Rights & Reproductions: The Handbook for Cultural Institutions

Association of Registrars and Collections Specialists
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#RightsReproHndbk

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INDIANAPOLIS MUSEUM OF ART
IMA

American Alliance of Museums

“The IMA is dedicated to continued service to the museum field, and this publication is an important step for all of us that deal with the complicated world of image rights on a daily basis.”

Dr. Charles L. Venable
The Melvin & Bren Simon Director and CEO
Indianapolis Museum of Art

“AAM is proud to be publishing this groundbreaking digital handbook on intellectual property law, fair use, licensing, publications, websites and open access, something the museum field has needed for a long time.”

Laura L. Lott
President and CEO
American Alliance of Museums
Rights & Reproductions: The Handbook for Cultural Institutions is made possible by a grant from the U.S. Institute of Museum and Library Services. The project utilizes the OSCI Toolkit, which is supported by the Getty Foundation as a part of its Online Scholarly Catalogue Initiative.
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New Digital Publication

• The definitive rights and reproductions resource:
  – Guidelines;
  – Established standards;
  – Emerging best practices.

• Intended audience:
  – Cultural institution professionals who oversee:
    • Rights clearances;
    • Permissions;
    • Intellectual property matters.
Topics Addressed

INTRODUCTION
Law vs. Ethics
Legal vs. Cultural Institution Thinking
Risk

INTELLECTUAL PROPERTY
Types of Intellectual Property (U.S.)
Personal, Moral, and Third Party Rights
International Intellectual Property Rights
Infringement

INSTITUTIONAL INTELLECTUAL PROPERTY POLICIES
Intellectual Property Audits
Open Access Policies

RIGHTS ISSUES FOR THE COLLECTION
Determining Copyright Status
Identifying/Finding Copyright Holders
Non-Exclusive Licensing Agreements

INSTITUTIONAL USES
Publications
Educational Materials
Institutional Websites
Traditional Marketing and Promotion
Social Media
Retail and Commercial Products
Fair Use and Attribution
Clearing Permissions and Sourcing Materials

LEVERAGING CONTENT: DISTRIBUTION PARTNERS
Expanding Audiences and Potential Revenue Generation
Fair Use
Risk and Liability

EXTERNAL USES
Licensing Collection Images
Photography Policies
Communicating Copyright to the Public

APPENDICES
International Treaties, Federal Materials and Court Decisions
Document and Contract Templates
Terms and Definitions
References and Resources
A Tale of Two Publications:

1) The Online Preview

Website exported from the OSCI Toolkit

Available for purchase through the AAM Bookstore:

https://rightsrepro.imamuseum.org
A Tale of Two Publications:

2) The Full Publication

ePub and MOBI files exported from the OSCI Toolkit

Available for purchase through the AAM Bookstore:

https://aam-us.org/ProductCatalog/Product?ID=5186
Why Digital? Why OSCI?

- Advantageous
- Living Document
- Templates
- Link to primary source materials
- First reference publication in OSCI

ABOUT THE OSCI TOOLKIT

The OSCI ToolKit is an open-source project of the Indianapolis Museum of Art (IMA) to create a suite of tools that facilitates the publishing and broad dissemination of online scholarly catalogues for art history. In 2011, the IMA was awarded a grant from the Getty Foundation to support the project as part of its Online Scholarly Catalogue Initiative (OSCI), which aims to create replicable models for museum collection catalogues in the online environment. This current project builds upon the conceptual framework and prototype software developed at the direction of the Art Institute of Chicago during the initial OSCI grant cycle from 2008-2011.
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### OSCI Entry – Adding Content

<table>
<thead>
<tr>
<th>Content Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article</td>
<td>Use articles for time-sensitive content like news, press releases or blog posts.</td>
</tr>
<tr>
<td>Basic Page</td>
<td>Use basic pages for your static content, such as an 'About us' page.</td>
</tr>
<tr>
<td>HTML Asset</td>
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<tr>
<td>IP Asset</td>
<td>An IP based image used in a publication</td>
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<tr>
<td>Image Asset</td>
<td>An Image used as a figure in a publication</td>
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<tr>
<td>Layered Image</td>
<td>An interactive figure type that combines assets into layers</td>
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<tr>
<td>Note</td>
<td>User Notes</td>
</tr>
<tr>
<td>Publication</td>
<td>The root of a publication. Used to store publication information and the publication content hierarchy</td>
</tr>
<tr>
<td>Section</td>
<td>A section of content for a publication</td>
</tr>
<tr>
<td>SVG Asset</td>
<td>A Scalable Vector Graphic for use in a layered image</td>
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</tbody>
</table>
Cover Image: Description: The first comprehensive resource to focus solely on the rights and reproductions guidelines, established standards, and emerging best practices at cultural institutions. With intellectual property laws and rights and reproductions methodologies ever-changing with new technologies, this digital publication will be a living document that can be updated to remain current with trends and best practices. This project is made possible by a grant from the U.S. Institute of Museum and Library Services. The project utilizes the OSCI Toolkit, which is supported by the Getty Foundation as a part of its Online Scholarly Catalogue Initiative.

