

Just Let It Go? Controlling Reuse of Online Holdings¹



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RÉSUMÉ Cet article examine les façons dont les centres d'archives américains tentent de contrôler davantage l'utilisation de leur contenu en ligne, les raisons pour ce faire et le rôle du droit d'auteur dans cette pratique. Dans une étude basée sur 96 sites web de centres d'archives, 66 réponses à un sondage et 18 entrevues avec du personnel, les données révèlent que les institutions se servent de mesures techniques pour limiter la qualité des images ou prévenir le copiage et établissent aussi des conditions qui régissent les autres utilisations. Dans certains cas, les centres d'archives peuvent agir pour protéger leur légitime droit d'auteur, mais dans la plupart des cas, les centres d'archives ne sont pas les détenteurs de ce droit. Malheureusement, les conditions d'utilisation mises en place sont souvent liées au droit d'auteur, même si l'intention des moyens de contrôle est d'assurer l'attribution, de générer des revenus ou de garder trace de l'utilisation. Les centres d'archives devraient réexaminer leurs politiques sur la réutilisation de leurs fonds et collections afin de s'assurer qu'ils n'évoquent pas le droit d'auteur de sorte à restreindre l'utilisation du patrimoine documentaire en ligne.

ABSTRACT This article examines the ways in which American archival repositories attempt to control further uses of their online content, their reasons for doing so, and the role of copyright in such practices. In a study based on 96 repository websites, 66 survey responses, and 18 interviews with staff, the data revealed that institutions use technical measures to limit image quality or prevent copying and also establish terms and conditions that govern further uses. In some cases, a repository may be protecting its legitimate copyright interests, but in most other cases the repository is not a rights holder. Unfortunately, conditions placed on further uses are often linked to copyright, even though controls are intended to ensure attribution, generate revenue, or track use. Archives should re-examine their policies on reuse of holdings to make sure they are not invoking copyright in ways that present a barrier to the use of online documentary heritage.

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Introduction

A fundamental tenet of an archives' mission is to make its holdings available for use, and the Internet provides exciting opportunities to achieve that goal. Archival repositories have enthusiastically embraced the Internet as a means of engaging a wider audience. However, a tension exists between their professional mandate to provide access and their concerns about the ease with which digital content can be copied and further disseminated. In response, archivists attempt to control or limit further uses of their institution's online content by various means, often under the rubric of copyright. As Peter Hirtle noted a decade ago, "Many repositories would like to maintain a kind of quasi-copyright-like control over the further use of materials in their holdings."²

This article discusses the findings of one aspect of a larger study that investigated the copyright practices of American archival repositories when digitizing their holdings and making them available online. Copyright issues affect many aspects of digitization projects, including selection for digitization, provision of information about rights holders and copyright expiry, and controls on further uses. This article addresses the following research question: "To what extent and in what ways do American archival repositories attempt to control further uses of their online content, and why?"

The study investigated technical measures that limit image quality or prevent copying of an online image, as well as terms and conditions on further uses. Of particular interest are the distinctions between the controls related to copyright and those that address other issues, such as revenue generation or attribution. In some cases, a repository may be protecting its legitimate copyright interests, but in other cases it has no copyright interests to protect (if the copyright in the online content has long expired, for example, or if the rights holder is a third party). If archives do not clearly separate copyright interests from other motivations, they may be invoking copyright in ways that present a barrier to the use of online documentary heritage, thus compromising one of their core missions.

Literature Review

When cultural heritage institutions began to digitize their holdings for online access, they sought guidance in the available manuals, few of which addressed controls on further uses. One exception is the article by Michael Moss and James Currall, in which the authors suggest that repositories consider low-resolution images, watermarking, and formats that cannot be printed or copied in order to "control" the digital content so that "it is not misused by those who might wish

2 Peter Hirtle, "Archives or Assets," *American Archivist* 66, no. 2 (Spring/Summer 2003): 240.

to profit from the digital objects that have been created.”³ Responding to the copyright challenges surrounding access to digital content and the need for an integrated access strategy for online and analog holdings, Bradley J. Daigle describes a rights management system that has been proposed at the University of Virginia to control access to online materials based on content type and access levels. For example, some audio materials are available only via onsite computers or to users affiliated with the university; low-resolution images are available to anyone worldwide.⁴

Systematic empirical research into the extent to which archives attempt to control further uses of their online holdings, and their methods and reasons for doing so, has only recently begun. An investigation of the copyright practices of Canadian archivists found that they attempt to control further uses of holdings using technical measures, such as visible watermarks or low-resolution images, as well as terms and conditions on use. However, they do not always separate copyright interests from other motivations, such as revenue generation or attribution of sources.⁵ In other studies, researchers Alexandros Koulouris and Sarantos Kapidakis and researcher Melanie Schlosser examined copyright statements for digital collections; Nathaniel Poor looked at the copyright notices in academic journals devoted to media studies. All found that, to some degree, copyright is used to limit access to, and use of, cultural heritage resources.⁶

Kristin Eschenfelder investigated the range of strategies used by cultural heritage institutions to prevent or discourage use of their online holdings.⁷ In a subsequent survey of the use of technological tools to control patron access to

- 3 Michael Moss and James Currall, “Digitisation: Taking Stock,” *Journal of the Society of Archivists* 25, no. 2 (2004): 131–2.
- 4 Bradley J. Daigle, “The Digital Transformation of Special Collections,” *Journal of Library Administration* 52, no. 3–4 (2012): 256–7, 259–61.
- 5 Jean Dryden, “Copyright in the Real World: Making Archival Material Available on the Internet” (PhD diss., University of Toronto, 2008), 190–212, 241–3, <https://tspace.library.utoronto.ca/>, accessed 2 April 2013; and Jean Dryden, “Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings,” *American Archivist* 74, no. 2 (Fall/Winter 2011): 522–43.
- 6 Alexandros Koulouris and Sarantos Kapidakis, “Access and Reproduction Policies of University Digital Collections,” *Journal of Librarianship and Information Science* 37, no. 1 (March 2005): 25–33; Melanie Schlosser, “Unless Otherwise Indicated: A Survey of Copyright Statements on Digital Library Collections,” *College and Research Libraries* 70, no. 4 (July 2009): 371–85; Nathaniel Poor, “Copyright Notices in Traditional and New Media Journals: Lies, Damned Lies, and Copyright Notices,” *Journal of Computer-Mediated Communication* 14, no. 1 (October 2008): 101–26.
- 7 Kristin R. Eschenfelder, “Every Library’s Nightmare? Digital Rights Management, Use Restrictions, and Licensed Scholarly Digital Resources,” *College and Research Libraries* 69, no. 3 (May 2008): 205–26; Kristin R. Eschenfelder, “Controlling Access to and Use of Online Cultural Collections: A Survey of U.S. Archives, Libraries and Museums for IMLS” (Madison: University of Wisconsin-Madison School of Library and Information Studies, 2009), <http://digital.library.wisc.edu/1793/38251>, accessed 29 April 2013.

