EMERGING INTELLECTUAL PROPERTY ISSUES, PARADIGMS AND
CONTROVERSIES: AN INTRODUCTION FOR ARCHIVISTS

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Introduction and objectives

This module intends to fulfill three primary objectives:

1. Orienting MIAP students and other moving image archivists to emerging intellectual property issues, paradigms and controversies and their effects on moving image archival practice

2. Serving as a reference and set of approximately 85 pointers to timely and authoritative resources on intellectual property issues affecting moving image archives

3. Providing students and archivists with information from diverse sources that can potentially enable them to play key roles in the continuing evolution of intellectual-property paradigms impacting archives

This is an immensely rich, complex and dynamic area of legal, cultural and social practice. Every day brings new developments, new writing and new speculation about copyright and cultural property. It is impossible to reference all of this in any single document, just as it is impossible for any document to remain current. What this module attempts to do is to focus on topics and resources of special interest to moving image archivists, addressing generic copyright issues only when they have direct relevance to the core archival missions of preservation and access.

As with all writings concerned with copyright and intellectual property issues, the standard disclaimer is in order: The author is not a lawyer and nothing in this document should be considered legal advice, legal opinion or legal commentary. In addition, this module focuses principally on U.S. copyright law and should not be considered authoritative with regard to non-U.S. copyright issues.
New intellectual property paradigms and controversies

Until the 1990s, the IP arena was a relatively quiet place populated principally by attorneys; it has now moved into the media mainstream, and IP issues now concern a broad spectrum of the public: creators, technologists, librarians, archivists, the media and information industries, and consumers of culture.

The seeds for IP's emergence as a prime cultural, social and economic issue were laid in the 1970s, when Congress passed the 1976 Copyright Act (effective 1978), which modernized a long-quiescent body of law and brought many copyright issues to the attention of the public. In the 1990s, major copyright proprietors (e.g., Hollywood studios and the recording industry) became concerned over two emerging issues: the imminent introduction of digital recording, reproducing and transmission technologies and the upcoming expiration of many copyrights still under exploitation (e.g., Gershwin and Mickey Mouse). These concerns brought about two key pieces of legislation: the 1998 Copyright Term Extension Act and the Digital Millennium Copyright Act. In the early 2000s, several court cases have also awakened wide attention: Eldred v. Ashcroft, a challenge to Congress's extension of copyright terms, and MGM v. Grokster, an attempt to declare peer-to-peer (p2p) networking illegal.

The emergence of the Internet as a distribution platform that challenges existing media distribution systems and forces established media companies to reconsider and, in many cases, reengineer their business models has accentuated the attention given to IP issues and conflicts. The Internet's contradictory nature as a distribution system carrying both licensed and unlicensed content has rendered it at once a dream and nightmare for content owners.

One consequence of the acceleration of legislation and litigation has been that copyright and IP issues have escaped the confines of legal and technology discourse and become big news, and, in the case of digital rights management (DRM) occasionally even consumer issues. Though we can expect this trend to continue and hope for increased public awareness in the area, there are pluses and minuses to all of this publicity. Though awareness is certainly positive, the heated and polarized debates have not always been reality-based. Considerable misinformation circulates around copyright law and its interpretation, especially in fan and filmbuff circles. Perhaps most disturbing for our field, the interests of archives and libraries are rarely considered or discussed by those outside our immediate field.
A timeline of recent events in the evolution of copyright law

1976: Passage of Copyright Act of 1976, which lengthens terms and codifies fair use doctrine


1994: Uruguay Round Agreements Act causes restoration of large number of copyright in non-U.S. works that had previously entered the public domain

1998: "Sonny Bono" Copyright Term Extension Act passes, extending many copyrights 20 years

1998: Digital Millennium Copyright Act (DMCA) becomes law, prohibiting unauthorized access to works through circumvention of technological protection measures. See DMCA section below.

2003: Supreme Court rules in Eldred v. Ashcroft, affirming the constitutionality of copyright extension

2003: Supreme Court rules in MGM Studios, Inc. v. Grokster, Ltd. that peer-to-peer filesharing software violates copyright law

2005: Copyright Office solicits comments on orphan works; legislation introduced to address reuse of these works in 2006 fails to pass but will probably be reintroduced in 2007. See Orphan Works section below

2007: U.S. Court of Appeals for the 9th Circuit in Kahle et al. v. Gonzales rules that the 1992 elimination of the copyright renewal requirement is constitutional

2007: U.S. Court of Appeals for the 10th Circuit rules in Golan v. Gonzales that the 1994 Uruguay Round Agreements Act's restoration of non-U.S. copyrights "has altered the traditional contours of copyright" and must therefore be subject to First Amendment review. The case is remanded to the district court for review

2008: U.S. Supreme Court denies certiorari in Kahle et al. v. Mukasey (formerly Gonzales), thus affirmaing the 9th Circuit's decision

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1 The complete text of the Copyright Law of the United States now in effect is here: http://www.copyright.gov/title17/
4 Materials relating to the case can be found at http://eldred.cc/eldredvashcroft.html.
5 Links to many resources and documents on this case and related issues are at http://w2.eff.org/IP/P2P/MGM_v_Grokster/.