Sections:

- Cover (edit)
- Title Page (edit)
- Foreword (edit)
- Acknowledgements (edit)
- Disclaimer (edit)
- Introduction (edit)
- Excerpts from Chapter One: Intellectual Property (edit)
- Chapter Two: Institutional Intellectual Property Policies (edit)
- Chapter Three: Rights Issues for the Collection (edit)
Rights & Reproductions: The Handbook for Cultural Institutions is for anyone in a cultural institution, including museums, libraries, archives, historical property associations, and universities, who has the responsibility of handling rights clearances, permissions, and intellectual property matters. In this digital age, the management of creative content has become an essential task for cultural institutions. While they have long been in the content-creation business, many of these institutions are now recognizing the importance of the sound management of intellectual property assets.
For the purposes of this publication, the phrase ‘rights and reproductions specialist’ refers to anyone working at a cultural institution who handles this type of work, including but not limited to registrars, rights and reproductions managers, archivists, librarians and lawyers.
Rights & Reproductions: The Handbook for Cultural Institutions

Edited by Anne M. Young.

With contributions by: Megan P. Bryant, Cherie C. Chert, Kenneth D. Crews, John ffrench, Walter G. Lehman, Naoma Leibovitz, Melissa Levine, Sofia Galarza Linn, Michelle Gallagher Roberts, Nancy Sims, Deborah Wythe, and Anne M. Young.
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Duration of Copyright

The Constitution empowers Congress to grant copyright protection for "limited times." Recent decisions from the U.S. Supreme Court have reaffirmed Congress's wide discretion to determine the length of copyright protection. But once the applicable term of copyright has run its course, the protection expires. This is the core of the law, which grants a set of rights that last for a specified term, but when the term ends, the work enters the public domain, where the public has the right to use the work without restriction.

The rules affecting copyright terms have changed many times. Publication was once required for copyright ownership, as was registration and correct copyright notice. In some time periods, registrations had to be renewed after a set term of years. Today, copyright for all works comes into being when a work is created. Neither registration, publication nor copyright notice is currently required for a copyright to exist; however, registration is still available and provides benefits to copyright owners both in terms of enforcement of rights in courts and practically in terms of enabling contact from users requesting permissions.

Formalities, Duration and Works Created Before the U.S. Copyright Act of 1976

Due to changes in U.S. copyright law over the years, the rules to determine whether copyright has expired are extremely technical—especially for works created prior to Jan. 1, 1978, when the 1976 Act took effect. Key issues include when and where the work was created, whom it was created by or for, whether and when the work was "published," and whether applicable statutory formalities, if any, were followed.
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Many people have the impression that all “old” works are in the public domain. While this impression is not categorically correct, there is one large category of “older” works for which public domain status is relatively clear: those published in the U.S. prior to 1923. However, what constituted “publication” can be unclear, especially with some artworks. For the purposes of copyright term determination, public display (an exhibition), public performance, or the leasing or offering of a work (or copies of a work) for sale may have constituted, under limited circumstances, “publication.” It is also important to remember that works created prior to 1923, but not published prior to 1923, may have much more complicated term rules.

For works that were not published prior to 1923, or that were created after or in 1923, it is quite possible that the copyright term may have ended. However, for a specific work, that determination may depend on whether the work was ever published (and if so, when), whether it was registered, whether the registration was renewed, when the author died, whether the work was created outside the U.S. and even whether the author served in the military of some non-U.S. countries.

Cultural institutions may want to invest in researching some of these factors; the payoff for determining that a work is in the public domain can be great. Peter Hirtle’s “Copyright Term and the Public Domain in the United States” chart maintained by Cornell University can be a valuable tool for such investigations.

Subject Matter of Copyright

The U.S. Copyright Act lists many kinds of work protected by copyright; in addition to books, copyright applies to choreography, music, visual art, film and architectural works. However, the statutory list is not exhaustive—other kinds of creative works can be subject to copyright.