or use of digital cultural materials made accessible by US archives, libraries, and museums, Eschenfelder and Grace Agnew found that respondents relied on resolution limits, clips and thumbnails, visible watermarking, and click-through licence agreements.⁸ In an exploration of cultural heritage institutions' reasons for controlling non-commercial reuse of online content, Eschenfelder and Michelle Caswell identified three broad themes: controlling representations, legal issues, and getting credit. The authors suggest that institutions need a range of reuse policies to address competing concerns.⁹ A US study of the role of fair use in achieving the mission of academic and research libraries revealed that academic librarians face a conflict between their mandate to support scholarship and teaching on the one hand and the need to protect their institutions from liability for copyright infringement on the other. To address concerns about potentially infringing patrons' uses of digitized holdings, they limit what they make available online and control access in various ways.¹⁰

Claiming copyright in public domain materials has come under increasing criticism. Jason Mazzone has coined the term "copyfraud" to describe false claims of copyright. He considers archival institutions to be perpetrators of copyfraud, particularly when they claim copyright in public domain material.¹¹ The issues that arise in attempting to control reuse of public domain works have been explored within the art museum community in the course of legal analysis of the impact of *Bridgeman v. Corel*¹² and in studies of pricing reproductions from art museum holdings.¹³ Jonathan Purday raises concerns about barriers

- 8 Kristin R. Eschenfelder and Grace Agnew, "Technologies Employed to Control Access to or Use of Digital Cultural Collections: Controlled Online Collections," *D-Lib Magazine* 16, no. 1–2 (January/February 2010).
- 9 Kristin R. Eschenfelder and Michelle Caswell, "Digital Cultural Collections in an Age of Reuse and Remixes," *First Monday* 15, no. 11 (1 November 2010).
- 10 Prudence Adler, Brandon Butler, Patricia Aufderheide, and Peter Jaszi, *Fair Use Challenges in Academic and Research Libraries* (Washington, DC: Association of Research Libraries, 2010), 5, 11–12.
- 11 Jason Mazzone, "Copyfraud," *New York University Law Review* 81 (2006): 1026–1100.
- 12 *Bridgeman Art Library Ltd. v. Corel Corp.*, 36 F.Supp.2d 191 (S.D.N.Y. 1999), found that a copy of a work of art was not sufficiently original to merit copyright protection; consequently, museums that claim copyright in the digital reproduction of a public domain work are on dubious legal ground. See Kathleen Connolly Butler, "Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyrights in Photographic and Digital Reproductions," *Hastings Communication and Entertainment Law Journal* 21, no. 1 (1998–99): 55–127; Susan M. Bielstein, *Permissions, a Survival Guide: Blunt Talk About Art as Intellectual Property* (Chicago: University of Chicago Press, 2006); Mary Campbell Wojcik, "The Antithesis of Originality: Bridgeman, Image Licensors, and the Public Domain," *Hastings Communication and Entertainment Law Journal* 30, no. 2 (2007–8): 257–86; Kenneth D. Crews and Melissa A. Brown, "Control of Museum Art Images: The Reach and Limits of Copyright and Licensing," Social Science Research Network (2010), <http://ssrn.com/abstract=1542070>, accessed 3 April 2013.
- 13 Rights and Reproductions Information Network (RARIN) of the Registrars Committee

to access to public domain content on the Europeana.eu portal, which brings together digitized content from some 1,500 European museums, archives, and libraries. Via a link, the portal connects the user to the institution that holds the digitized item and allows that institution to establish its own terms of use governing downloading and reuse. Although most of the digital content is in the public domain, users face a confusing “multiplicity of different options, from free downloading of material ... to subscription-based sites at which only thumbnails are accessible without charge.”¹⁴

User studies have found that copyright issues are potentially or actually an impediment to downloading and using digital content.¹⁵ An exploratory study of users of online archival material revealed that they are often annoyed by the controls that repositories place on reuse and simply ignore them or work around them.¹⁶ Although a recent study of special collections and archives in the US and Canada found that user services are evolving in positive ways, it appears that conservative approaches are still inhibiting access. The study recommends that the community “develop and liberally implement exemplary policies to *facilitate* rather than inhibit *access* to ... rare and unique materials.”¹⁷

Research Design and Methods

For this study, the research population was a purposive sample of 96 repositories drawn from nearly 500 institutional members of the Society of Ameri-

of the American Association of Museums, “Draft Report of the AAM Member Museums Rights and Reproductions Survey 2003–04 Results” (2004), <http://www.panix.com/~squigle/rarin/RCAAMSURVEY2003-4.pdf>, accessed 3 April 2013; Simon Tanner, “Reproduction Charging Models and Rights Policy for Digital Images in American Art Museums: A Mellon Foundation Study” (London: King’s Digital Consultancy Services, 2004), http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf, accessed 3 April 2013.

- 14 Jonathan Purday, “Intellectual Property Issues and Europeana, Europe’s Digital Library, Museum and Archive,” *Legal Information Management* 10 (2010): 175.
- 15 Pennsylvania State University, *Visual Image User Study*, <http://www.libraries.psu.edu/vius/summary.html> (2003), accessed 2 April 2013; Jennifer Trant and David Bearman, *Amico On-Line User Survey: Preliminary Results* (PowerPoint, 2003), 11, www.amico.org/univ/docs/AMICO.AMM0305UserSurvey.pdf, accessed 2 April 2013; Daniel G. Dorner, Chern Li Liew, and Yen Ping Yeo, *A Textured Sculpture: The Information Needs of End-Users of Digitised Collections of New Zealand Cultural Heritage Resources* (Wellington, NZ: School of Information Management, Victoria University of Wellington, 2005), 29; Daniel G. Dorner, Chern Li Liew, and Yen Ping Yeo, “A Textured Sculpture: The Information Needs of Users of Digitised New Zealand Cultural Heritage Resources,” *Online Information Review* 31, no. 2 (2007): 179.
- 16 Jean Dryden, “Cavalier or Careful? How Users Approach the Rights Management Practices of Archival Repositories,” *Journal of Archival Organization* 10, no. 3–4 (2012): 191–206.
- 17 Jackie M. Dooley and Katherine Luce, *Taking Our Pulse: The OCLC Research Survey of Special Collections and Archives* (Dublin, OH: OCLC Research, 2010), 11 (emphasis in the original), <http://www.oclc.org/research/publications/library/2010/2010-11.pdf>, accessed 2 April 2013.

can Archivists (SAA). Selecting the sample proceeded in two stages. The first stage involved a review of the list of the SAA's institutional members to identify distinct repositories¹⁸ whose websites were publicly available and included at least 100 digitized items from their online holdings (to ensure that participating repositories had a certain level of experience with digitization and with making holdings available online); 197 repositories met the initial criteria. To reduce this number to approximately 100, further criteria were applied to ensure that the research population represented a range of types of institutions and types of holdings made available online.¹⁹ As a result of this process, 96 repositories were selected for this study.

The findings are based on three sources of data: the website content of the 96 repositories, a mail survey sent to those repositories, and 18 interviews with repository staff responsible for digitization. Using a checklist derived from the research questions, the websites were examined between January and June 2010. Given that the sites varied widely in size, organization, and structure, it was possible to examine only a sample of the online content; therefore, the study is not a comprehensive analysis of all the digital content of these websites.²⁰ From the perspective of controls on further uses, relevant website content included policy statements about terms of use, policies and procedures for ordering copies, fees for reproduction, and the like. For each repository, relevant website pages were printed, annotated, numbered, and organized in binders. Where possible, policy documents were imported into NVivo, software that supports analysis of qualitative data.

