

Copyright Issues for the "Bits of History" Project

by

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Introduction

This report deals with the application of copyright law to the display of historical photographic images on the Internet. Such images, taken since the mid-1800's and through the present time, have been donated to various libraries and museums in San Mateo County. (For convenience, the participants are collectively referred to as "libraries" in this report.) The originals of those photographs are currently made available in hard copy to library patrons. The libraries desire to create web pages containing some of those images so that library patrons can view the photographs in a more convenient and useful manner. The project is called "Bits of History."

This paper is an attempt to guide the local libraries on the major copyright issues that will affect the activities of the "Bits of History" project.

The basic copyright law can be summarized as follows: If a work is protected by copyright, the user of the work must ask for permission from the copyright owner unless the planned use is covered by one of the law's exemptions, such as fair use. If the work is not protected by copyright law, which may result from the expiration of the copyright or the loss of copyright through some action by its author, the work is in the public domain and may be used without restriction.

As photographic and electronic technology has advanced, high-quality reproductions of visual images have become easier and cheaper to make, and

more widely accessible. This has particular attraction for non-profit libraries, which hope to disseminate their materials through the newly available media.

These issues were explored in the mid-1990's at the Conference on Fair Use (CONFU), where participants, including representatives from the American Library Association, Association of Research Libraries, Association of American University Presses and the Association of American Publishers, attempted to develop a consensus policy for the fair use of copyrighted materials in a digital information environment.

No such consensus evolved. In late April 1997, Bruce Lehman, Commissioner of Patents and Trademarks, publicly stated that the Proposed Guidelines negotiated by CONFU participants had failed to achieve consensus support. In May 1997, at its third "final" meeting in Washington, DC, CONFU participants concurred. None of the Proposed Guidelines survived the comment and endorsement process that ended in May.

Given the uncertain results of the CONFU policy initiative, and the failure of Congress to revise the copyright law, it is apparent that no rules can be cited upon which the "Bits of History" participating institutions can firmly rely. Instead, this paper provides guidance that will help prevent egregious violations of the copyright law and encourage appropriate uses and copying of the libraries' photographic collections onto the Internet.

Following a description of the relevant aspects of copyright law, this paper recommends certain guidelines for the use of historical photographs by the "Bits of History" project participants. As is further explained below, by complying with these guidelines the libraries may insulate themselves from damages for accidental copyright infringement.

The Purposes of Copyright

The framers of the United States Constitution empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const., art. I, sec. 8, cl. 8. Relying on this grant of authority, Congress has passed copyright legislation to protect the right of authors to control the reproduction of their intellectual creations.

As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a

means to that end. The legislation is intended to stimulate authors to create by granting them a monopoly and in the process conferring a benefit upon the public that outweighs the evils of that temporary monopoly.

These two purposes are closely related. Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works. Similarly, copyright protection enables publishers and other distributors to invest their resources in bringing those works to the public. The U.S. Supreme Court described this dual purpose as follows:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. " *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

In the *Twentieth Century Music* case, the Court made those general observations about the reach of copyright protection in a time of technological innovation that most people would now consider almost antique. The specific question in that case was whether the reception of copyrighted music from radio broadcasts and its transmission through speakers installed in the ceiling of a fast-food restaurant constituted a "performance" on the part of the restaurant owner. A divided Court concluded that it was not, reasoning that members of the audience in a restaurant do not "perform" the musical works they hear any more than a person performs a copyrighted song when he sings in the shower.

For present purposes, the important point of the *Twentieth Century Music* case deals with the relationship of the copyright law to technology. It is always true that technology changes more rapidly than the law, and so it is necessary to interpolate when applying the law to new technology. The Court instructs as follows: "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose." *Id.* That is, creative work is to be encouraged while simultaneously the broad public availability of literature, music, and other arts is to be promoted.

This balance should also apply in the context of the technological changes relating to the Internet. Individuals can now access and copy, with

minimal effort, an enormous collection of text, graphics, photographs, music and other expressive content from web sites on the Internet. The copyright law must encourage and reward creativity on the Internet, but it must simultaneously promote the broad public availability of the creative works themselves. Such balance is only possible if the creators of Internet web sites can protect their creative works through the copyright law without fear that their creations can be copied without permission or compensation. It is also critical that the Internet not become a venue where copyrighted works are copied and distributed indiscriminately to provide content for web site owners.

