



Journal of Copyright in Education and Librarianship

JCEL is published by the Kraemer Family Library and the University of Kansas
ISSN 2473-8336 | jcel-pub.org

Volume 1, Issue 1

Copyright and Digitization and Preservation of State Government Documents: A Detailed Analysis

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Currier, B., Gilliland, A. & Hansen, D. R. (2016). Copyright and Digitization and Preservation of State Government Documents: A Detailed Analysis. *Journal of Copyright in Education and Librarianship*, 1(1), 1-10.

DOI: 10.17161/jcel.v1i1.5915



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CONTRIBUTED PAPERS

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Abstract

This paper builds off "Copyright and the Digitization of State Government Documents: A Preliminary Analysis" presented at IPres 2015. In this paper, we present a more detailed analysis and a practical framework for local archivists and librarians to use in assessing copyright status, the application of fair use, and use of other copyright limitations to different types of government documents.

Introduction

As memory institutions digitize their collections for preservation and access, they confront a variety of issues, especially when they make the digitized materials available on the open web.

¹ The views expressed herein are solely those of the authors and do not necessarily reflect the views of the Federal Reserve Bank of Kansas City or the Federal Reserve System.

Within these collections, state government documents present specific challenges. Nevertheless, digitization of state government documents is of great interest to many institutions.

One compelling reason for digitizing state documents is our societal and political commitment to transparency and open government. Many state governments have a commitment to open and transparent government that goes back nearly a century (An Act to Safeguard Public Records in North Carolina, ch. 265, 1935 N.C. Sess. Laws 288 § 6) and has become more robust over the years. (North Carolina Attorney General's Office, 2008). Digitized state records provide broader public access to individuals who otherwise may be unable to do an in person public inspection (Blankley, 2004).

The second reason why memory institutions want to digitize the public record is to provide access to individuals who are print disabled. Approximately 5% of all publisher materials are available to the print disabled community (Epp, 2006). The creation of digital surrogates for state government documents allows textual materials to become more accessible to the print disabled community as individuals can use screen readers to hear the alternative text or enlarge the text to a more appropriate font size. (Kouroupetroglou & Tsonos, 2008).

The third reason why memory institutions have an interest in digitizing state documents is to continue to archive the historic record. Archival practice now includes digitization as an important step in maintaining the physical integrity of the object because it limits the handling of the original materials (Smithsonian Institution Archives, n.d.). Finally, memory institutions want to digitize the state documents in order to preserve and archive born-digital materials, items that exist only in a digital form without a physical surrogate.

Defining State Government Documents

For the purpose of this paper, we use the broadest definition for state governments to include “. . . an institution, board, commission, or department of: (A) the state or a subdivision of the state; or (B) a political subdivision of the state, including a municipality, a county, or any kind of district.” (Tex. Gov. Code § 10- 2051.022). This may include traditional governmental units like town councils, county commissioners, the legislature, or state agencies but also may include colleges and universities, public libraries, school districts, or museums owned and operated by the state or a political subdivision. We also define a public document broadly to include:

Information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; (2) for a governmental body and the governmental body: (A) owns the information; (B) has a right of access to the information; or (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body. (Tex. Gov. Code § 5- 552.002).

These definitions encompass more materials than a more typical and restricted state government document definition. In many cases, when staff within memory institutions consider digitization of state government documents, they may only be thinking about government documents issued through the state depository library program. The scope of those programs can be much narrower than what this paper considers.

As one example, the above definition for a state government document is much broader than the definition of a government document for Texas State Library Depository Program. The scope of records that qualify for the Texas State Library Depository Program covers “State office, officer, department, division, bureau, board, commission, legislative committee, authority, institution, substate planning bureau, university system, institution of higher education.” (Tex. Gov. Code § 4- 441.101). Additionally, a state publication

(A) means information in any format, including materials in a physical format or in an electronic format, that: (i) is produced by the authority of or at the total or partial expense of a state agency or is required to be distributed under law by the agency; and (ii) is publicly distributed outside the agency by or for the agency; and (B) does not include information the distribution of which is limited to: (i) contractors with or grantees of the agency; (ii) persons within the agency or within other government agencies; or (iii) members of the public under a request made under the open records law (Tex. Gov. Code § 4- 441.101).

Unlike the definition provided for state government documents, this definition precludes inclusion of subdivisions of the state, like city and county governments. Records that are only available from a request under the open records act would not qualify as a record for the State Depository Library Program, in the state of Texas, but would qualify as a government document under this paper’s definition.

Simply, this paper defines a state government document as any document that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by the state, or any division or subdivision of the state.

Implicating Copyright

Contrary to what many believe, copyright protects state government material. Often the confusion stems from the law that places all federal government documents in the public domain (17 USC 105). However, this statute does not cover state documents, and materials produced by state government documents are subject to copyright unless the copyright owner—usually the state or a subdivision of the state—decides otherwise. As rights holders, states have the exclusive rights under the Copyright Code, which include the right to reproduce the material, distribute the material, create a derivative copy of the material, or publicly perform or display the material (17 USC 106). The right of reproduction is one of the exclusive rights of authors (17 USC 106(a) (2012)) and is interpreted broadly. Rights holders, and by extension elected state officials, may have the right to limit reproduction as the enforcer of the copyright. In fact, elected officials have attempted to limit reproduction to reduce public exposure (Healey, 2015).