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NYU-MIAP Curriculum Modules are available here: http://www.nyu.edu/lisch/preservation/program/curriculum_modules.shtml
Copyright maximalism breeds resistance

Critics of copyright term extension, digital rights management and the accelerating proliferation of controls over intellectual property term these trends "copyright maximalism." This, plus aggressive copyright enforcement on the part of trade associations and some copyright holders, has sparked conspicuous resistance to copyright law on the part of activists, Internet users and some creators. This resistance occurs on a spectrum, from the reuse of copyrighted works in ways that probably constitute fair use all the way to mass duplication of works for commercial sale in such a manner as to constitute piracy. But though fair use for scholarly or educational purpose has nothing in common with the sale of inexpensive pirated movies on Canal Street, the discourses greeting these practices are often the same. Since U.S. copyright law treats the product of creative or intellectual labor as property as soon as it is fixed in tangible form, and because private property is protected by law, many fail to consider the exceptions and elasticities (such as fair use) already embedded in copyright law.

Case study in resistance: Eyes on the Prize

*Eyes on the Prize* I and II (1987 and 1990) were 6- and 8-hour television documentaries on the history of the African-American struggle for civil rights between 1954 and 1985, produced by Blackside, Inc. and aired by PBS. Because the producer had not been able to obtain perpetual licenses for all content within *Eyes* (in part because some licensors refuse to license their material in perpetuity, the programs became unavailable after 2000 and used VHS videotape copies were selling on the secondhand market at wildly inflated prices. The situation surrounding this program became a widely publicized example of the leverage that rightsholders maintained over culture and history when Downhill Battle, an IP-activist organization, joined civil rights activist Lawrence Guyot in calling for civil disobedience. Advocating widespread downloading of versions of the documentaries by means of BitTorrent filesharing software, they also planned "Eyes on the Screen," a campaign of nationwide screenings to commemorate Black History Month in February, 2005. In the meantime, the Ford Foundation had granted initial funds to re-clear certain material (including the copyrighted song *Happy Birthday to You*) and the family of deceased producer Henry Hampton asked activists to recant their call for civil disobedience out of worry that a profusion of bootlegs would prevent future legal distribution of the series. Downhill Battle issued a statement of recantation. The series is now available for educational use on DVD and VHS, but has not yet been cleared for home use. As of February 27, 2008, used boxed sets of VHS tapes are being offered on Amazon.com for prices ranging from $199.49 to $1698.98.7 The *Eyes* dispute publicly illuminated the little-known fact that archives, archival footage licensors, and perhaps more prominently music publishing companies, possess a potential stranglehold over the

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distribution of culturally significant materials, and has given increased credibility to the movement to expand fair use for documentary makers (see below).

At present (early 2008) the social aspects of IP law are in flux, and it is difficult to imagine that many attributes of the current picture will remain unaffected. In addition, opposing forces are highly polarized and have a high propensity toward bellicose and apocalyptic pronouncements. Given that archives by definition focus on the long haul, it would be imprudent to craft long-term plans on the basis of short-term conditions and antinomies. On the other hand, in an age of increasing online accessibility of digital materials, archives will likely find it self-defeating to resist moving towards greater openness. Excessive deference to rightsholders should not be a substitute for active engagement with the evolution of cultural property law.
Determining the copyright status of works

Though the state of copyright in the digital age poses many fascinating issues, most archivists will, on a day-to-day basis, be most concerned with the fundamental question: How can I ascertain the copyright status of a work?

Though copyright law is complex, especially regarding works of non-U.S. origin, there are a number of useful resources that may help archivists determine the rights status of works without having to pay for expensive copyright records searches or consult lawyers. A detailed tutorial on copyright status determination is beyond the scope of this module, but we present a number of key resources geared to the needs of the moving image archivist.

U.S. Copyright Office resources:

U.S. Library of Congress. Copyright Office. How to Investigate the Copyright Status of a Work (Circular 22).
Text: http://www.copyright.gov/circs/circ22.html
PDF: http://www.copyright.gov/circs/circ22.pdf

Describes the various records systems maintained by the Copyright Office and outlines basic searching strategy.

Text: http://www.copyright.gov/circs/circ15a.html
PDF: http://www.copyright.gov/circs/circ15a.pdf

U.S. Library of Congress, Copyright Office. Motion Pictures Including Video Recordings (Circular 45).
Text: http://www.copyright.gov/circs/circ45.html
PDF: http://www.copyright.gov/circs/circ45.pdf

Describes specific procedures and conditions for registering moving image materials.

Other online resources:

Hirtle, Peter. Copyright Term and the Public Domain in the United States, 1 January 2008. At http://www.copyright.cornell.edu/public_domain/. Excellent, lucid breakdown broken down by type of work, publication date and circumstances of publication.

Until 1978, the Copyright Office published Catalog of Copyright Entries, a multi-volume serial that listed basic information drawn from copyright registration records. The entire series is soon (2008) to be digitized by the Boston Public Library, Prelinger Library and the Internet Archive, and will be offered online through the Internet Archive and other sources. Print copies may be found in many government documents depository libraries.
From January 1, 1978, registration records were made available for searching through an online interface, at http://cocatalog.loc.gov/.

Carl Malamud and others have made a copy of the registration database, amounting to some 21 million records, available for free download at http://bulk.resource.org/copyright/. These would be useful for research studies and data mining projects.

The Copyright Office also published a number of volumes specifically listing copyright registration records for motion pictures:


Each of these volumes (except 1960-1969) has been reproduced by private publishers who have undertaken to annotate the entries with renewal information. A list of available volumes, which can be found at large libraries:


A 1960-1969 compilation is in preparation by Skip Elsheimer and Distributed Proofreaders.