Copyright of Photographs

Copyright protection subsists in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. §102. This broad description includes literary, musical, dramatic, choreographic and pictorial works, and specifically includes photographs ("Pictorial, graphic and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs...." 17 U.S.C. §101.)

The courts have expressly held that a photograph may be copyrighted, "although it is the work of an instant and its significance may be accidental." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 230 (1903), *Time Inc. v. Bernard Geis Assoc.*, 293 F.Supp. 130 (S.D.N.Y. 1968). The *Time* case, for example, decided that the Zapruder film of the Kennedy assassination could be copyrighted.

The original photographs in the collections of the "Bits of History" project participants are subject to copyright restrictions imposed by their owners. So, too, are the web pages on which the libraries intend to display and distribute those photographic images. For the former, the libraries must ensure that they do not infringe others' copyrights. For the latter, the libraries must ensure that their own copyrights are protected. This report addresses both concerns.

Ownership of Copyrighted Photographs

The Copyright Act gives initial copyright ownership to the author, or to the authors who jointly create a work. 17 U.S.C. §201(a).

Generally, the initial owner of a photograph will be the person who took the photograph. The exception is for the case of "works made for hire," a work prepared by an employee within the scope of his employment and certain works commissioned from independent contractors. In those cases, the employer is considered the author. This applies to photographs as follows: If the photographer was an individual acting on his own, the photographer owned the initial copyright. However, if the photographer was an employee or contractor for a newspaper or magazine, the newspaper or magazine is considered the author.

The library should thus determine at the time of a grant whether the grantor is indeed the copyright owner. This examination must start by asking who took the photograph or in which publication the photograph first appeared.

As intangible property, a copyright can be transferred from the author to another, either through a grant during his lifetime or by will or intestate succession. To be an effective transfer, a grant of exclusive rights must be in writing and signed by the grantor; a non-exclusive grant may be valid even though oral. 17 U.S.C. §201.

Even the grants of exclusive rights, however, may not be permanent. The law provides that an author who grants an interest in a copyright after January 1, 1978 may terminate that grant, upon complying with certain procedures, effective at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant. 17 U.S.C. §203.

Any library receiving a photograph must determine, then, not only who owned the original copyright but also whether that copyright was transferred, in whole or in part, to another person.

One must also distinguish between ownership of a copyright, or of any of the exclusive rights under a copyright, and ownership of "any material object in which the work is embodied." 17 U.S.C. §202. For example, a photographer can take a photograph, donate the print and retain the negative for purposes of making copies. The donee may own the material photograph, but the copyright remains with the photographer or his assignee.

It is probable that most of the photographs donated to libraries do not come with a written grant of exclusive rights to the photograph by the copyright holder. The owner of the copyright may have reserved his own rights to make copies for any purposes. Except as discussed below, therefore,

the library may not even actually have any right to copy the photograph, and will be limited as to what it can do with that photograph.

Exclusive Rights to Copyrighted Photographs

The copyright law, at 17 U.S.C. §106, declares that the owner of the copyright in a pictorial work has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies of the copyrighted work to the public by sale or other transfer of ownership;
- (4) in the case of pictorial works, to display the copyrighted work publicly.

There are additional exclusive rights that pertain to literary, musical, dramatic, and choreographic works, pantomimes, and graphic or sculptural works. 17 U.S.C. §106.

Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic or artistic form in which the author expresses intellectual concepts. It enables the author to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's form of expression.

In the context of a pictorial work, this means that the owner of a copyright in a photograph cannot limit others from displaying their own photographs or drawings of the same scene or subject.

Once a copyright expires, or indeed if copyright is waived or lost by some act by the copyright owner, the work enters the public domain and it can be used or copied without restriction.

Restrictions by the Donor or Photographic Subjects

The donor of a photograph may have imposed restrictions on its use. Such restrictions must be honored. It is also essential to remember that a copyright holder retains all rights except those he grants.

The copyright law does not grant any specific rights to the models or subjects of photographs or other writings. There are, however, privacy statutes that govern the use of another person's "name, voice, signature, photograph, or likeness." Cal. Civil Code §3344. California law prohibits such uses "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent." *Id.*

Since the libraries' uses are not for profit, there is no risk from being sued for damages under this Civil Code by the subjects of any of the photographs.

Of course, there may be contractual arrangements between photographers and their subjects that limit what the photographer may do with the photograph. A library that accepts the donation of a photograph without knowledge of the preexisting contract cannot be held to the contract. If the library is aware of the contract, however, then the contract terms, including any usage restrictions, would need to be honored.