Responses to a mail survey sent to the 96 repositories in October 2010 constituted the second source of data; 66 surveys were returned, a response rate of 69%. The survey addressed a range of issues; however, only responses to questions relating to controls on further uses are reported here.²¹ The quantitative data were analyzed and summarized as descriptive statistics. Qualitative data from open-ended questions were imported into NVivo.

The survey was used to recruit interviewees. In the final survey question, respondents were asked to indicate their willingness to participate in an inter-

18 In some cases, different repositories are affiliated with the same parent institution, e.g., a university. In such cases, further investigation took place to ensure that the selected repositories were independent entities within a larger organization.

19 Repositories with greater diversity of website content (photos, textual material, sound recordings, etc.) were selected because different media are subject to different copyright rules, and a greater range of materials provides more evidence of repository copyright practices.

20 Because the study investigated institutional policies and practices, content from co-operative digitization projects (subject to policies of the group) and content contributed to image-sharing sites such as Flickr were excluded.

21 Because the survey investigated several research questions, the entire survey is not reproduced here; however, the questions relevant to this aspect of the study are reproduced in this article.

view. The research plan called for no more than 20 interviews; however, 39 respondents volunteered. To reduce this number, volunteers were screened based on familiarity with their institution's copyright practices (measured by having worked at least 6 years in their present position), knowledge of professional norms (measured by having worked at least 11 years with archival material), and whether they held a master's degree.²²

Telephone interviews with 18 archivists were conducted between January and March 2011 to explore in more detail the copyright practices of their particular repositories. The interviews lasted between 40 and 60 minutes each and followed a semi-structured script of open-ended questions.²³ The repository's website content and questionnaire responses were reviewed prior to each interview, and, where necessary, questions were added to the interview script. The interviews were recorded and later transcribed and verified. Participants were given the opportunity to review the transcriptions and clarify their remarks; 3 did so. The transcripts were imported into NVivo.

Qualitative data from all sources were analyzed in NVivo in an iterative process, starting with the preliminary identification of coding terms and followed by the addition of new terms as additional topics and themes emerged. Codes were further refined as the analysis moved from largely descriptive coding to more analytical terms to probe the underlying reasons for repository practices.

Findings

This article first examines the repositories' views on controlling reuse and their reasons for doing so. The findings regarding these matters are based on data from the survey and the interviews. The second part of the article examines specific repository practices for controlling reuse; this is based mainly on website data, along with some additional data from the survey and interviews. For reporting purposes, institutions were assigned numbers starting with R (R1, R2, etc.); survey respondents were assigned numbers starting with S (S1, S2, etc.); interviewees were given numbers starting with I (I1, I2, etc.).

Views on Controlling Reuse

Repositories' views on controlling reuse were explored in both the survey and the interviews. In the survey, respondents were asked, "Is your repository's administration concerned that visitors to your repository's website may copy or

22 Although the question did not specify the type of master's degree, it was assumed that many would have graduate training in library science, with a specialization in archives.

23 Because the interviews investigated several different research questions, the entire interview script is not reproduced here; however, the questions relevant to this aspect of the study are reproduced in this article.

download archival material from your website?" Nearly two-thirds (65%) responded no; the remainder said yes. These responses were probed in the interviews. Of the 18 interviewees, 13 (72%) reported in their survey responses that their administrations were not concerned about the copying of online content; the remaining 5 (28%) said that their administrations were concerned.

The 13 interviewees whose administrations were not concerned were asked why that was the case. Several reasons emerged. The most frequent response (from 11 interviewees) was that the whole point of making holdings available online was to increase access. Other reasons were the inability to control (or the lack of resources to monitor) what end users were doing (5 interviewees) and the fact that the administration may not be aware of the risks because there had been no adverse events (4 interviewees).²⁴ It is interesting to note that liability for copyright infringement does not appear to be a major concern. When asked why the administration was not concerned, only a single interviewee mentioned repository selection practice, yet participants' responses to other questions revealed that there may be a further reason: the online content of most of these repositories consists mainly of materials that present little or no risk of copyright infringement because the material is in the public domain or the repository owns the copyright. Even the 5 interviewees whose administrations *were* concerned about copying of online content noted the importance of access and the impossibility of control. In some cases, there were differing views within the institution: in 3 cases, the archives staff were concerned but the administration was not; in the case of 2 much larger institutions, the opposite was true. Interviewee I14 summed it up well: "If your purpose is for discovery and access, to put more barriers on getting to the material is going to be a frustration for the researcher, and if you're really worried that they're going to steal without making contact with you, then I just don't think you have that much control in the digital environment that we are part of, to really control all those things, and I think you should let some of that go."

Whether or not their administrations were concerned about copying/downloading of online content, 11 interviewees identified various reasons for concern leading to a desire for some control over copying. Their responses are summarized in Figure 1. A desire for the repository to be credited in some way was the primary concern, followed by the need to generate revenue (mainly from the sale of high-quality copies but also from extra fees for commercial uses) and a desire to track use (and misuse). As I9 stated, "We want them to download it,

24 That there have been no copyright challenges is borne out by survey and interview data. When asked "Has your repository ever been challenged by a copyright owner about putting a digitized copy of a document on your repository's website?" 73% of survey respondents said no, 22% said yes, and 5% were not sure. Only 3 interviewees recalled being challenged on a copyright matter; another 10 survey respondents described situations in which they had been challenged. In all cases, the matter was resolved without litigation.

but we want them to come to us if they want a high-quality [copy]. The reason is just so that we will get credit and people will know where it came from, not that we want to restrict their access.”

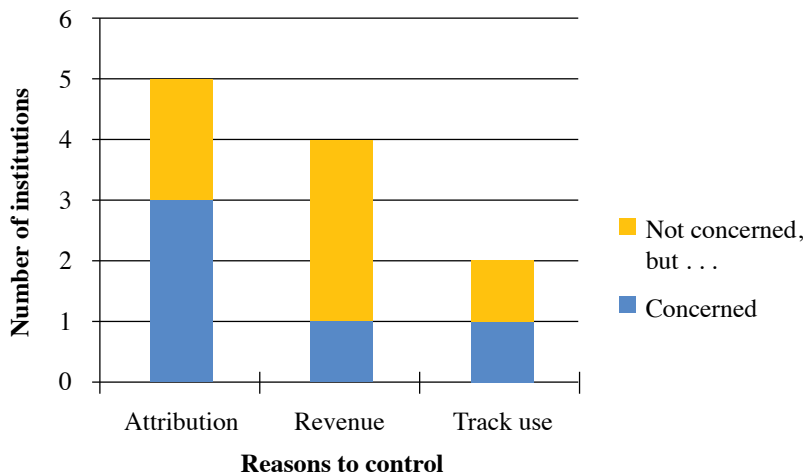


Figure 1. Reasons for concern about users copying content from websites (N=11).

The survey further explored views on controlling reuse by asking respondents to indicate on a five-point Likert scale their extent of agreement with certain statements. In response to the statement “It is important to restrict the ability of visitors to our website to copy or download documents from our website without permission,” 16% agreed or strongly agreed, 58% disagreed or strongly disagreed, and 26% checked “neutral.” In other words, more than half feel that archives should *not* restrict the ability to copy without permission, only 16% feel that archives *should* restrict the ability to copy, and one-quarter have no opinion or are not sure. These responses are consistent with the comments of interviewees whose administrations are not concerned about copying/downloading because access is their main goal; they cannot control what end users are doing.