Historically, library preservation activities had few or no copyright implications because they did not reproduce the material or engage in other activities that implicate the exclusive rights of the rights holder. Today, however, the recommended archival practice has changed and now involves digital duplication (Smithsonian Institution Archives, n.d.). Now, as memory

institutions preserve materials by retaining a physical copy and creating an electronic duplicate or to create multiple electronic copies of a born digital file, these reproductions are considered potentially infringing of the exclusive rights (See, e.g., *Authors Guild v. HathiTrust*, 755 F.3d 87 (2nd Cir., 2014)). When these items are then housed on multiple servers as backup copies, each server copy is potentially an infringing copy of the work under the Copyright Code (*Authors Guild v. HathiTrust*, 2014).

As libraries and other memory institutions digitize state government documents to preserve the state government record, the process of digitizing implicates copyright. Copyright is and can be an impediment to the goals of open government, providing materials to the print disabled, or long term preservation strategies.

Copyright Limitations

While copyright protects many types of materials, copyright does not protect all materials forever. As state government documents are protected like other types of copyright materials, they are governed by the same rules and limitations. These next sections will apply those limitations to state government documents.

Note on Publication

Publication status of a work is almost always an important factor in a copyright analysis. First, the length of time that a material qualifies for copyright protection depends on its publication status. Unpublished materials are protected for a longer period of time than published materials, when created by an entity and not a person. Second, the Copyright Code required authors to abide by certain formalities for materials published through 1989, and materials that did not follow these formalities passed into the public domain. Third, publication status is one of the issues to consider as part of the second factor in a fair use analysis.

The copyright definition of publication has a different standard than traditional definitions of publication. A publication is when the material is offered for sale or transfer OR the offering to distribute copies for further distribution (17 USC 101 (2012)).

There are two potential definitions by which a work may be determined to have been published. The first definition refers to the traditional understanding of “publication” which refers to the sale or transfer of the work. Many state government documents, like recipe brochures or yearbooks, were sold to the public and would be considered published works under the copyright statute.

The second definition refers to a less traditional understanding of “publication” which refers to “. . . the offering to distribute copies for further distribution.” In order to qualify as a publication, the work must be “. . . made available to members of the public at large without regard to their identity or what they intended to do with the work” (*Brown v. Tabb*, 714 F. 2d 1088, 1091 (11th Cir., 1983)). Public distribution through a state library depository program appears to qualify as publication under this standard. It may be less easy to decide whether other items in a collection have been public disseminated.

When making publication status determinations for state documents, most collections will hold materials that are clearly published, that are clearly unpublished, and materials where the publication status is unclear. Materials that were offered for sale are clearly published. Materials like internal reports, memos, or emails that are subject to open records requests, but never intended for public disclosure, are clearly unpublished. The publication status of other items in the collections may not be clear one way or another. If it can be determined that the item was published for the purpose of the Copyright Code, then it is possible to apply some copyright exceptions more confidently. Further copyright implications relating to publication status will be discussed in more detail in other sections of this paper.

Facts

Material must reflect a modicum of creativity before copyright law protects it. (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991)). Census data and the white pages have been considered to be facts and ineligible for copyright protection (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991). While determining whether a work contains the necessary modicum of creativity may be difficult, the courts have given us clear indications of when materials are not protected by copyright law. Case law (*Wheaton v. Peters*, 33 U.S. 591 (1834)), statutes (*Banks v. Manchester*, 128 U.S. 244, 253 (1888)), regulations (*Veeck v. Southern Building Code Congress Int'l, Inc.*, 293 F.3d 791, 800 (5th Cir. 2002) (en banc)), and materials incorporated into statutes and regulations (*Veeck v. Southern Building Code Congress Int'l*, 2002) are in the public domain as facts. These materials do not receive copyright protection.

Materials that Have Aged into the Public Domain

State government documents, like other kinds of copyrightable materials, can and do age into the public domain. For these kinds of materials, memory institutions would apply the same rules as other copyrighted items. For specific questions, Cornell offers a helpful chart (Hirtle, 2016). These materials would have aged into the public domain and would not require further analysis for digitization under copyright law.

State Law Exclusions from Federal Copyright Protection Public Records Law

Although copyright protection is automatic, the copyright holder is not required to enforce their exclusive rights. In fact, many states have disclaimed copyright protection for some or all of their documents that would qualify for copyright protection as a default. (See, e.g., *County of Santa Clara v. Superior Court of Santa Clara County*, 170 Cal. App. 4th 1301 (Cal. Ct. App. 2009)). Some only claim copyright protection for specific kinds of materials (Fla. Stat. § 119.011(12) (2016)). The State Copyright Resource Center (Harvard Library, 2016) keeps up to date information on states' positions on the copyrightability of their documents. When a state has disclaimed copyright for certain documents, these materials are in the public domain and can be copied and distributed freely.