The Requirement of Notice

Prior to March 1, 1989, in order to enjoy a copyright, published works had to bear a copyright notice in a prescribed form. If the notice was not properly affixed upon publication, the work went into the public domain.

Any photographs in library collections that were first published prior to January 1, 1976, without appropriate copyright notices are not subject to copyright protection.

In the 1976 revision to the copyright law, Congress provided that the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. Reasonable efforts to correct the mistake could protect against forfeitures resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.

In a March 1, 1989 revision to the copyright law, Congress changed the word "shall" to "may" in the section dealing with the requirement for copyright notices. The copyright law no longer requires a copyright notice in order to obtain copyright protection. 17 U.S.C. §§401, 405.

Libraries and the Fair Use Doctrine

The most important exception to the exclusive rights of the copyright owner is embodied in the doctrine known as fair use. The doctrine was developed in order to allow unauthorized uses that were "reasonable" and that did not unduly deprive the author's work of a market. The traditional concept of fair use excused reasonable unauthorized appropriations from a work when the use to which the second author put the appropriated material in some way advanced the public benefit, without substantially impairing the present or potential economic value of the first work. The Court of Appeals for the Second Circuit in *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1976) described the fair use doctrine as follows:

"The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts.' ... To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' ... Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether the distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter."

The copyright law provides that "the fair use of a copyrighted work, including use by reproduction in copies or phonorecords or by [certain] other means,... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. §107.

A person who has reproduced, adapted, publicly distributed or displayed a copyrighted work without authorization must do more than invoke one of these (enumerated or similar) socially beneficent purposes. Section 107 also enumerates four factors to consider in determining whether the use is indeed fair:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. News reporting, scholarly research and teaching are examples of favored fair uses of copyright material. Commercial use is not favored.

(2) The nature of the copyrighted work. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy. To the extent one must permit expressive language to be copied in order to assure dissemination of the underlying facts, copying may be more justified.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole. Fair use is less appropriate if entire works, or the most valuable parts of them, are copied.

(4) The effect of the use upon the potential market for or value of the copyrighted work. If copying of a work will prevent the owner of the copyright from profiting from it, even if such profit is only potential, the copying is less justified. This factor may tip the balance in favor of fair use where there are no other known copies of the work in existence, where the copyright owner is unidentifiable, or where there is no ready market by which copies can be sold.

None of these factors is determinative standing alone.

Partly because of the uncertain effect of the fair use statute, Congress clarified the application of the doctrine to libraries in 17 U.S.C. §108. That section, which Congress regarded as "authoriz[ing] certain photocopying practices which may not qualify as fair use," permits the making of copies by libraries only for "private study, scholarship, or research." Unfortunately, that section permits the making of one copy only, or the "isolated and unrelated reproduction or distribution of a single copy ... of the same material on separate occasions." It further excludes reproduction of pictorial works except for purposes of preservation and security, or to replace a damaged, deteriorating, lost or stolen copy. 17 U.S.C. §108(h). This section is narrowly tailored to authorize interlibrary loan procedures or other procedures for protecting the libraries' own collections, and cannot be used to justify the distribution of copies of photographs over the Internet.

The American Library Association ("ALA") joined with other representatives of library, educational and proprietor communities to attempt to draft fair use guidelines in the digital information environment. That process proved to be premature. Following that process, the ALA published a position paper that concluded as follows:

"[Because] information and communication technologies are continuing rapidly to evolve, and because of the degree to which healthy experimentation is underway, ALA does not recommend formal guidelines for fair use in a digital information environment at this time.... While changes in the details of intellectual property policy are under active debate to adapt to new technologies, the broad principles that fair use and other exceptions represent in the interests of the advancement and spread of knowledge need acknowledgment and protection. Thus it is premature to formalize fair use guidelines. Doing so may unduly restrain the proper application of fair use in the educational and research environments." *American Library Association Position On Fair Use Guidelines in a Digital Information Environment*, ALA Washington Office Newslines, Vol. 6, No. 1, January 3, 1997.

The ALA went on to promise that it "will, together with other library associations, investigate the development of guiding principles and examples of current practices in the appropriate use of, and in licensing agreements for, digital information resources." *Id.*

There is a special provision of the copyright law that allows a court to refuse to award any damages at all if it chooses, even if the copying at issue was not a fair use. The good faith fair use defense applies if the person who copied material "believed and had reasonable ground for believing" that his or her use of copyrighted work was a fair use. 17 U.S.C. §504(c)(2). This defense is particularly important if the infringer is an employee or agent of a nonprofit educational institution, library, or archives.