**Offline resources:**


**Accessibility of copyright records**

Accessibility of copyright records is itself an emerging issue. Although the *Catalog of Copyright Entries* contains much useful information, renewals and assignments that predate 1978 generally require recourse to original registration certificates, which are available only at the Copyright Office in Washington. In addition, pre-1978 copyright records (with the exception of renewals for 1923-1963 books) are not currently online. The prospects for the digitization of pre-1978 records are not yet clear. It is possible that the *Catalogs of Copyright Entries*, when fully scanned, may be reformatted into a searchable database, but the resultant resource will not contain all the information that can be gleaned from the copyright registration certificates themselves, nor will it link to copyright assignment documents and other information held at the Copyright Office. There is also a possibility that the Copyright Office themselves will digitize its own records, but the expense of doing so may defer this project for a long time.

At present most deep copyright searching requires an in-person visit to Washington or the engagement of a professional researcher. For most published nontheatrical U.S. films, however, a deep search will not be necessary to determine copyright status.8 Most ephemeral works published prior to 1963, and a significant number made prior to 1989, are in the U.S. public domain and do not constitute bundles of rights, with the possible

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8 “Publication" is a technical concept that does not necessarily resemble a layperson's definition of the term. According to the 1976 Copyright Act, "Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication." U.S. Copyright Office, "Copyright Office Basics" (Circular 1), at http://www.copyright.gov/circs/circ1.html#pub.
exception of copyrighted background music. The Superlists and online databases permit relatively easy determination of copyright status for most works.

Unpublished works, such as amateur films or home movies, raise more complex issues. As Peter Hirtle's matrix "Copyright Term and the Public Domain in the United States" (see above) reveals, unpublished works from identifiable authors who died 1938-present remain under copyright, and unpublished anonymous, pseudonymous and corporately authored works from 1889-present are currently under copyright. These two categories encompass almost all home movies, notably those whose authors did not place their names upon the works. This places home movies squarely in the orphan works category, and we may hope that orphan works legislation addresses the vulnerabilities facing archives and collectors as a result of their normal activities.

It has been suggested that archivists, distributors, film researchers and other interested parties collaborate to build and maintain a registry of copyright status for a body of high-interest works, especially feature films thought to be in the public domain. This is a useful suggestion that so far seems not to have been made real.

Finally, many moving image works that are not easily available for research and screening are represented by descriptive materials filed with the U.S. Copyright Office at the time of their copyright applications. These materials, now held at Library of Congress's Motion Picture, Broadcasting and Recorded Sound Division, may include scripts, continuities (akin to shot lists), still images, promotional materials, press kits, music cue sheets, cast and credit information and synopses. In an unpublished report, David Pierce has called for the Library of Congress to digitize these materials, now primarily accessible on microfilm, and to determine their copyright status with an eye towards making them widely accessible for research and study.9

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Orphan works

Orphan works have in recent years emerged as a significant issue for archives and libraries. As defined by the U.S. Copyright Office, orphan works are copyrighted works whose owners may be impossible to identify and locate. In the United States, these works certainly number in the hundreds of thousands, perhaps even millions, especially if home movies and amateur films no longer held by their makers are included. Since there is always the possibility that copyright holders may surface, archives and users risk incurring liability if they copy these works. The orphan works problem is exacerbated by copyright term extension and the elimination of the copyright renewal requirement, as both of these changes in copyright law cause copyrights to last longer, even if there is no claimant or interest to protect.

Archives holding orphan works in need of preservation or that are potentially reusable risk liability if they pursue normal preservation or access activities with these works. In the same way, reuse of orphan works poses risks for makers of derivative works. Widespread awareness of the problem (and an Internet petition drive) led the U.S. Copyright Office to study the orphan works issue in 2005. A report was issued in early 2006 after over 700 initial and 140 reply comments were received. The number of comments demonstrates great public concern over this issue, and the comments illustrate the plurality of opinions in great detail. Legislation was introduced in 2006 but failed because of opposition from illustrators, graphic arts and photographers, whose work often appears within other works without specific attribution. According to Public Knowledge, new House and Senate orphan works bills may be expected to emerge in 2008.10

Resources on orphan works

The Copyright Office's page on its orphan works study, including links to its final report and all public comments, is at http://www.copyright.gov/orphan/. The public comments express diverse points of view and are in many cases well worth reading.

Until recently, Stanford law professor Lawrence Lessig was a leader in the campaign to make orphan works more accessible. His counterproposal to legislation that was introduced in 2006 is at http://www.lessig.org/blog/archives/003696.shtml.

Public Knowledge maintains a resources page on orphan works, which includes links to parties opposing orphan works legislation, at http://www.publicknowledge.org/issues/ow.

10 http://www.publicknowledge.org/node/1380
Copyright term extension

Until the 1990s, U.S. archives and their users relied heavily on the steady progress of works out of copyright and into the public domain. Classically, works entered the public domain because of the copyright holder's unwillingness or failure to renew copyrights, noncompliance with formalities such as affixing proper notice of copyright, and other technical consideration. Since the vast majority of creative works lose revenue-producing potential for their creators or owners after a period of years (while often becoming more culturally or historically significant), this system tended to assure that the public domain would be enriched by regular infusions of content and that makers of derivative works could roam freely in a growing public domain to find materials to repurpose.

In 1992, renewal formalities were ended in the United States. This meant that all copyrights in effect as of 1992 would continue for their full term (see Hirtle for specifics on duration of copyright), and that nothing entered the public domain because of failure to renew. Two years later, passage of the Uruguay Round rendered it possible for copyright owners in other countries to restore copyrights that had lapsed in the U.S. In 1998, the Sonny Bono Act added 20 years to the terms of many copyrights. The Supreme Court ruled in 2003 that copyright extension was constitutional, and other cases since then have affirmed this.