Repositories’ concerns about use of online holdings beyond personal research was found in the responses to this statement: “As long as the repository is credited as the source, it’s OK for members of the public to download documents from our website and use them in a publication or on another website.” In response, 41% agreed or strongly agreed, 50% disagreed or strongly disagreed, and 9% checked “neutral.” The importance of attribution or credit to the institution is demonstrated in Figure 1. While 41% think that use in a publication or

on a website is fine if it includes attribution, half think that it is not acceptable, even with attribution. One reason may be the desire to authorize use of material in which the repository has a legitimate copyright interest. This possibility is supported by the responses to the question “If we discovered that someone had, without our permission, published a document from our website in which we owned the copyright, we should draw the matter to their attention”: 76% agreed or strongly agreed, 7% disagreed or strongly disagreed, and 17% checked “neutral.” One can only speculate on other reasons; for example, the use of a low-resolution image from the website may reflect badly on the institution and cause it to miss out on revenue from the sale of a publication-quality copy. Requests for permission and orders for copies are ways of counting uses so that a repository can demonstrate value to its parent body, whereas online copying does not allow the systematic tracking of uses that is possible in the analog world.

In another survey question, participants were asked, “Does your repository have written policies/procedures/guidelines regarding controls on further uses of your online content?” Of the 64 who responded, 24 (37%) indicated that they do; 40 (63%) do not. The existence of policies (or lack thereof) and the policy development process were further explored in the interviews. Because making holdings available online is a relatively new venture, it is not entirely surprising that nearly two-thirds of respondents do not have such policies. Policies are evolving in response to changing technology and new possibilities, and staff do not always get around to writing them down. In larger institutions, an archives may also have to rationalize its research services policies with other departments that want to monetize digital assets.

Repository Practices

As noted, this research investigated the research question “To what extent, and in what ways, do archival repositories attempt to control further uses of their online content, and why?” The first part of this article explored repositories’ reasons for controlling further uses. It is clear that they are dealing with a complex range of competing factors when deciding on the extent of their efforts to do so. To discern the methods they use to control reuse, it was not possible to rely on policy documents: relatively few of the repositories have documented policies, and while the policies that do exist may be available on their websites, they are rarely framed in terms of controlling reuse. Therefore, it was necessary to examine evidence from the survey, the interviews, and the websites themselves. For the purposes of this study, means of controlling further uses has been divided into two groups: technical measures that directly affect the online presentation of the digital images; and terms of use that indicate the conditions governing further uses of archival material.

Technical Measures

In response to the survey question “What measures, if any, does your repository take to limit further uses of holdings made available online?” respondents were asked to check all answers that applied. Their responses are presented in Figure 2. Each of these measures is discussed in more detail below. It is interesting to note that 22% reported that they use none of the measures indicated. Those who checked “Other” and provided details described terms of use rather than technical measures.

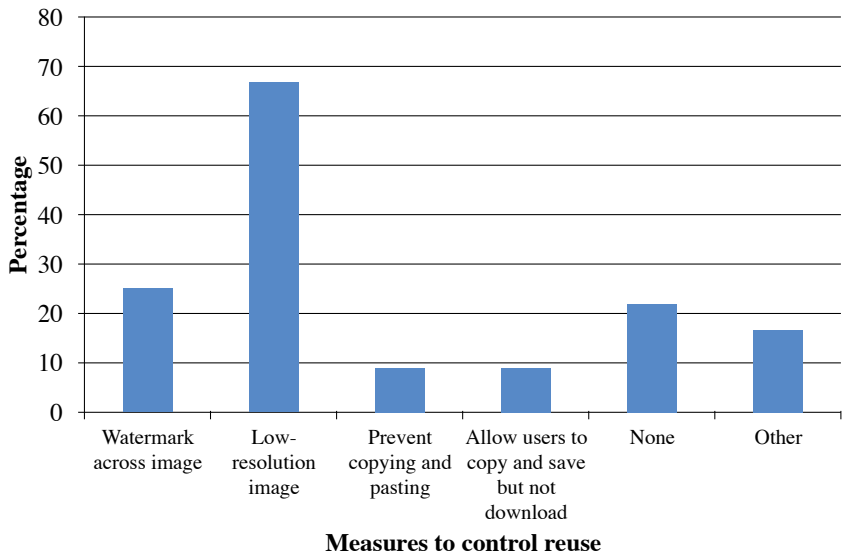


Figure 2. Percentage of survey respondents using measures to control reuse ($N=64$).

Reducing quality

One way of controlling further uses is to reduce the quality of the online image in some way, either by posting low-resolution images or by adding visible watermarks. The resulting image remains adequate for research or personal use but is not suitable for publication. Survey responses revealed that the most common measure by far is the use of low-resolution images, as is the case for 43 institutions (67% of survey respondents). An examination of the sampled online content of the 96 repositories revealed that 18 institutions provide explicit statements of image resolution for web delivery (either in metadata, in

the introduction to the particular digital resource (DR),²⁵ or in policy/procedure documents).²⁶ While the resolution may vary throughout a repository's website, the most common resolution used for web delivery is 72 dpi. Low-resolution images are primarily used to support fast web delivery (none of the statements of resolution is tied explicitly to copyright); however, 5 interviewees also considered low-resolution images to be a means of controlling reuse in that they are not suitable for publication. As I4 said, "When we started out, we did watermark some images, and when we realized that we could just put up very low-resolution images, we really could restrict what could be done with them anyway by putting up low-res images." Only 4 institutions surveyed provide downloads of high-quality (TIFF or high-resolution JPEG) images; more commonly, users must order publication-quality digital images from the repository.

Covering part of the image with a visible watermark is the second most common way to reduce its quality. Survey data revealed that 25% of the 64 respondents reported using a "watermark across the image." However, website data indicate a higher use of visible watermarks: of the 96 institutions whose websites were sampled, 30% employed watermarks in some form, either placed across some or all images (17%) or added as a cropable addition along the edge of some or all images (13%). Watermarks running across the image consist of the name of the institution, phrases such as "all rights reserved" or "copyright," or contact information for inquiries about use.

The use of watermarks was explored in the interviews. Two interviewees said their use of watermarks is not for copyright reasons but to ensure attribution. Two others had used them in the past but discontinued the practice because they found that low-resolution images addressed the issue or because their users complained that watermarks were annoying: "The watermark was criticized by a lot of people as being overly aggressive, and obliterating ... the text or the image, distorting it, making it hard to read" (I12). Of the interviewees who do not use watermarks, four had considered it but did not pursue it, either because of cost or a belief that hackers could easily remove them. One interviewee who does not routinely use watermarks recounted a situation in which his institution had used one to obscure most of the image of a document because the copyright owner had challenged them. Another interviewee explained that his institution uses a variation: "We sometimes overlay a transparent GIF image of the actual

25 For the purposes of this study, a digital resource (DR) is defined as "a grouping of archival documents presented together on the repository website because of some relationship among them." The 1,554 DRs identified in this study were categorized into the following types: 807 Virtual Exhibits, 556 Single Collections, 131 Illustrative Essays, and 60 Searchable Databases.