To even attempt to qualify for the good faith fair use defense, a participant in the "Bits of History" project will need to follow an attorney's advice regarding the use. Following the specific guidelines for the "Bits of History" project set forth at the end of this paper is one way to meet that requirement.

Time and the Duration of Copyrights

Because libraries are interested in publishing photographs created over the past century and even earlier, it is essential to understand whether such photographs are still subject to copyright protection.

When copyright protection begins and ends depends on when the work was created. As to works created today or in the future, copyright attaches

automatically as soon as the work is put down on paper or some other tangible medium. 17 U.S.C. §102(a).

Current law provides the following terms for copyright. 17 U.S.C. §§302-304, 405.

Works created on or after January 1, 1978: Copyright in a work created on or after January 1, 1978 subsists from its creation and endures for a term consisting of the life of the author and seventy (70) years after the author's death. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and seventy (70) years after such last surviving author's death. In the case of anonymous works, pseudonymous works and works made for hire, the copyright endures for a term of ninety-five (95) years from the year of its first publication, or a term of one-hundred-twenty (120) years from the year of its creation, whichever expires first. Works published without copyright notice between January 1, 1978 and March 1, 1989 retained copyright only if registration was filed within five years of publication. Following March 1, 1989, copyright notice was no longer required.

Works created but not published or copyrighted before January 1, 1978: Copyright in a work created before January 1, 1978 but not theretofore in the public domain or copyrighted, subsists from January 1, 1978 and endures for the term provided for works created on or after January 1, 1978. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

Works first published under the 1909 copyright act: Copyright in a work published with an appropriate copyright notice under the 1909 copyright act (e.g., from 1909 through January 1, 1978) endured for an initial term of twenty-eight (28) years, with a renewal permitted during the final year for an additional twenty-eight (28) years. The 1976 copyright act (as amended) extended the duration of the renewal term to sixty-seven (67) years, so that timely renewal would lead to copyright protection for ninety-five (95) years rather than fifty-six (56) years. Works published with an appropriate copyright notice before 1924 are in the public domain. Works published without a copyright notice prior to March 1, 1989 are in the public domain unless a copyright registration was filed.

Works first published prior to the 1909 copyright act: Copyright for such works has expired.

These time provisions are summarized in a chart included among the guidelines at the end of this paper.

Protecting Derivative or Collective Works from Being Copied

The library plans to gather together its photograph collections for display in an organized fashion on the Internet.

The initial step will be to scan the photograph for conversion into a machine-readable form. This process is subsumed under the definition of "derivative work":

"A 'derivative work' is a work based upon one or more preexisting works, such as a translation, ... art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. §101.

The owner of a copyright has the exclusive right to prepare and to authorize the preparation of a derivative work. 17 U.S.C. §106(2). Preparing derivative works without the copyright owner's permission is infringement. For example, Albuquerque A.R.T. Co. purchased copies of a book containing art prints by the artist Patrick Nagel, cut out selected pages, glued the prints onto a black plastic material to provide a border, glued this product onto a rectangular white ceramic tile, and applied transparent plastic film over the tile surface. The company then sold the tile, with artwork mounted thereon, to the public. The Ninth Circuit Court of Appeals held that Albuquerque had prepared an infringing derivative work because it "recast or transformed the individual images by incorporating them into its tile-preparing process." *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989).

Although the physical techniques are substantially different, there is no legal distinction between the process disapproved by the court in the *Mirage Editions* case and the process proposed for the "Bits of History" project of copying photographs for incorporation onto a web site.

In the "Bits of History" project, the library intends to gather together multiple such photographs into a database for display on an Internet web site. This process is subsumed under the definition of "compilation" or "collective work."

"A 'collective work' is a work, such a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. §101.

"A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." *Id.*

The important point is that any copyright in a new version, whether it be a collective work or a compilation, covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material. Indeed, copying preexisting copyright materials into a collective work or compilation can be copyright infringement.

One form of compilation that has direct relevance to the "Bits of History" project is the digitization of photographs to create "thumbnail images." Such images can be used in a visual online catalog or image browsing display to enable visual identification of records in an institution's image collection. They are small scale, typically of low resolution, and have no intrinsic commercial or reproductive value. These thumbnail images may be combined with descriptive text in a visual catalog that is searchable by a number of fields, such as the source.