This legislation and these decisions have effectively slowed growth of the public domain to a trickle. The consequences for archival access are profound. Archives now find themselves holding quantities of moving images whose copyright status, if not uncertain, is likely to render them unusable in most contexts for a very long time. Though there is an exception in copyright law permitting archives to make preservation copies of endangered works that are not commercially available in the last 20 years of their term, this does not permit archives to offer a high degree of access to most copyrighted works in their collections. The histories of entire generations remain under copyright control. Though many works documenting the early baby-boomer era are now in the public domain and enjoy fairly extensive distribution, the same is not so for works documenting the life and culture of so-called Generation Xers and Millennials. Since the perennial atmosphere of fiscal austerity often renders it necessary for archives to derive income from providing some kind of access to their holdings, continual copyright extension affects their financial stability.

Further challenges to copyright term extension in the legislative and judicial spheres are likely. However, much attention has shifted towards addressing the orphan works problem, and we may hope for some form of resolution in this area before too long.

Resources on copyright term extension

Berkman Center for Internet and Society, Harvard University. Openlaw page of resources on Eldred v. Ashcroft at http://cyber.law.harvard.edu/openlaw/eldredvashcroft/.

Digital Millennium Copyright Act (DMCA)

The DMCA amended U.S. copyright law in 1998 by making it illegal to make or distribute circumvention technology — technology created primarily to defeat access controls on copyrighted works — and also to circumvent an access control, whether or not copyrights were infringed in the process. Though DMCA is a complex issue, it would be accurate to say that it will pose significant barriers to archival access in the digital age, as archives will be inhibited from breaking electronic "locks and keys" on many born-digital and digitized works (including DVDs, many downloads and other material protected by digital rights management (DRM) technologies) and thus unable to offer customary access to them. Librarians and many archivists consider DMCA a serious erosion of fair use.

DMCA puts manufacturers of consumer electronics gear into opposition with content producers and distributors. Hardware manufacturers, unless they are also in the content business, face the need to address the wishes of consumers, who tend to seek freedom to source, duplicate, reformat and migrate entertainment content as they please. Content producers, with some exceptions, typically seek to maximize the number of billable events associated with their properties, and look to technology to enable, secure and sustain this process.

Every three years, the U.S. Copyright Office is empowered to issue DMCA exemptions as it sees fit. The November 2006 exemptions permitted several classes of users to circumvent access controls on copyrighted works for noninfringing uses for a three-year period. Two exemptions relevant to archival works includes:

"1. Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

"2. Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."11

The first exemption was widely criticized for its limitations, especially because it limited compilations to "media studies or film professors," leaving out archives, elementary and secondary schools and professors whose fields were outside media or cinema studies. The next three years (2007-2009) will demonstrate how this exemption is employed and what uses result.

Efforts to institute legislation resembling DMCA in Canada proceeded without significant opposition until activists, led by Michael Geist and others, foregrounded the question in the press and publicly questioned the Prime Minister. This suddenly brought a halt to the rapid progress of the bill.12

On the positive side, DMCA contains "safe harbor" provisions that shelter online service providers and hosts of websites from liability from activities of their users that may infringe copyrights. If a service provider qualifies, the customer, not the provider itself, is liable for the infringement. DMCA provides for a "notice and takedown" procedure by which copyright holders can notify web hosts and service providers of infringement.13

**Resources on DMCA**


Electronic Frontier Foundation's compendium of criticism on DMCA is at http://www.eff.org/IP/DMCA/.


Wikipedia on DMCA (an example of a contentious article that is likely to evolve over time) at http://en.wikipedia.org/wiki/DMCA.

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12 Michael Geist is following the progress of new Canadian copyright legislation at http://www.michaelgeist.ca.
13 The Chilling Effects Clearinghouse maintains a FAQ on DMCA safe harbor provisions, at http://www.chillingeffects.org/dmca512/faq.cgi
**Fair use: a resurgence**

In the last several years, copyright maximalism and escalating licensing costs for images (and especially music) have encouraged fair use advocates and documentary filmmakers to come together in an attempt to codify best practices for fair use. Though four factors for fair use of copyrighted material are codified in U.S. copyright law, they do not constitute rights. They are rather factors for evaluating a judicial defense. This means that a user of copyrighted material who wishes to claim her use as fair must either live in uncertainty or successfully defend her claim in court. Neither situation is ideal, and neither one makes distributors and errors-and-omissions (E&O) insurance carriers happy.

Mediamakers working with the Center for Social Media at American University elaborated best practices for fair use within documentary projects in 2005, and have widely circulated their findings. In February 2007, the Fair Use Project at Stanford Law School's Center for Internet and Society teamed with an insurance broker and announced that they would provide E&O coverage and pro bono legal representation to certain filmmakers who comply with these best practices. Though we have yet to see how this works out in practice, it is a promising development for mediamakers and an ambiguous one for archives.

We can expect archives to be divided on the fair use issue. Many proprietary collections that hold copyrighted material or rely on stock footage income to survive will be under pressure to defend their rights as they see them. Others may tacitly or openly support efforts by others to claim fair use over their holdings because they wish for holdings to see the light of day, even though they do not control their copyrights. This could raise ethical concerns if donors or depositors have placed material in the archives with the implied or expressed understanding that archives will support their claims to copyright.