26 That the remaining institutions did not have an explicit statement on their website does not mean that they do not use low-resolution images. However, while pixel size is indicated in the image properties, the resolution cannot be calculated without knowing the size of the original.

image” (S74), thus reducing the quality. Another repository (R27) states on its site that it does not watermark images because “we rely on the user’s compliance with applicable copyright laws,” and “our goal is to make our collections as widely available as possible for non-commercial use.”

Other ways of reducing image quality emerged in the examination of the website content. Six institutions reduce the quality by using thumbnails: one does so for all images; the others do so only for copyright-protected images or when there is some related concern about further uses.

Limiting copying

Limiting copying is less commonly used as a means of controlling further use: only 9% of survey respondents disable the right-click to prevent copying and pasting; 9% allow users to copy and save but not download.²⁷ Examination of website content to explore aspects of these practices provided little additional detail because of the limited sample of DRs. Some of the online holdings of 3 institutions were viewed in Adobe Flash Player, which does not have save or copy options on the right-click menu.

Of course, the ultimate way to limit copying is to withhold access to the image entirely. Two interviewees noted that their institutions may display only metadata and withhold access to the image for a range of reasons related to copyright, privacy, donor conditions, or other access restrictions. Website data identified 4 other institutions that do the same for certain DRs. Three other repositories limit access to audio files by requiring them to be played onsite on the reading room computers; of these, 1 institution provides only the description online, and the other 2 provide only 30-second clips (or extracts of songs) online.

On the other hand, website data revealed that 16 institutions encourage users to download or copy and save content by providing instructions to do so or providing information about software that will assist in downloading large files or printing large maps.

Terms and Conditions of Use

Terms of use (TOUs) that specify the conditions governing further uses of archival material are more common than technical measures. The nature and extent of the TOUs vary greatly. Simply locating TOU information can be challenging. It is rarely found in one place: it may be included in procedures or on forms for

27 Some institutions permit users to copy the image (often low-quality) on their computer screen. Others save the user time and effort by allowing them to download the image (often including certain metadata) directly to the user’s computer, so the user does not have to copy, save, and record details such as reference number, etc.

ordering copies or requesting permission, in item-level metadata, in fee schedules, in reading room rules and researcher registration forms, and/or in more general policy statements. Unless a repository selects only public domain items or those in which it owns copyright, the TOUs may differ across (and within) DRs, depending on copyright status, donor agreement, or media type.

When asked “What guidance, if any, does your repository provide to visitors to your website regarding copyright?” 52% of survey respondents reported having terms and conditions on further uses of archival holdings; 39% reported having rights metadata about individual documents (e.g., whether copyright has expired, name of copyright owner, etc.).²⁸ However, website data revealed that 89 (93%) of the 96 institutions place various conditions on further uses of their holdings. Of the other 7, 5 provided no online information about terms and conditions on the use of their collections; 1 indicates only that its holdings are protected by copyright, and 1 simply asks users to contact the repository should they require copies.²⁹

Where are TOUs found?

As noted, TOUs are found in a variety of places, including item descriptions or DRs. For the purposes of this discussion, description encompasses item-level metadata (e.g., in a “rights” or “rights management” or “copyright” field) as well as information about a particular DR (e.g., its provenance, scope and content, the digitization project, and any limitations on its use). Table 1 shows the number of repositories that indicate TOUs at the item level or the DR level for at least some of their online resources. It is important to note that repository practice varies widely, not only across repositories but within a single repository’s website. Inconsistencies in intra-institutional practice may result from differences in the type of the resource (e.g., item-level metadata are more often available for systematic digitization projects related to a particular fonds, rather than for exhibits of items selected to illustrate a theme), or a shift to more sophisticated practices as digitization programs evolved.

- 28 These were two of several possible responses to a multiple choice question that also included efforts to educate users about copyright, including a link for submitting copyright inquiries, information about copyright law, or a link to information about copyright law. The findings of an investigation of repositories’ efforts to educate users about copyright are discussed in Jean Dryden, “But Are They Grateful? Educating Online Users About Copyright,” *Imagine, Innovate, Inspire: Proceedings of the Conference of the Association of College and Research Libraries, April 10–13, 2013, Indianapolis, IN*, ed. Dawn Mueller (Chicago: Association of College and Research Libraries, 2013), 92–96, http://www.ala.org/acrl/sites/ala.org/acrl/files/content/conferences/confsandpreconfs/2013/papers/Dryden_Grateful.pdf, accessed 30 April 2013.
- 29 While these seven institutions *may* place conditions on further uses, their websites contain no information indicating that this was the case.

Table 1. Number of institutions providing terms of use in description (N=96)

	Number (percentage) of institutions
TOUs at item level	44 (46%)
TOUs at DR level	12 (13%)
TOUs at item or DR level	7 (7%)
“Rights” field at item level but no TOUs	15 (16%)
No TOUs in description	18 (19%)

It was stated earlier that 39% of survey respondents reported having rights metadata about individual documents. However, web data indicate that 66% provide rights metadata in descriptions, some of them at the item level for at least some of the DRs, others at the DR level, and some at the item level for some DRs and at the DR level for others. Eighteen do not provide TOUs in description at either level. Fifteen have a “rights” or “rights management” field at the item level that provides no specific information about specific TOUs, although it may indicate the rights holder or simply refer users to the repository for information about copyright, ordering copies, and/or permissions information.

The TOUs provided at the item level can range from simple statements (e.g., “The digital version [of this item] is available for educational use under ‘Fair use’ guidelines” or “Permission to reproduce this image must be requested from [Repository]”) to lengthy statements that set out the terms and conditions in some detail, such as this one (R68):

Digital reproductions available through [Repository] from the [X] Collection may be copied and used freely for the purpose of private study, scholarship or research without written permission. To use the digital reproductions from the [X] Collection in any other way, users must make a request in writing to [Repository]. If a user makes a request for, or later uses, a reproduction for purposes in excess of the conditions of “fair use” described above, that user may be liable for copyright infringement. [Repository] reserves the right to refuse a reproduction request if, in its judgment, fulfillment of the request would involve violation of copyright law. Users of collections are expected to abide by all copyright laws. Reproductions of materials from the [X] Collection cannot be published (either in print or on the internet) without obtaining the legally required permission from the [Repository]. Permission requests should include: title of publication, expected date of publication, type of publication (scholarly, general, etc.), and expected print run or distribution. We will review the request and respond in writing regarding the permission and publication fee.

Eight repositories tie their TOUs to click-through agreements that require users to accept the conditions before they can view the digitized content. In two cases, the user must agree before even seeing the list of available DRs, let alone

the contents of any of the digitized collections. In two other cases, the agreement opens when the user clicks on a subject category containing many items, or before the user can view the items in a photo collection. Four others place the click-through agreement at the item level. In one case, the agreement opens when the user clicks on the description of the digitized item; the user has to indicate agreement in order to view the item. Two other agreements apply to oral history interviews: the user must agree to the terms before he or she can read the transcript or listen to the audio. The remaining example is simply a pop-up window (“Copyright Notice”) that appears when a user wants to download the audio of an oral history interview. The user can continue without agreeing to the terms, but the pop-up is a means of bringing copyright issues to the user’s attention.