Although the creation of thumbnail images involves the creation of a copy of the original photograph, it is likely that such use by a library as part of an online catalog would be considered a fair use for educational purposes.

Each derivative or collective work prepared from the libraries' photograph collections should bear its own copyright notice. A single notice applicable to a collective work as a whole is sufficient to protect the work, and all individual photographs within it, against a claim that subsequent infringement was innocent. 17 U.S.C. §§404, 401(d).

Penalties for Copyright Infringement

The penalties for copyright infringement are very harsh. 17 U.S.C. §§502-509. A court can award damages up to \$100,000 for each separate act of willful infringement, where the infringer knew he was infringing and did it anyway. Even lack of intent to infringe is not a defense to infringement, although a court may reduce damages if the infringement is "innocent." 17 U.S.C. §504(c).

A court may also award actual damages and require the disgorgement of any profits earned by the infringer as a result of the infringement. 17 U.S.C. §504(b).

There is also provision in the law to award costs of suit and attorney's fees to the prevailing party in a copyright infringement suit. 17 U.S.C. §505.

Specific Guidelines for the "Bits of History" Project

The basic copyright law was summarized above. That summary leads to the clear conclusion that libraries do not have the right, without a careful review of the copyright status of each photograph, to simply place digital copies of their photographs onto the Internet. Indeed, the single most important guideline to follow is this: **A library should not copy any photograph onto the Internet unless (1) the original of the photograph is not subject to copyright protection, or (2) it has received express permission by the copyright owner to copy it.**

The specific guidelines to follow in the "Bits of History" project are summarized below.

Guideline 1: Determine copyright ownership of each picture in the library collection.

To determine whether an original photograph is not subject to copyright protection, ask these questions:

- Who created the photograph?
- Did the photographer work for hire?
- Was the photographer anonymous or did he or she publish the photograph under a pseudonym?
- Is the photographer deceased, and if so when?

- Was the photograph ever published?
- Was the photograph published without a copyright notice, or with an invalid copyright notice, during the period prior to March 1, 1989 when proper notice was required?
- Was the copyright in the photograph ever formally registered?
- Based upon the date of the original photograph, has any possible copyright expired? Refer to the section on "Time and the Duration of Copyrights" earlier in this paper and the summary chart provided in Guideline 2.
- Did the original photograph enter the public domain through an explicit act by its creator? This may be evidenced by a writing, particularly in the documents by which the photographs were donated to the library.
- Did the photographer assign copyrights to the photograph to anyone?
- Was the assignment exclusive or non-exclusive?
- Did the library conduct a reasonable inquiry for the purpose of clearing rights to copy the photograph?

Guideline 2: Review the copyright status of each picture in accordance with the following chart.

This chart is intended as a convenient summary of the rules described in the "Time and the Duration of Copyrights" section earlier in this paper. It is derived from a chart prepared by Lolly Gasaway at the University of North Carolina at Chapel Hill.

DATE OF WORK	PROTECTED FROM	TERM
Published before 1924	In public domain	None
Published without copyright notice from 1924 to 1977	In public domain	None
Published from 1924 to 1963	When published with copyright notice	28 years + renewal term of 47 years, now extended to a renewal term of 67 years; if not renewed, now in public domain
Published from 1964 to 1977	When published with copyright notice	28 years + automatic extension of 67 years for second term
Created before 1978 but not published or copyrighted	1-1-78	Life + 70 years, but not before 12-31-2002
Work for hire, anonymous work or pseudonymous work created before 1978 but not published or copyrighted	1-1-78	The shorter of 95 years from publication or 120 years from creation, but not before 12-31-2002
Created before 1978 but published between then and 12-31-2002	1-1-78	Life + 70 years but not before 12-31-2047
Work for hire, anonymous work or pseudonymous work created before 1978 but published between then and 12-31-2002	1-1-78	The shorter of 95 years from publication or 120 years from creation, but not before 12-31-2047
Published without copyright notice from 1-1-78 to 3-1-89 but registered within five years	When work is fixed in tangible medium of expression	As for any work created in 1978 or later; if not registered within five years, now in public domain
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years
Work for hire, anonymous work or pseudonymous work created 1-1-78 or after	When work is fixed in tangible medium of expression	The shorter of 95 years from publication or 120 years from creation

Guideline 3: Determine whether copy restrictions apply for each picture in the library collection.