Fair use assertions are unlikely to be the undoing of archives. Though unwelcome uncompensated uses will always occur, pressures on makers and users to properly clear material continue to rise. It is difficult to imagine that E&O carriers will roll over and blithely insure producers that routinely claim fair use and fail to secure customary rights and permissions. More likely, E&O carriers will be somewhat more open to considering special cases when elements in a production are difficult or impossible to clear, or when a production manifestly seeks to comment or criticize. But even though archives may not exert full control over copies of materials they hold, they still possess considerable leverage as trusted entities that can testify to the ownership of or rights in materials, and provided coveted indemnification to users.

**Fair use: the four factors**

Courts assess four factors when deciding whether to uphold a fair use claim.

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1. the purpose and character of the use (also known as the transformative factor)
2. the nature of the copyrighted work
3. the amount and substantiality of the portion taken, and
4. the effect of the use upon the potential market.\footnote{These factors are analyzed in detail at http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html.}

There are also existing and proposed educational fair use guidelines, which do not specifically relate to the above four factors.

- Rules for recording and exhibiting television programs: see http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-b.html#4

- Proposed guidelines for digital copying (e.g., scanning), and use of copyrighted images in digital works: see http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-c.html#1

- General information on educational fair use guidelines: see http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-b.html#1

Resources on fair use


Center for Social Media's fair use page at http://www.centerforsocialmedia.org/resources/fair_use/.

Stanford University Libraries provide an excellent set of resources on copyright and fair use at http://fairuse.stanford.edu/. A blog at http://fairuse.stanford.edu/blog/ assists in keeping these resources current.
Section 108 under study

Section 108 of U.S. copyright law provides limited exceptions for libraries and archives. Quoting the Library of Congress website,

"Section 108 of the Copyright Act permits libraries and archives to make certain uses of copyrighted materials in order to serve the public and ensure the availability of works over time. Among other things, Section 108 provides limited exceptions for libraries and archives to make copies in specified instances for preservation, replacement and patron access. Section 108 was enacted as part of the Copyright Act of 1976, then amended in 1998 by the Digital Millennium Copyright Act and the Copyright Term Extension Act, and in 2005 by the Preservation of Orphan Works Act."\(^\text{17}\)

A Section 108 study group, whose members include copyright experts from law, publishing, libraries, archives and the "creative industries," has been meeting and expects to present its report to the Librarian of Congress and the Register of Copyrights in early 2008. Based on this report, the Copyright Office will then make legislative recommendations to Congress. The study group's remit focuses on the shortcomings of Section 108 in the digital era. Since the Copyright Act was written with analog materials in mind, libraries and archives find their options limited with regard to collecting and preserving born-digital and digitized materials. A revision of Section 108 would hope to expand libraries' and archives' capabilities while respecting the interests of rightsholders.\(^\text{18}\)

\(^\text{17}\) http://www.loc.gov/section108/about.html. The text of Section 108 may be found at http://www.copyright.gov/title17/92chap1.html#108.

\(^\text{18}\) Library of Congress's official webpage on the Section 108 Study Group, which contains links to many important resources on preservation and copyright, is at http://www.loc.gov/section108/.
Preservation and copyright

It has often been remarked that copyrights may last longer than the physical manifestations of the works they protect. This fact gives birth to an opposition between the archives' core mission of preservation and the law of copyright, and is a special problem with moving images and digitally based works, whose fragility can render preservation an urgent necessity.

Several key resources on digital preservation and copyright include:


Open content, open access, open source

Though the terms "open content," "open access" and "open source" all sound alike, they have each accreted a specific (if often tendentious) meaning and galvanized their own groups of supporters. Each term comes in many flavors, and it will be beyond the scope of this module to describe any of them in detail; we instead refer the interested reader to the many available web resources.

"Open access" and "open source" are presently defined in a more codified manner than is "open content." "Open source" was elaborated around computer code, while "open access" is currently being elaborated around scholarly and scientific literature. "Open content" is fraught with vagueness, but typically refers to cultural material that is not software. But perhaps the question most worth considering for archivists is what constitutes "openness." "Openness," like "access," is a term that lacks a specific definition; it is generally defined by degrees or in opposition to something perceived as "closed." It is also important to point out that openness is not necessarily a characterization of copyright status, but rather an attribute describing a document, a work, an object, a collection, a service or an interaction. As an attribute, "openness" considers the entire nature of the situation surrounding the work or collection at issue.

Resources on open content, open access and open source

A simple web search on any of these terms is likely to engender more confusion than clarity. Wikipedia is a reliable point of departure on these three terms and the discourses that have grown up around them:

Open access: http://en.wikipedia.org/wiki/Open_access

Open content: http://en.wikipedia.org/wiki/Open_content

Open source: http://en.wikipedia.org/wiki/Open_source


Lawrence Lessig's books have infused the field of discussion in this area and are essential reading:


In January 2006, WGBH hosted an "Economics of Open Content" symposium which brought together many scholars, educators, media producers and executives, attorneys and others to speed movement toward open content. The talks cover such subjects as networked and collaborative production models; the ethos of openness; open courseware; open archives, museums and libraries; and much more. Participants include Yochai Benkler, Howard Besser, Paul Courant, Henry Jenkins, Marsha Kinder, Clifford Lynch, Anne Margulies, David Pierce and David Weinberger. Audio and video is at http://forum.wgbh.org/wgbh/forum.php?lecture_id=0197.

