

Digitization and Copyright

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General Principles

If a record is in the public domain, it may be digitized at will, assuming there are no privacy or external concerns.¹ If a record is not in the public domain and is within the last twenty years of its copyright term it may be digitized locally, although may not be disseminated on the internet. This is thanks to Section 108, Title 17 of the United States Code.² If a record is not in the public domain and does not fall under Section 108 a library might attempt to digitize an item based on the doctrine of Fair Use. Digitizing on the basis of Fair Use can be dangerous endeavor however, as each invocation of this doctrine must be confirmed by a court on a case by case basis; an alleged copyright claimant could rightfully file suit against the library and the application of Fair Use might be overturned by a court, in which case the library might very well face fines or other legal repercussions.³ Lastly if the item is not in the public domain, does not fall under Section 108 or any likelihood of Fair Use, the librarian must ask for permission directly from the copyright claimant before digitizing.

Records

1. Some personal letters written by Mr. Walter Packard to Mrs. Carrie Stevens dated during the year 1900. The personal letter described an outing that they had taken with a group of friends. Both parties are deceased.

The issue here lies with the date of death for Mr. Packard. Normally records created by personal authors fall into the public domain 70 years after the death date of the author. If Packard died in the 1940s or 1950s we would be in violation of common copyright by digitizing this record. However, it is

possible under Section 302 of Title 17 to receive protection from any action for infringement given that 95 years have passed since the year of publication or 120 years have passed since it was first created, whichever expires first.⁴ This exception only applies to cases in which the date of death of the author is presumed unknown in good faith. In this case all possible copyright protections against this record would expire in 2020. Accordingly we could still digitize this item locally under Section 108 or take a calculated risk and digitize on the internet under Fair Use doctrine. If the institution is risk averse and still wants to offer the record on the internet, efforts could be made to check probate records in an attempt to track down a next of kin in order to establish permission.

2. A book with the following citation: Hall, F. (1871). The history of San José and surroundings: with biographical sketches of early settlers. (L. Goodrich [role]), San Francisco: Printing house of A.L. Bancroft and Company no. 721 Market Street

This example is different because the copyright law differs for published works as opposed to personal writings. As a general rule published records fall into the public domain 95 years after the date of copyright or registration.⁵ Starting from records copyrighted in the early 1920s and beyond the Sonny Bono Copyright Term Extension Act would also have to be considered.⁶ Regardless, this particular book should be in the public domain, assuming that the copyright was not renewed between the current date and 1871. An extra cautious librarian might make the effort to travel to Washington DC to check the Copyright Office's records for evidence of renewal or at least check Penn University's catalog of copyright entries.⁷

3. Some photographs of J.J Owen (1827-1884?) that contain no dates and no information on who took the photographs.

This is a difficult case to determine due to the fact that we have no information on where the photographs originate from. If they originate from a personal author or from a published collection, we

could apply the rules of records #1 and #2, yet there is also another variable. Works made for hire or works by anonymous authors have a separate rule which governs their application to the public domain: they enter it 120 years after the creation date.⁸ Accordingly if J.J. Owen died in 1884, these photographs would be in the public domain since 2005 (120 + 1884), as it would be difficult to photograph someone relaxing on a chair that is already dead. As his death date is ambiguous, we can safely digitize this record if we assume he died no later than 1889. If research is unable to confirm his death date or otherwise secure additional details of the record's provenance we might digitize this item and keep it local by invoking Section 108 protection. An institution might also digitize this record for use on the internet with calculated risk on the grounds of Fair Use.

¹ Stephen Fishman, *The Public Domain: How to Find Copyright-Free Writings, Music, Art & More* (Nolo: 2000)

² § 108. Limitations on exclusive rights: Reproduction by libraries and archives

<http://www.copyright.gov/title17/92chap1.html#108>

³ § 107. Limitations on exclusive rights: Fair use <http://www4.law.cornell.edu/uscode/17/107.html>

⁴ § 302. Duration of copyright: Works created on or after January 1, 1978

<http://www4.law.cornell.edu/uscode/17/302.html>

⁵ Library Digitization Projects and Copyright - Part II - Expiration of Works into the Public Domain

<http://www.llrx.com/features/digitization2.htm>

⁶ S.505 <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SN00505:|TOM:/bss/d105query.html>

⁷ <http://digital.library.upenn.edu/books/cce/>

⁸ Library Digitization Projects: U.S. Copyrighted Works that have Expired into the Public Domain

<http://www.librarylaw.com/DigitizationTable.htm>