In the absence of a written agreement, the copyright owner of a photograph will be deemed to have given the library only the right to use the photograph for educational and scholarly purposes.

The library has the right, under the fair use provisions of the copyright law, to protect the work by making a copies for interlibrary loan, for purposes of preservation and security, or to replace a damaged, deteriorating, lost or stolen copy.

All other uses, including creating copies for display or distribution on an Internet web site, are not permitted without the copyright owner's approval.

Guideline 4: Develop new procedures for donations that include electronic rights.

Libraries should take steps to ensure that they are given appropriate rights to copy all photographs donated in the future. Donors should sign documents granting "the license to reproduce the work and distribute it by all means and media now known or hereafter discovered, including, without limitation, print, microfilm, and electronic media, as well as the right to display and transmit the work publicly on-line."

Guideline 5: Apply appropriate copyright notices to all derivative and collective works.

Make sure a notice such as the following appears on every page of the library's web site:

© Copyright <year> <library name>. All rights reserved.

Be sure also to credit the donor and display the original copyright notices, along with the relevant copyright ownership information, shown in the original source, for all photographs that are legitimately copied onto the web site.

Guideline 6: Protect derivative and collective works from being copied.

By placing the libraries' copyright notices on all derivative and collective works, including web pages, any potential infringers are warned of

the copyright. It will be easier then to prove that subsequent infringement by third parties is willful, thereby justifying higher damage awards.

There are relatively new techniques available by which copyright notices can be hidden within the digital copies of images contained on web pages. This allows the images to be viewed without obstruction, but the hidden notices can be used to prove illegal copying of those images by third parties. Consider embedding such hidden notices in all images placed on web pages.

Registration of copyrights is not required to obtain a copyright, but it is a prerequisite to an award of statutory damages and attorney's fees in the event of infringement of the copyright. The registration process is relatively straightforward and inexpensive. Consider registering the copyright of any web pages that are particularly valuable or are potentially tempting targets for infringement.

Guideline 7: Do not use electronic means to alter photographs except to create thumbnails or embed copyright notices.

This guideline is intended both to ensure that the intentions of the original donor are honored as nearly as possible, as well as to meet the libraries' mission to protect the historical accuracy of the photographs.

Certain modifications to the photograph may be appropriate. For example, it would be entirely reasonable to create thumbnail versions of each image to include in an online catalog or directory. As described earlier, it would also be entirely reasonable to hide digital copyright notices in the photograph to help detect later copying by third parties.

Other forms of alteration should be avoided.

Conclusion

The participating libraries and museums in the "Bits of History" project must review the copyright status of each individual photograph before copying it onto a web site. This process requires a determination of the date the photograph was taken, the identity of the photographer, the circumstances of any previous publication of the photograph, and the terms and conditions of its donation.

Libraries can copy and distribute high-resolution copies of photographs only if those photographs are in the public domain, or if the photographer has expressly granted to the library permission for such copies.

The copyright law does allow libraries to create online catalogs of photographs, including thumbnail copies of each photograph for display and distribution over the Internet.

Libraries should protect their own investments in those derivative or collective works by including their own proper copyright notices, and where appropriate by seeking registration of their copyrights by appropriate filing with the Registrar of Copyrights.

Going forward, libraries must establish new procedures for donations to their collections, so that ambiguous terms and conditions of copyright grants can be clarified. Libraries should request their donors to grant all necessary rights so that the libraries can meet their societal objectives without risking violations of the copyright law.

The issues examined in this paper point out the complexities of the copyright law as it applies to the new electronic distribution medium of the Internet. Many educational and research institutions are grappling with those issues, but there is not yet a consensus on whether or how to modify the law to permit new uses of copyrighted photographs or other creative works.

Whatever consensus emerges will have to satisfy the dual public policy purposes of the copyright law. Authors must be encouraged to create and publishers to publish by grants of limited monopolies, so that they may obtain economic rewards for their efforts. Simultaneously, the public interest must be served by encouraging the broad public availability of literature, music and other creative arts.

The fair use doctrine attempts to balance those interests by providing limited exceptions to the exclusive rights of copyright owners. However, that doctrine as currently interpreted by the courts does not allow libraries to distribute copyrighted works over the Internet, even if the libraries' worthy goal is to encourage broader public access to valuable library collections. Instead, libraries must honor copyrights, and they must seek permission of copyright owners before using and distributing those works on their web sites.