What do repositories try to control?

This research focuses on the ways in which repositories try to control further uses of digitized online holdings, given that the unmediated online environment is different from the two-way interactions with users that occur onsite or via mail or telephone. The investigation started by identifying the “positive” uses, i.e., those that do not involve some condition or limitation. Of the 89 repositories that have online TOUs, 25 (28%) provided no “positive” purposes; in other words, the repository gave no indication of what could be done without some obligation on the part of the user. Of the remaining 64 repositories, 41 (46%) stated positive purposes that apply specifically to their digital collections; 23 (26%) have positive purposes that apply to all holdings, whether available online or not.

Table 2 presents a summary of the positive uses available to users of digital collections. Across the 41 repositories with positive purposes that apply to digital collections, there are 22 different wordings; similar or related wordings have been grouped together. Wording may also differ within a given website. The most common is “Research, teaching, private study, or scholarship,” which is used by 10 institutions. Nine institutions permit non-commercial uses in combination with educational and/or personal uses. Seven permit “fair uses.” Five permit “personal use” or private study. Typically the statement says that the digital collections can be used for the designated purposes and that the user assumes all responsibility for copyright infringement. If, however, the user requires high-quality copies or wants to do something that goes beyond the designated purposes, a variety of terms and conditions apply.

Table 2. “Positive” reuse purposes available to users of digital collections (N=41)

“Positive” purpose(s)	Number (percentage) of institutions
Research, teaching, private study, or scholarship	10 (24%)
Non-commercial (combined with other uses)	9 (22%)
<ul style="list-style-type: none"> • personal (may include research), non-commercial (or non-profit), and educational uses (5 institutions) • personal (may include research), non-commercial uses (3) • educational, non-commercial (1) 	
Fair use	7 (17%)
Personal use/private study	5 (13%)
Personal or educational use	3 (7%)
Educational and research purposes	3 (7%)
Educational purposes	3 (7%)
Research or other scholarly purposes	1 (3%)

For uses of digital content that fall outside this wide range of permitted uses, what do repositories wish to control through conditions and limitations (principally requiring the repository’s permission for further uses)? Once again, how “controlled” uses are expressed varies widely; for example, permission is required simply for “use,” or to “publish, in hard copy, moving image, recorded sound, or electronic media,” or to “publish, exhibit, include in a website or otherwise publicly disseminate.” Generally speaking, repositories wish to control “publication,” which is often a catch-all term that includes not just traditional print publication in all its forms, but also other means of dissemination, such as exhibits, TV or radio broadcast, films or videos, websites, and advertisements. The scope of “publication” can be discerned only by examining the repository’s reprographic fees. “Controlled” uses are also expressed in terms of a profit motive, that is, commercial (for-profit) uses as well as scholarly or not-for-profit uses.

Controlling such uses may provide an opportunity for the repository to track use, ensure proper attribution, and/or generate revenue. It is, however, disheartening to see that eight institutions require the repository’s permission to *quote* from the holdings, an activity that surely falls within fair use. Of those, one requires permission only for quotations of more than 500 words; two require permission to quote or cite. Another institution has a special form to request

permission “to cite extensively.” Two other institutions do not require the repository’s permission to quote; instead, they require the user to agree not to quote from the material being copied without the permission of the rights holder in one case or the permission of the repository in the other.

Specific controls

It remains to examine the nature of the terms and conditions that repositories place on further uses. TOUs that apply to both digital and analog holdings are more commonly found in order forms; requests for permission to publish; policy statements pertaining to copyright, permissions and/or reprographic orders; or researcher registration forms. The terms and conditions are generally more consistent, although there are still inconsistencies between forms or between forms and policies, if one has been revised and the other has not.

Of particular interest is the requirement to obtain the repository’s permission for uses beyond those permitted. Table 3 sets out different aspects of this requirement. Of the 89 repositories that have TOUs, 73 (82%) must authorize further uses, regardless of whether they own the copyright. Only 28 of the 73 explicitly note that, although they own the physical materials, they may not be the copyright holder. Ten of the 73 require the user to provide written permission from the rights holder before the repository will grant permission to publish or use for commercial purposes (or in some cases before they will reproduce at all). Only 4 repositories neither grant nor deny permission for further uses (unless they are the rights holder).

Table 3. Requirements for repository permission and user responsibility for copyright compliance (N=89)

	Number (percentage) of institutions
Repository’s permission required for further uses	73 (82%)
Repository requires permission but states that it may not own copyright	28 (31%)
Repository requires written permission for further use from rights holder	10 (11%)
Repository neither grants nor denies permission for further use (unless it holds copyright)	4 (4%)
User responsible for copyright compliance	68 (76%)
User will indemnify and hold harmless the repository with regard to claims arising from user’s actions	36 (40%)

Are repositories controlling permission because they think they own the copyright in the digital images they have created, although they may not own copyright in the original work? If so, requiring the repository's permission for uses beyond fair use makes some sense (although the claim of copyright in a slavish copy is on shaky legal ground because the copy lacks the necessary originality to merit copyright protection).³⁰ However, the data provide no clear answers to this question. The survey asked respondents about the extent to which they agreed with the following statement: "If my repository creates a digital copy of a document in our holdings, we own the copyright in the digitized image that we created, even if we do not own the copyright in the original." Of the respondents, 60% disagreed or strongly disagreed with this statement; 22% were neutral, only 18% agreed or strongly agreed. Website data revealed 17 repositories that claim copyright in at least some of the digital images (usually in item-level rights metadata); 15 of the 17 require the repository's permission for further uses.³¹

If a repository is going to provide copies for fair use (as it is authorized to do under section 107 of the US Copyright Act) but is not going to authorize uses of material in which it is not the rights holder, then responsibility for copyright compliance must be stated somewhere. As shown in Table 3, 68 repositories (76% of the 89 repositories with TOUs) include a provision that the user is responsible for copyright compliance, including the obligation to obtain any necessary permissions from the rights holders (and in many cases to be responsible for safeguarding other third-party rights such as privacy). Furthermore, 36 (40%) require that the user "indemnify and hold harmless" the repository with regard to claims arising from a user's actions.

Repositories impose a wide range of specific conditions on further uses of their holdings, as shown in Table 4. By far the most common is a requirement to acknowledge the repository as the source of the item. Some institutions are very conservative about reproducing items for users. For example, one repository will not even scan copyright-protected material when fulfilling public orders, even if the user wants the copy for research or private study. Two institutions provide high-resolution copies for publication, but not for personal use; another provides only low-resolution images if the user wants it for posting on a website. Two other repositories prohibit the reproduction of their images on websites. On the other hand, another states that all of its online holdings are "copyright-free"³² and asks only that users cite the repository as the source, using the stated format.

30 See note 12 above.

31 Of those 15, 4 require the permission of the rights holder in addition to that of the repository for further uses. However, only 2 of the 17 agreed with the survey statement; 9 disagreed, 1 was neutral, and 5 did not return their surveys.

32 The basis for this claim is not stated, but it appears that the repository is the rights holder for much of the online material, and is granting a licence for use.

