policy issues involved in recent Congressional action and court cases see Charles C. Mann, "Who Will Own Your Next Good Idea?" *Atlantic Monthly* (September 1998): 57–82.
 7. James M. O'Toole, *Understanding Archives and Manuscripts* (Chicago: Society of American Archivists, 1990): 58. Mark Greene, "'The Surest Proof': A Utilitarian Approach to Appraisal," *Archivaria* 45 (spring 1998): 127–169 and especially 150–151.
 8. <www.archivists.org/governance/handbook/app_ethics.html#code>. Examined January 17, 2002.
 9. United States Copyright Office (2000). *Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*, <www.loc.gov/copyright/title17/>. Examined January 18, 2002.
 10. Provisions on boat hull design became Chapter 13 of the copyright law. Provisions regarding playing of music in small bars and restaurants became §513 (and amendments to §110 inter al.) via Chapter II of the Sonny Bono Copyright Term Extension Act. There is an interesting parallel in the inclusion of boat hull designs in the DMCA with one of the earliest laws dealing with the granting of exclusive rights: Florence's 1421 grant to Filippo Brunelleschi of a patent for a specific boat hull design. [Ross King, *Brunelleschi's Dome* (New York: Penguin Books, 2000): 112–17.]
 11. Michael S. Shapiro and Brett I. Miller. *A Museum Guide to Copyright and Trademark*. (Washington, D.C.: American Association of Museums, 1999).
 12. According to §101, a work of visual art includes: "1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . . or 2) a still photographic image produced for exhibition purposes only . . ." *Nimmer on Copyright* (New York: Matthew Bender and Leix Publishing, 2000) notes that this definition disqualifies ". . . the vast majority of products resulting when someone snaps a camera's shutter." (8D.06[A]1).
 13. The Supreme Court has said, "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purpose of copyright." *Campbell v. Acuff-Rose Music*, 510 U.S. (1994) at 578.
 14. A good early introduction to the cases is Kenneth D. Crews, "Unpublished Manuscripts and the Right of Fair Use: Copyright Law and the Strategic Management of Information Resources." *Rare Books & Manuscripts Librarianship* (1991): 61–70.
 15. The Second Court of Appeals argued that the Supreme Court ruling in *Harper & Row v. Nation* (a 1985 case involving *The Nation's* preemptive publication of surreptitiously obtained excerpts from a Gerald Ford memoir) prevented the application of the fair use defense in the case of unpublished materials.
 16. The 1992 act's legislative history provides emphatic support for this interpretation: *Congressional Record* vol. 137, no. 136 (September 27, 1991) S 13923–25 and vol. 138, no. 118 (August 11, 1992) H 7991–92. See also *United States Code Congressional and Administrative News* 102nd Congress, Second Session, P.L. 102–492, vol.5, 2553–2562. Furthermore, in the 1991 case of *Wright v. Warner Books* (unpublished materials could be used in a biography based on fair use factors one, three, and four), the 2nd Court of Appeals backed away from its earlier categorical statements in *Salinger*. Although the court saw unpublished material as less open to quotation under "fair use" provisions, it stated "Neither *Salinger*, *Harper & Row*, nor any other case, however, erected a *per se* rule regarding unpublished works. The fair use test remains a totality inquiry, tailored to the particular facts of each case." *Wright v. Warner Books, Inc.* 953 F.2d (1991).
 17. *Sundeman v. Seajay Society Inc.* 142 F. 3d 194 (4th Cir. 1998) at 29–30.
 18. Several Internet sources provide useful guidance in assessing whether a particular use might be considered a "fair use": Georgia Harper, "Crash Course in Copyright," <www.utsystem.edu/OGC/IntellectualProperty/cprindx.htm#top>, and "Fair Use of Copyrighted Materials," <www.utsystem.edu/

- OGC/IntellectualProperty/copypol2.htm>. Especially helpful is Kenneth D. Crews' *Copyright Management Center* site (<<http://www.iupui.edu/~copyinfo/aboutcmc.html>>), including the "Fair Use Check List" (<<http://www.iupui.edu/~copyinfo/fucheckintro.html>>). Examined January 18, 2002.
19. For guidance on the form of notices, see information at Kenneth D. Crews' *Copyright Management Center* Web site: <<http://www.iupui.edu/~copyinfo/copying.html>>. Examined January 18, 2002.
 20. Sample language for a Deed of Gift might be: "To facilitate the research use of the collection, the Donors hereby give and assign to the Donee those rights of copyright that the Donors have in the collection." One might also ask the donors to transfer their rights of trademark, publicity, and privacy, if any, in the materials.
 21. A convenient guide for archivists and librarians is the table prepared by Peter Hirtle, "When Works Pass into Public Domain in the United States," *Archival Outlook* (January-February 1999), also available at <<http://cidc.library.cornell.edu/copyright/>>. Examined January 18, 2002.
 22. In the time remaining before January 2003, there are issues that should concern archivists about actions that could reduce the scope of material to enter the public domain at that time: Kenneth D. Crews, "Do your manuscripts have a Y2K+3 problem?" *Library Journal* (125:11) June 15, 2000: 38-40.
 23. On Disney's involvement in the 1998 Copyright Term Extension Act, see "Disney Lobbying for Copyright Extension No Mickey Mouse Effort," *Chicago Tribune* (17 October 1998): 22 or Bill McAllister, "Special Interests: Mouse Droppings," *Washington Post* (15 October 1998): A 21. See also, Michael H. Davis, "Extending Copyright and the Constitution," 52 *Florida Law Review* (2000): 989-1037. For a scholarly study of the constitutional issues see Paul J. Heald and Suzanna Sherry, "Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress," *University of Illinois Law Review* (2000): 1119-1197.
 24. Although the combatants in suits over the legality of Internet information-sharing protocols such as Napster are ready to take off their gloves at the first mention of the phrase "information wants to be free," it is undeniable that the notion has captured the attitude of many users since it was first articulated by Stewart Brand in *The Media Lab: Inventing the Future at MIT* (New York: Viking, 1987): 202-207.
 25. See <http://www.archivists.org/news/copyright_amicus.html> and <<http://eon.law.harvard.edu/openlaw/eldredvreno/>>. Examined January 18, 2002.
 26. *Golan v. Ashcroft* No. 01-B-1854 (D. Colo. filed Sept. 19, 2001) (conductor and others questioning constitutionality of retrospective and prospective extension of copyright term by the 1998 Copyright Term Extension Act and restoration of copyright works by the 1994 Uruguay Round Agreements Act).