The U.S. Copyright Act also lists things that are explicitly not protected by U.S. copyright law. Some of these exclusions are to preserve the separation of other types of legal protections: “methods of operation,” for example, can sometimes be patentable, but would not otherwise be copyrightable. Other exclusions are related to public policy and the “bargain” copyright
Disclaimer

This handbook is written for the nonlawyer. It attempts to provide general guidance on how to approach important considerations involving the administration and management of intellectual property assets. This handbook does not provide legal advice, and readers should not rely upon it as such. Readers are encouraged to obtain professional legal advice where appropriate. The authors expressly disclaim any representations, express or implied, as to the currency or accuracy of Rights & Reproductions: The Handbook for Cultural Institutions.
are still protected as of the early 21st century! However, there are two distinct categories of works that are easily identifiable as being in the public domain:

- works registered or first published in the U.S. before 1923
- works created by employees of the U.S. federal government within the scope of their employment

U.S. in 1915 with a copyright notice.
7. An anonymous work was created sometime in the 1950s and first published in the U.S. in 1960.

Orphan Works

The term “orphan works” is commonly used to refer to works still believed to be protected by copyright, but the rights holder(s) either cannot be determined or if identified cannot be located despite best efforts. Thus, it is impossible to obtain permission to use an orphan work. If an institution uses an orphaned work, it assumes the risk of an infringement claim if a rights holder later comes forward. Orphan work status is not an official copyright category under U.S. law, although the Copyright Office has attempted to address this issue beginning in 2004 with roundtable meetings and notices of inquiry. The most recent roundtable was held in March 2014 at which comments from the public were solicited in order to advise Congress on possible next steps for pending legislation. Cultural institutions have responded with proposals for a “safe harbor”—limited protection against damages — if a reasonable due diligence search does not find the rights holder. Ultimately, though, Congress must pass legislation to codify an orphan works approach, and this has failed to happen as of 2015.

Test Your Copyright Terms Knowledge

Megan P. Bryant and Cherie C. Chen

Grab a copy of Hirtle’s chart and calculate when copyright for these works expire:

1. A painting was created in 1965 by a living artist. The work is unpublished.
2. A sculpture was created in 1980 by an artist who died in 2001. The work is unpublished.
3. A corporate work was created in 1942. The work is unpublished.
4. A drawing was created in 1922 by an artist who died in 1950. The work was first published in the U.S. in 1971 with a copyright notice.
5. A home movie was created in 1963 by a videographer who died in 1970. The work was first published in the U.S. in 1963 with a copyright notice and the copyright registration was renewed.
6. A photograph was created in 1910 by a photographer who died in 1949. The work was first published in the
Information About the Request Process

No matter which approach a cultural institution chooses to grant access to collection materials, it is important to provide some general information about the request process to the public so that a request can be handled efficiently. Ideally, this information should be posted on an institution’s website for easy reference, though it could also be communicated upon request. It should include the types of uses that will be considered by the institution as well as practical details about the information the institution needs from requestors to process their order. Here are some recommended items to include on an information page:

- definitions for varying types of use (e.g., scholarly, commercial, personal, etc.)
- time frame for submitting a request (e.g., “at least six weeks prior to date needed”)
- information required when submitting a request (e.g., full contact and usage details)
- link to an image request form
- fees and payment process
- credit line requirements
- number of gratis copies for the institution required
- party responsible for rights clearance

Developing a Request Form

Processing external requests can be streamlined by utilizing a form that collects all the necessary information required to assess and fulfill the request. This form may be a Word or PDF document that the institution sends to the requestor to complete and return, or it may be placed online so that it can be directly downloaded.

Key information to capture on the request form:

- name of work/object in collection
- name of artist or maker
- unique identifier (e.g., accession or catalogue number)

- intended usage (catalogue, t-shirt, movie, etc.)
- project title
- author
- publisher
- expected release date
- print run, languages, editions, formats (print, Web, e-book, etc.)
- geographic distribution/territory
- reproduction size (e.g., cover, half-page, etc.)
- requestor’s full contact information, including e-mail address, phone number, mailing address

Many institutions offer image request forms that allow information to be submitted directly via the institution’s website. Such online forms help to streamline and automate the request procedure both for the requestor and for the institution.