Table 4. Specific conditions on reuse (N=89)

	Number (percentage) of institutions
Acknowledgement of source	69 (78%)
One-time specified use	41 (46%)
Repository requires copy (or copies) of publication or other product	35 (39%)
Non-exclusive license	30 (34%)
No alteration of images permitted	21 (24%)
Restrictions on further duplication	20 (22%)
Pre-publication approval of repository	5 (6%)
No use of material in advertising	4 (4%)
Analog reproduction only	1 (1%)

As noted, the practice of claiming copyright in public domain (PD) materials has been harshly criticized, and some institutions, such as Cornell University, have changed their practices.³³ Studies of selection for digitization and online access have shown that institutions frequently select PD materials to avoid copyright complications.³⁴ That being so, one might expect that the use of PD materials would be addressed in the TOUs, presumably by indicating that PD items may be used freely without permission. However, website data reveal that only 17 institutions address uses of PD materials in the ways shown in Table 5.³⁵ Only 6 indicate PD items at the item level in at least some of their DRs and state that they can be used freely as long as the repository is credited; 4 others do so but do not require attribution (however, the item-level metadata include a “credit” or citation field, and repository policy also includes a general requirement to cite the repository as source). PD policy is more frequently indicated at the repository level than at the DR level. It must be noted that the practices are not necessarily consistent throughout a website; PD may be indicated at the item level or at the DR level for some DRs but not others. One can speculate about the reasons why so few institutions indicate PD materials. Although they think

33 Peter Hirtle, with Tricia Donovan, “Removing All Restrictions: Cornell’s New Policy on Use of Public Domain Reproductions,” *Research Library Issues: A Bimonthly Report from ARL, CNL, and SPARC*, no. 266 (October 2009): 1–6.

34 Jean Dryden, “Copyright Issues in the Selection of Archival Material for Internet Access,” *Archival Science* 8, no. 2 (2009): 123–47; Jean Dryden, “The Role of Copyright in Selection for Digitization,” *American Archivist* 77, no. 1 (Spring/Summer 2014): 64–95.

35 The number of institutions totals 19 because 2 institutions are counted twice, as indicated in the Notes.

they are selecting PD materials, they may lack the resources to do an item-by-item copyright analysis, or they may lack the confidence to state their conclusion about PD status. Many also want to generate revenue, regardless of PD status.

Table 5. Institutions that indicate public domain (PD) materials (N=17)

Policy or practice	Number of institutions	Notes
PD indicated at item level; only requirement is to cite repository as source	6	1 of the 6 also states at the repository level that no fees or permissions will be required for PD items
PD indicated at item level; no requirement to cite indicated there	4	1 of the 4 also states at the repository level that use of PD material may require permission
PD indicated at DR level; only requirement is to cite	1	
PD indicated at DR level; no requirement to cite	1	
Repository level: no permission required for PD material; only requirement is to cite repository as source	4	
Repository level: copyright does not apply to PD material	1	
Repository level: "commercial publication fees" apply to all holdings, including PD	1	
Repository level: use of high-quality digital reproductions of PD material may require permission	1	PD JPEGs do not require permission

As discussed above, revenue generation motivates many institutions to control further uses. The matter of use fees (fees that go beyond cost recovery) was explored in website, survey, and interview data. As noted, many repositories reduce the quality of online images in various ways so that users have to come to them to order high-quality copies. Many charge fees that allow them to recover their costs, but others have fee structures that include an extra charge for a

variety of uses that are generally lumped together under “publication” but which include a wide range of means of dissemination, as previously discussed. Figure 3 sets out repository practice related to fees as revealed in website data. A total of 24 repositories (25%) provide no information about fees on their websites. Twenty repositories (21%) charge for reprographic services only, i.e., the cost of time and materials to make a copy and send it to the user. However, more than half (52, or 54%) charge an additional fee if the user wants to publish, display, or broadcast an item from the holdings. Such fees go by various names, e.g., publication fee, use or usage fee, commercial use fee, permission fee. Some institutions (particularly those with extensive audiovisual holdings) have very elaborate fee schedules, which vary depending on such factors as the size of the print run, geographic distribution, type of use (e.g., print or broadcast), whether or not the publisher is a for-profit entity, and affiliation with the repository (e.g., faculty and students of an educational institution are entitled to a lower fee). Others simply add on a flat fee for commercial uses; another sets fees on a case-by-case basis; one simply requests donations.

All but one of those that charge a use fee also require the repository’s permission to “publish,” whether or not the repository owns the copyright (although of those who require the repository’s permission, 23 state that they may not own the copyright but require permission based on their ownership of the physical holdings). One other charges a use fee only if the repository is the copyright owner.

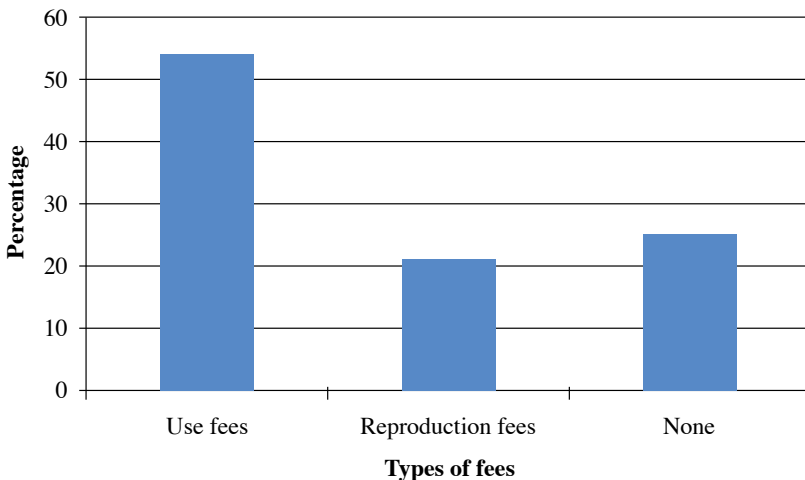


Figure 3. Percentage of institutions charging different types of fees (N=96)

Survey data provided further information about use fees. Survey respondents were asked, “Do you charge a use fee to those who want to use a copy of a document from your holdings?” In response, 20% said yes, 26% said no, and 54% checked “It depends.” Those who checked the latter were asked to explain. The responses reflect a number of specific issues and the wide range of practice that is evident from website data. Generally, the responses indicate that commercial for-profit uses are far more likely to incur fees, and repositories have a lot of discretion about whether or not to charge a fee; they often waive or reduce fees for scholarly uses.

Survey respondents were also asked to indicate the extent to which they agreed with the statement “Archival institutions should charge use fees when providing patrons with publication-quality copies of documents.” Of the survey respondents, 56% agreed or strongly agreed, 20% disagreed or strongly disagreed, and 24% were neutral. This finding aligns closely with actual practice reflected in website data presented in Figure 3.

Although reasons for charging a use fee (or not) were not explored in great detail, the topic came up in the qualitative survey data and the interviews. Two survey respondents noted that the revenue from use fees supported the repository – in one case its digitization program, and in the second case other aspects of the repository’s program (“It’s only to support the service, not make any profit off the images” (S22)). Interviewee I14 backed up this statement: “Well, they [use fees] are really one of the only few sources we have for our repository ... it actually brings in some revenue, which helps us sustain some of our other exhibit programs and buying supplies we need and that kind of thing.” However, another survey respondent (S28) noted that “the fees are mostly there to keep requests under control, not to make money.”