Peter Suber of Earlham College maintains Open Access News, at http://www.earlham.edu/~peters/fos/fosblog.html. The high-traffic blog collects and reprints significant news items and writings around the open access movement, especially in scholarly and university publishing.
Permissive licensing: Creative Commons

Creative Commons (CC), a San Francisco nonprofit organization, arose out of a critique of copyright law elaborated, among others, by Eric Eldred and Lawrence Lessig. Eldred was a computer programmer and independent Hawthorne scholar who suggested an "intellectual property preserve" in the late 1990s. Lessig was a law professor who critiqued the "permission culture" that had arisen in tandem with the domination of modern culture by large content companies. CC was founded not as an anti-copyright organization, but rather to make it simpler for copyright owners or custodians of content to share certain rights to their materials as they desired.

CC enabled "permissive licensing" by drafting a set of licenses that copyright owners could place on their works. If, for instance, a filmmaker wished to make their work available for noncommercial use with credit, the maker could affix a "Non-Commercial-Attribution" license to the work. The licenses were available in human-readable (skeletal) form, in full legal language, and also in machine-readable form. (RDF/XML data)

CC has gained significant traction in a number of domains, especially online, where many millions of webpages carry a CC license. Many musical compositions and short films have also been CC-licensed, and the Prelinger Archives online collection at the Internet Archive carries a CC "Public Domain" dedication. CC licenses have been legally upheld in the Netherlands,19 and many authors are publishing books and journal articles under CC licenses.

CC is a useful option for archives who own copyright to material or wish to warrant its public domain status to potential users. By using a CC license, an archives can retain its rights while giving implicit permission to its patrons to use the material in certain specified ways. Google, Yahoo and Yahoo's photo-hosting and sharing site Flickr all offer CC searches, enabling their users to easily find CC-licensed material for reuse.

Resources on Creative Commons

Creative Commons website at http://www.creativecommons.org.


The cc-community mailing list, hosting active discussions on attributes of existing licenses and emerging licensing forms, resides at http://lists.ibiblio.org/mailman/listinfo/cc-community.

Code as law: digital rights management (DRM)

DRM is a term, often loosely defined, for a collection of existing and emerging technologies that control access to or restrict the usage of digital content, either software or hardware. It was inevitable that copyright holders would seek to deploy protective measures as digital reproduction and transmission technologies proliferated, but nonetheless DRM has become an extremely controversial issue. Though at this point DRM is much more present in commercial content ventures than in non-profit archival projects, it will increasingly become an issue for archives that (1) are part of commercial enterprises utilizing DRM as part of an enterprise-wide strategy; (2) partner with entities using DRM in content delivery situations, such as Apple's iTunes and Google Video; or (3) use commercial media management or delivery systems that employ DRM by default. Grace Agnew's two articles on the OCLC website form a brief but excellent introduction on DRM's basic attributes and ways in which it may affect libraries, and by extension archives.

The path for DRM is paved by the widespread assumption that cultural property is a nonrenewable resource quite like physical property. If IP is like physical property, maximalists say, its misappropriation is equal to theft in the physical world. Why not guard against the consequences of theft by installing locks and erecting fences? The issue with this argument, however unassailable it may seem, is that freer distribution of and access to culture may often yield greater benefits than enclosure. There are certainly cases for DRM; we might not wish our private homevideos that we store on a server to be accessible to people outside our immediate families. But archives, whose social contract with their users depends first on the provision of broad, permanent public access to the maximum extent possible, can't and shouldn't accept security solutions uncritically. Like copyright enforcement, DRM needs to be deployed with care, precision and forethought, and any decision to deploy DRM needs to be assessed in terms of its impact on preservation and access.

DRM already stands in the way of preserving, not to mention providing access to, many works. For example, games and DVDs are copy-protected, and making preservation copies of these materials often requires breaking copy protection. The Copyright Office has granted a number of selective three-year Digital Millennium Copyright Act (DMCA) exemptions to certain institutions and classes of users, so as to assure certain kinds of access and preservation work that do not limit the market, if any, for certain kinds of works. In practice, the exemptions recognize that the law as currently written does not serve all needs well, but they are limited and temporary. For more, see the section on DMCA, above.

Some predict that DRM is doomed. Cory Doctorow's celebrated Microsoft Research talk makes 5 points: that DRM systems don't work; that DRM systems are bad for society; that DRM systems are bad for business; that DRM systems are bad for artists; and that DRM is a bad business move for Microsoft. It's very much worth reading to assess
whether his argument continues to hold. I believe it is too early to pronounce a verdict on DRM's future.

Explicit DRM restrictions aside, other similar issues impact the scope of archival work in the digital space. One issue, and I will speak nontechnically here, is the isolation, enclosure, obfuscation, ephemerality and sheer mass of moving images that live on the Web. As of summer 2007, YouTube was estimated by analysts to hold over 24 million distinct videos, and estimates of the total number of videos online hovered around 120 million distinct items. If archives are to collect and preserve this newly dominant media form, we won't be able to collect its manifestations one by one as we have done for so many years. We'll have to develop and deploy automated tools to grab objects, and develop automated metadata harvesting and cataloging routines. (This, of course, is exactly what search engines do in order to grab and index webpages.) The difficulty of this task leads many archivists to feel that it should be left up to the search engines themselves. Unfortunately, YouTube is not an archives, and doesn't offer the kind of cataloging, access and preservation that we expect of longterm digital repositories. Collecting online video content requires complex tools that often run up against robot exclusions (e.g., websites' prohibitions against automatic indexing), against meaningless filenames and obscure directory structures, degraded file formats, and confusing collections of objects that come and go by the second. Finally, the legal issues around web archiving continue to evolve and are at best, far from settled. Since web-based harvesting is not inexpensive, decisions about how it will be deployed will likely not be up to archivists alone.