Reproduction Fees

Reproduction fees vary from institution to institution for a variety of reasons. Sometimes the governing body of an institution will influence the setting of fees, with private nonprofits having more flexibility than a governmental agency. Some cultural institutions consider supplying image files as a public service and part of their mission, and thus charge reduced fees (or waive them entirely) for educational uses in particular. Others may need to consider the staff resources that go into processing requests—for instance, the cost of new photography or scanning—and thus structure their fees in part to recover those costs. While licensing can serve as a source of revenue, previous studies conducted by the Mellon Foundation have found that most cultural institutions do not make a significant profit against expenditures in their licensing activities. It is helpful for potential requestors if the institution’s fee schedule or, at minimum, an explanation of how fees are calculated, is posted on its website. Supplying this information upfront will save time negotiating rates after the request has been submitted and will also negate any claims of capriciousness or unfair treatment.
attempt to secure an agreement covering all the works acquired in the future by the same creator in the collection in case circumstances change and the rights holder is no longer reachable in the future.

Case Study: Brooklyn Museum Copyright Project
Deborah Wythe

In 2008, as the Brooklyn Museum geared up to release its entire collection on its website, the Digital Lab and Technology staff working on the project realized that a huge problem was on the horizon: none of the more than 150,000 objects in the collection had rights information recorded in the collections database. Broken down into the steps below, the project has resulted in both a mission-driven online transparency that shares known rights information with online visitors and a repeatable, ongoing rights clearance process.12 The Digital Lab, which also houses the museum’s rights and reproductions and picture research staff, has assumed responsibility of this process.

Education and Research on Rights and Plan Development

- Drawing in very broad strokes, a series of rights categories and accompanying text for the website were written and reviewed by legal counsel. A nonexclusive license, including a standard cover letter, was drafted and approved by counsel.

Standardize Object Rights Types

- In the Rights and Reproductions module of the museum’s collections management system, The Museum System (TMS), Object Rights Types were created and standardized. Employing targeted searches, objects were identified and grouped into packages for batch assignment of Object Rights Types. A quarterly rights audit finds new objects and changes in dates or creator names. The database is then updated as needed.

Website Collection Pages

- As part of the website collections page design, TMS Object Rights Types drive online output, including image size, rights statements and pop-up text with explanatory notes. Updates to TMS are automatically reflected on the website nightly.

Copyright Interns

- An intern (usually one per year) researches artists and seeks nonexclusive licenses, tracks their work in an Access database, records contact information, updates TMS and maintains the master file of licenses.13 A standardized workflow and detailed manual facilitate a smooth transition from one intern to the next, with...
Appendix D

References and Resources

General Intellectual Property Resources

- American Intellectual Property Law Association (AIPLA)
  www.aipla.org/Pages/default.aspx
- Brooklyn Museum Copyright Project
  www.brooklynmuseum.org/community/blogs/phases/blogs/tag/copyright
- Canadian Heritage Information Network (CHIN)
  www.csc-csc.gc.ca/recherche-search-ang.ipg
  No=O&Ne=O&Nt=intellectual+property&Os=Search
- Center for Intellectual Property and Innovation, Robert H. McKinney
  School of Law, Indiana University, Indianapolis
  http://mckinneylaw.iu.edu/
- College Art Association (CAA)
  www.collegeart.org/ip/
- Copyright Advisory Network, American Library Association Office
  for Information Technology Policy
  http://librarycopyright.net/
- Copyright and Cultural Institutions: Guidelines for Digitization for
  U.S. Libraries, Archives, and Museums, Peter B. Hirtle, Emily Hudson,
  Andrew T. Kienzle, 2009
  http://ecommons.cornell.edu/bitstream/1813/14142/2/Hirtle-
  Copyright_final_RGB_Journals-cover.pdf (free e-book)
  www.cryptospace.com/3405063 (to order printed version)
- Copyright for Librarians: the essential handbook from the Berkman
  Center for Internet and Society
  http://cyber.law.harvard.edu/publications/2013/copyright_for_librarians
  (free download)
- Copyrightlaws.com