Formalities

Works published between 1923 and 1962, had to comply with the formalities including copyright renewals. It is estimated that only 15% of all materials that were eligible for a renewal at the copyright office were renewed (U.S. Senate. Committee on the Judiciary, 1961), and the other 85% of qualifying copyrightable material passed into the public domain. One would expect that

state governments did not renew their copyrights with the Copyright Office, but no specific study on that subset of documents has been completed. Again, Cornell's chart addresses the exact formalities required at different points in the twentieth century (Hirtle, 2016).

Orphan Works

Much of the literature on orphan works assumes that these works were authored by people, not organizations or governments. However, a political subdivision of the state, like a city, or a subdivision of the state, like an agency may produce orphan works if it does not have a continuous, uninterrupted existence and a clear legal successor that owns copyrighted materials..

The United States is littered with ghost towns throughout American history, starting from the country's inception with the lost colony of Roanoke in 1590. As one example, the state of Oklahoma alone has had over 2,000 hamlets, towns, villages, and cities which have become ghost towns (Morris, 1977). While many now ghost towns were abandoned in the 19th century, and their materials are clearly in the public domain, towns became ghost towns, even in the 20th century. As the United States continues to experience the shift from rural communities to urban communities and as rural communities become disproportionately older (Glasgow and Brown, 2012), more of these towns may become abandoned. As librarians archive, preserve, and use government documents, it is worth noting that the orphan works problem can extend into this area as well. Guidelines like *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions* will be helpful for materials from these kinds of rights holders.

Application of Fair Use

A claim of fair use is analyzed through a four-factor test, weighed against each other and balanced against the purpose of copyright (17 USC 107 (2012)). No single factor is dispositive of a finding of fair use. Congress has given some guidance on expected uses that would seem to favor fair use, like criticism, commentary, news reporting, teaching, scholarship and research (17 USC 102 (2012)), although that is an incomplete list.

The first characteristic is the purpose and character of the use. This factor looks at the use of work by the user. Courts have found in favor of libraries that are digitizing for the purpose of preservation (*Authors Guild v. HathiTrust*, 902 F.Supp.2d 445 (SDNY, 2012) rev'd on other grounds *Authors Guild v. HathiTrust*, 2014)) or making materials available to the print disabled (*Authors Guild v. HathiTrust*, 2014.) By digitizing the material and publicizing these documents, memory institutions continue fulfilling the government's goal of open and transparent government by providing public access to public work. Factor 1 may weigh in favor or against a finding of state government documents.

Factor two is concerned with the nature of the copyrighted work. Here the court has looked at the publication status of the material (*Salinger v. Random House*, 811 F.2d 90 (2nd Cir., 1987)) and the extent to which the material is creative or factual (see, e.g., *Cambridge University Press v. Patton*, 769 F. 3d 1232 (11th Cir., 2014)). As discussed previously, the publication status of state government documents varies.

An analysis of the second fair use factor looks at the extent to which the material is creative or factual. Pure facts, like nutritional information, soil reports, etc. will be closer to the pure facts

identified by copyright law. Other items, like the documentary films that the North Carolina Film Board released (Mazzochi, 2006), have more creative expression.

The third fair use factor, the amount and substantiality that is used, weighs against a finding of fair use when the entire copyrighted item is digitized (*Authors Guild v. HathiTrust*, 2014). This factor may weigh against a finding of fair use, but does not necessarily preclude it, when the four factors are taken as a whole.

The final factor is the effect of the use upon the marketplace, which is often considered the most important factor when determining a fair use analysis (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539 (1985)). Here, the courts may typically look at whether the use will substitute for a sale (*Cambridge University Press v. Patton*, 2014) or if the behavior would “. . . adversely impact the potential market” (*Harper & Row, Publishers v. Nation Enterprises*, 1985). Because there was never a market for many state documents, the effect of the use upon the marketplace will often be minimal to non-existent. Many state government documents are offered for sale on a cost recovery and not a revenue generating model. (See, e.g., Fla. Stat. § 119.07(4)(a)1). Other materials that this paper classifies as government documents were intended to be revenue and likely would have an effect on the marketplace (like an exhibition catalog for a state-sponsored art museum).

It is difficult to predict whether theoretically digitizing state materials are categorically protected by fair use. Instead, fair use is fact intensive and depends on the nature of the item and the use. As has been highlighted throughout this paper, state government documents are not substantially different under the Copyright Code than other kinds of copyrighted materials. As organizations have created *Codes of Best Practices in Fair Use* for Academic and Research Libraries (Adler, Aufderheide, Butler, Jaszi & Andrew, 2012) or Orphan Works (Aufderheide, Hansen., Jacob, Jaszi, & Urban, 2014), memory institution employees should continue to use these materials as guidelines as they work with digitizing these collections.

Conclusion

State government documents are not dissimilar from other kinds of copyrighted materials. To review these documents, we start at the Copyright Code and apply similar analyses. When digitizing these materials and providing access to them, we can apply the same rules and framework. By digitizing these materials, memory institutions have the ability to further open government by providing public access to public works.

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