How moving image archives address all of these challenges cuts to the heart of how we imagine the future of our mission. Will we concentrate on physical objects because they are easier to touch and describe, and ignore the production of the present and future? Or will we convene and cooperate to develop practices and standards for collecting online moving image materials?

**Resources on DRM**


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Post-copyright consciousness: a broader conception of archives' role in the culture

I have argued that many critics of copyright maximalism and many creators who take exception to aspects of current copyright law have focused on the technicalities of copyright to the exclusion of other important considerations. In the essay "Beyond Copyright Consciousness" I propose that copyright critics also focus on the difficulties of access to works. The essay, though somewhat dated, characterizes access as a form of openness whose importance ranks as high as copyright.

Resources on access as openness


Case study: Alternative IP economies based on access rather than copyright

The ferment currently surrounding copyright and intellectual property issues is raising questions about alternative economic and valuation models for content. Although many of these suggested models are still theoretical and unmeasured, some pose interesting questions for moving image archivists considering the evolving balance between openness and protectionism.

One key modeling question arises when archives consider making material available for free on the Internet or on emerging video-on-demand networks. Does enabling free access deprive the archives of income potential — is it equivalent to killing the goose that lays the golden eggs?

In a recent blog post that apparently functions as a draft for a forthcoming book,20 Kevin Kelly addresses this issue. He suggests eight "categories of intangible value" associated with free content, categories that can be bought and sold even when the content that's associated with them is given away. These uncopyable, "generative" values add value to copies that are otherwise free. His "generatives," slightly adapted to reflect archival interests and terminology, are as follows:

- Immediacy: receiving content on an immediate or timely basis
- Personalization: content tailored to individual needs or interests
- Interpretation: technical support, context, metadata, research
- Authenticity: trusted content from authoritative sources
- Accessibility: persistent, backed-up content

Embodiment: immersive, high-resolution or performative (spectacular) content
Patronage: audiences/users paying creators out of respect, appreciation or wish to support
Findability: indexing, metadata, aggregation, curation

Kelly's categories, though not completely congruent with other similar salable attributes that have proposed, indicate that our understanding of content economies can continue to evolve. Interestingly enough, these categories have nothing to do with copyright; they are primarily founded on access, contextualization, authentication, preservation and quality, cataloging and the gift economy — all areas in which archives have long functioned. His "generatives" operate on copyrighted or uncopyrighted content, within and without copyright regimes. Though experience will judge whether they remain germane and robust, his article indicates that copyright protection alone may be a coarse model by which to understand the distribution of cultural content, and that it isn't the only means by which content owners, distributors, custodians or aggregators can earn income from content distribution.

Compare Kelly's conceptualization of eight "generatives" with my own reality-based list of five attributes, and you will find considerable overlap. My five attributes describe what I have found users of Prelinger Archives footage will continue to pay for, even though they can download much of the same material for free from the Internet Archive.

1. People will pay for higher quality material. Often, physical materials enable uses not possible with compressed digital copies.

2. People will pay for solutions. Not everyone wants to, or can do their own archival research, when they can pay someone else for cleared and usable footage. An independent maker may, either by necessity or volition, click through the Internet Archive for usable footage. An advertising agency producer may lack the time to do the same while having the resources to buy a quick solution. Speed is often a key element of saleability.

3. People will pay for segmentation. Material that's segmented into discrete, single-subject clips has greater value than material embedded in long, hard-to-touch films or files.

4. People will pay for metadata. Like segmentation, metadata adds considerable value to audiovisual material. There are sizable footage businesses (alas, not ours) built on extremely well-indexed public domain material.

5. People will pay for paper. Contracts bearing a license's name at the top, a signature at the bottom, and the requisite representations, warranties, and indemnifications are needed for most production above a certain threshold of visibility, and contracts are never given for free.
Unsettled issues

Several unsettled copyright and copyright-related issues are likely to dog archives in coming years.

Who will control user-generated content, and will consensus move towards a paid or royalty model?

At the moment, much commercially-served and driven Internet content is created for free by users, who receive in exchange for their contributions little more than publicity, fleeting fame or perhaps community status. The business models of countless companies, especially those that have been characterized as pursuing participatory "Web 2.0" models, are built upon the availability of free user-generated content. Think, among others, of YouTube, Yelp, Slashdot, Facebook, Blogger, LiveJournal, or Flickr. We have come a long way from the simple statement on the WELL (the pioneering discussion network) that "You own your own words." Will the Web will move beyond this flourishing business model based on largely uncompensated cultural production towards one in which content creators receive compensation and retain greater control over their creations? Will we see litigation by discontented creators? If movement occurs in this direction, it may well help to create a class of millions of new moving image objects that are subject to increased control, perhaps to residual and royalty payments, and thus beyond the reach of archives. (It goes without saying that there are no systematic efforts to capture and preserve online video, which, with games, is developing into the dominant media delivery system of our time.)

Is copyright the primary issue with which archives need to be concerned when assessing the potential accessibility of content?

Not necessarily. Many works are subject to non-copyright restrictions that emanate from outside of the archival context, such as contractual limitations, union contracts, guild agreements, and other underlying issues. In some cases, as with many television programs, a given work can be saddled with a bundle of restrictions that may effectively limit its access in perpetuity, even after expiration of the basic copyright. Outside the U.S., moral rights function as another potentially limiting restriction.