- Copyright Term and the Public Domain in the United States (a.k.a.
  Hirtle’s Chart)
  www.copyright.cornell.edu/resources/publicdomain�l
- Copyright Watch
  www.copyright-watch.org/
- Cornell University Copyright Information Center
  www.copyright.cornell.edu/resources/
- Columbia University Copyright Advisory Office: Copyright Quick
  Guide
  http://copyright.columbia.edu/copyright/copyright-in-general/copyright-
  quickguide/
  Museums, Canadian Heritage Information Network (CHIN)
- Digital Copyright Slider, American Library Association
  http://librarycopyright.net/resources/digitalslider/
- Intellectual Property Issues in Cultural Heritage (IPiCH): Theory,
  Practice, Policy, Ethics
  www.wab.ca/spinch
- Library Digitization Projects and Copyright
  www.lib.uci.edu/features/digitization.html
- Maryland Intellectual Property Legal Resource Center, University of
  Maryland
  www.law.umaryland.edu/programs/cup/uncpc/
- A Museum Guide to Digital Rights Management, Canadian Heritage
  Information Network (CHIN)
  http://bit.ly/1OoFqEi
- Teaching Copyright, A project of the Electronic Frontier Foundation
  www.teachingcopyright.org/
- University of Michigan Copyright Office
  www.lib.umich.edu/copyright
- Visual Resources Association (VRA) Intellectual Property Rights (IPR)
  and Copyright
Indianapolis Museum of Art and American Alliance of Museums announce the release of Rights & Reproductions: The Handbook for Cultural Institutions

FOR IMMEDIATE RELEASE

Indianapolis Museum of Art and American Alliance of Museums announce the release of Rights & Reproductions: The Handbook for Cultural Institutions

Digital publication is the first definitive resource in an ever-changing field


Co-published by the IMA and AAM, the publication is the first of its kind and will serve as an industry-wide standard of emerging best practices and guidelines in the rights and reproductions field: Anne M. Young, the IMA’s manager of rights and reproductions, served as project director, editor and one of the contributing authors to the Handbook. Content development was guided by over 20 top experts in museums and libraries, intellectual property lawyers and collection specialists who partnered in its authoring, editing and peer review. Partnering institutions include The Art Institute of Chicago, The J. Paul Getty Museum, The Solomon R. Guggenheim Museum, the libraries at the University of Michigan and University of Minnesota, Los Angeles County Museum of Art, The New York Public Library and Yale University Art Gallery.
Price Point

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• $1.99 for AAM members**

*Includes Tier 1 members
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INSTITUTIONAL INTELLECTUAL PROPERTY POLICIES


By John Pfeiffer, Kristin G. Luhmann, Melissa Levine, Michelle Gallagher Roberts, Nancy Sims, and Anne M. Young

IP Policies:

As leaders in the knowledge-based economy, cultural institutions are increasingly involved in the creation and distribution of IP resources. Cultural institutions routinely create and use IP as part of every functional aspect of their daily activities—from collections management to human resources, fundraising, and retail sales. This knowledge is the cultural institution's intellectual capital. As a result, it is imperative that cultural institutions develop IP policies to provide guidance to the staff and procedures for its creation and distribution. Today's cultural institutions have an economic component that makes them accountable in a commercial sense, as well as an economic, historic, or aesthetic nature.

IP policies provide a set of guidelines to help leverage IP assets.

Ownership:

There is a longstanding tradition in the U.S. of treating scholarly works as though they belong to their creators, with respect for the distinct roles of their institutions. This ownership model is the basis for a legal framework that empowers employees to use IP resources and to negotiate reuse agreements.

Employees who are not scholars do not own IP that they create through their employment. The institution retains full ownership of all IP created by its employees. For many years, these informal practices governed the treatment of almost all IP in research institutions. However, such informal written and unwritten policies became the basis for creating IP policies within research and educational contexts and formal institutional policies addressing details of ownership began to develop in response.

One area ripe for the development of institutional IP policies was the Bayh-Dole Act, which primarily addressed patents. Early institutional ownership policies, therefore, were formulated as assumptions that the university owned and controlled the technology resulting from research. This practice continued with the increasing recognition of issues related to IP, such as the protection of new inventions and the commercialization of research. Additionally, federal legislation required separate policies to define IP ownership policies for academic institutions.

Institutional copyright policies are often complex, reflecting the need to balance the interests of different stakeholders. Some institutions have developed comprehensive policies governing IP creation and use, while others have adopted more limited approaches.

Use Policies:

Academic institutions often have more extensive policies than provide appropriate use of copyrighted materials, but these policies are often limited. Student conduct rules, employment contracts, and other institutional policies may require appropriate use of copyrighted materials.

Use policies are necessary because they inform the public about the specific rules and regulations applicable to the use of copyrighted materials. They also help to ensure that the institution is in compliance with copyright law.

With the rapid evolution of services and activities provided by these cultural institutions, it is not uncommon for academic and research institutions to have specific policies on how to address issues raised by the use of intellectual property. These policies may include issues such as the use of copyrighted materials in research, teaching, and other institutional activities.
Thank you!

#RightsReproHndbk

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