A scenario of this type is currently emerging in U.S. public television, where pressure is mounting from leading stations and especially from funders to make noncurrent programming and other archival media assets more accessible. Most programming is encumbered by preexisting contracts that will have to be renegotiated for material to be, for instance, placed online for reuse. Television executives are loath to put new issues on the table in union negotiations, and unions and guilds have historically been loath to concede their control over content when potential future gains might be at issue. When the BBC Creative Archive project sought to put selected footage from BBC productions online for educational and public remixing, they found that residual payments were due to cinematographers and soundpeople for the new usage, and had to pay license fees to their parent organization in order to permit even limited reuse.
The good news is that these issues is under active discussion at many production centers, and that there are efforts to illuminate and simplify the complex knots of rights that keep much interesting material out of distribution. Further developments in this area will be interesting to follow.

Donor restrictions, though often not specifically IP-based restrictions, also enclose a considerable mass of archival material. [did david pierce mention publicizing and assessing or renegotiating donor restrictions in his report?] In cases where potentially accessible collections are embargoed by donor restrictions, archives should develop strategies and means to revisit them and, if possible, build evolution and obsolescence into their terms.
Summing up

Clarification of copyright issues and, we can hope, reconciliation of current IP conflicts are central to the future archival access and the continuation of archives' canonical functions. Unfortunately, moving image archives and archivists have too often behaved as followers rather than as leaders, substituting reflexive deference to rightsholders for active dialogue and negotiation, reacting to legislation after it has gone into effect, and drafting access policies that express short-term perspectives rather than taking long-term cultural interests into account. If archives are to maintain and expand their customary cultural roles, they will have to find ways to be active agents in this area. One starting point might be for archives and archivists to try to articulate the principles of a copyright regime that would make it possible for them to pursue their legitimate agendas, and from there to imagine the contours of law that might better serve the interests of education, cultural production and scholarly inquiry. Though many (including this writer) feel that the generational divide that currently exists regarding attitudes toward IP protection may gradually result in a mellowing of attitudes on various sides of the "IP wars," progress cannot be taken for granted, and archives are likely to gain much more by being proactive instead of reactive.
Other resources

Balazs Bodo, at Budapest University of Technology's Center for Media Research and Education, has prepared a bibliography on copyright that contains numerous citations and links to a number of interesting academic papers, focusing especially on the economics and politics of copyright. It can be found at http://www.warsystems.hu/?p=67.

*Steal This Film II*, released in early 2008, addresses the future of cultural production, distribution and creativity. Numerous scholars, thinkers and activists are interviewed. Versions in DVD, HD and other formats are freely downloadable at http://www.stealthisfilm.com/Part2/index.php.

Cory Doctorow, writer, journalist and regular analyst and commentator on evolving regimes of cultural production and distribution, is a regular *Guardian* contributor on many topics of interest to archivists. His ongoing series "Digital Rights, Digital Wrongs" addresses such issues as the problematics of the term "intellectual property," the idea that copyright law should distinguish between commercial and cultural use, and the problems of digital rights management. The series page is here: http://www.guardian.co.uk/technology/series/digitalwrongs

William Patry, an eminent copyright attorney and now Senior Copyright Counsel at Google, writes a fascinating blog at http://williampatry.blogspot.com/, well worth reading for commentary on significant copyright issues of the moment.

Copyfight is a blog on the policy and politics of intellectual property, with almost six years of deep coverage on almost every issue that has concerned creators, activists and policymakers. At http://copyfight.corante.com/

Public Knowledge is a Washington public interest group "working to defend your rights in the emerging digital culture." They have researched and intervened in many issues relating to copyright and the distribution of culture, including orphan works and copyright extension. Their main site is at http://www.publicknowledge.org

The Electronic Frontier Foundation, which describes itself as "the leading civil liberties group defending your rights in the digital world," is a San Francisco-based research, policy and litigation organization that has been involved in many of the key copyright and IP-related issues since 1990. Their website is a rich collection of papers, briefs, filings and opinion on many of the issues with which this module is concerned. A good starting point would be their "Intellectual Property" page at http://www.eff.org/issues/intellectual-property

Copyrighthistory.org is a British project funded by the Arts and Humanities Research Council that's building a digital archive of primary materials on copyright from the 15th century, when the printing press was invented, to the beginning of the 20th century. Launch is scheduled for March 19, 2008.
The Chilling Effects Clearinghouse, a joint project of the Electronic Frontier Foundation and seven law school clinics concerned with IP issues, "aims to help you understand the protections that the First Amendment and intellectual property laws give to your online activities." The site disseminates information on the current legal climate for Internet activist and reprints cease-and-desist letters sent to website operators by copyright holders and other complainants. Included are useful resources on copyright and DMCA. At http://www.chillingeffects.org/

Kembrew MacLeod of the University of Iowa has written two books, both relevant to this module:

_Owning Culture: Authorship, Ownership and Intellectual Property_. New York: Peter Lang, 2001. Discusses how IP law supports private ownership of many areas of contemporary life and culture, and explains the importance of borrowing and appropriative practices throughout time.


MacLeod's website, which contains a shortish list of useful links, is at http://www.kembrew.com

Siva Vaidhyanathan, _Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity_. New York: NYU Press, 2003. Vaidhyanathan reviews the history of copyright protection and recent trends toward maximalism, and argues for a "thin copyright" that rewards and protects creators yet allows for the freest possible expression. His examples are mostly drawn from history, especially the history of jazz and blues, and the book focuses on consumer media and culture rather than legal technicalities.