Others noted that they are moving away from use fees. S70 stated that her repository is eliminating them because of concerns about legal liability related to works of “questionable authorship”; as she explained, “I would rather avoid any mess, give patrons access to the material, have *them* chase down copyright holders and call it a day.” Interviewee I11 noted that his repository has “cut down on the number of things that we actually charge [use] fees for ... It’s really only things that [the repository] owns the copyright in.” Another (I3) noted that, as budgets dwindle, pressure to generate revenue might increase, creating a need for greater control over further uses.

While use fees may be considered a means of controlling further uses, they do not appear to present a major barrier to use by individuals. Fees are generally low; only in a few cases do they represent large amounts of revenue. Even when the repository owns the copyright, the desire to make holdings available is the overriding purpose, rather than revenue generation. However, while the fees themselves may not be a barrier, they are incurred only after a request to the repository for permission to publish, and in many cases the repository is not the rights holder. Conflating revenue generation with copyright creates the

impression that copyright sometimes involves a financial cost that may be a barrier to further uses.

Enforcement

In light of the extensive conditions that repositories place on the use of reproductions of their holdings, one might expect a vigorous enforcement regime. Indeed, repository permission-to-publish agreements often include a financial penalty if the user breaches the contract specifying the TOU. As reported earlier, 76% of survey respondents agreed or strongly agreed with the statement “If we discovered that someone had, without our permission, published a document from our website in which we owned the copyright, we should draw the matter to their attention.” However, a related survey question produced a different response. When asked about their level of agreement with the statement “If someone copies a document from our website and uses it in a publication or on a website without obtaining the permission of the copyright owner, there is little we can do about it,” 62% agreed or strongly agreed, 20% disagreed or strongly disagreed, and 18% were neutral. When repositories are the rights holders, they are keen to go after those who do not obtain permission to publish, but nearly two-thirds agreed that there is little they can do if the permission of the copyright owner (repository or not) is not obtained. To be sure, the repository is not obliged to enforce others’ copyrights, and the majority of the repositories make it clear that the responsibility for copyright compliance lies with the user.

Two interviewees noted that they have challenged the use of their online holdings on other websites. I9 reported that, as time permits, his “web person” does searches to see what others may be doing with their images; if the use is “questionable” (e.g., the repository is not acknowledged), they send a message to the user. I15 has challenged someone trying to sell copies of her repository’s audio recordings on eBay and the reproduction of audio recordings on the Internet Archive with the metadata stripped out. As she stated,

... it partly burns me up, not so much that he’s making money off of it, but that he’s basically selling something that people could get for free elsewhere.... people who are selling [recordings] on eBay often put a link to our website if we have the same [recording] and say hey, this is the [recording] I’m selling, ... if you want to hear a copy of it, ... which I don’t object to at all.... The Internet Archive was the same issue.... If they had just loaded the thing up and said, oh, by the way, the original came from here, they wouldn’t have been in violation of the Creative Commons licence. They also would have allowed people to compare, to understand the original context of the thing.”

It is noteworthy that neither participant is concerned about control; each wants the holdings to be used. However, they want users to have the benefit of the value added by the archives, and they want the repository to be credited as the source.

Discussion

This study explored the question “To what extent, and in what ways, do American archival repositories attempt to control further uses of their online content, and why?” This question is part of a much broader investigation of whether archival repositories are invoking copyright in ways that present a barrier to the use of online documentary heritage. If that is the case, they may be compromising their core mission to make their holdings available for use.

The present study found a wide range of practice that is far from consistent (often even within the same repository). This is not surprising because digitization for online access is relatively new, and practice is rapidly evolving in response to changing technology, user demand, and greater experience with digitization projects. However, despite the lack of consistent best practices, this research generally confirmed the findings of earlier empirical research into archives’ copyright practices conducted by Dryden, Eschenfelder, and Eschenfelder and Agnew – that repositories attempt to control further uses of their online content through various technical measures and through terms and conditions governing further uses.³⁶ The present study found that repositories do so for a variety of legitimate reasons that have relatively little to do with copyright (i.e., attribution, revenue generation, and tracking use), although their terms and conditions on use are often couched in copyright language or presented as part of their copyright policies. This differed from the findings of Eschenfelder’s study, which identified three categories of reasons for control: controlling representations (i.e., attribution), getting credit (tracking use and revenue generation), and legal issues.³⁷ That legal issues did not appear to be a major concern in the present study can be explained by the fact that Eschenfelder’s study was much larger and more diverse: it looked not just at archives, but at libraries and museums as well. Furthermore, archives may be less concerned about legal issues when it comes to controlling further uses because, thus far, what they have selected for online access consists largely of holdings that are in the public domain or in which the repository owns the copyright.

The wide range of practice suggests an inherent tension between access and control, a complex matter that calls for further investigation. Fruitful directions for research include more detailed study of practitioners’ motives for controls in the online environment and whether their practices have achieved their goals, as well as more robust user studies to determine levels of compliance with archives’ rights management practices. In the meantime, repositories would do

36 Dryden, “Copyright in the Real World”; Dryden, “Copyfraud or Legitimate Concerns?”; Eschenfelder, “Controlling Access to and Use of Online Cultural Collections”; Eschenfelder and Agnew, “Technologies Employed to Control Access to or Use of Digital Cultural Collections.”

37 Eschenfelder and Caswell, “Digital Cultural Collections in an Age of Reuse and Remixes.”

well to review their reprographic policies and procedures to ensure that they are consistent with their objectives and form a coherent whole. As I12 said, “[We’ve] got a lot to learn about different approaches to the reuse and the downloads and the use of the images once they’re online.”

As stated, archives attempt to control further uses for a variety of reasons that are often presented as part of copyright policy, although they may have little to do with copyright. If, however, archives do not clearly separate copyright interests from other motivations, they may be compromising their “making available” mandate, which is fundamental to their mission. Are there ways in which they can achieve their goals without inappropriately linking them to copyright? As the title of this article asks, could they not just let some of the copyright aspects go? While copyright concerns figure prominently in what repositories select for digitization, copyright issues are a lesser factor in controlling reuse. This is not surprising if what a repository selects is in the public domain or if the repository is the rights holder (in which case, it is presumably more interested in providing access than in asserting copyright interests). As noted, reasons for controlling reuse have more to do with attribution, revenue generation, and tracking uses. Thus, repositories’ use of technical measures to reduce the quality of online images or to prevent copying³⁸ makes sense. A low-quality image copied from the web may be adequate for personal or research use, and is very convenient for the user. Although such copying does not allow the repository to track use or charge a fee, it does not incur administrative costs and serves the user well. However, publication-quality copies must be ordered from the repository. The ordering process provides repositories with the means to achieve their main objectives: to request attribution in a specified format, to review and categorize the proposed use to generate statistics to demonstrate the archives’ value to resource allocators, and to charge a fee to cover costs or generate additional revenue, all without mentioning copyright.

The inappropriate links to copyright appear in the terms and conditions of use. While repositories may not be intentionally using copyright to control further uses, their reprographic policies, order forms, and item-level metadata are peppered with references to copyright (e.g., “the item may be protected by copyright”; “uses beyond fair use may constitute copyright infringement”; “© [Repository]”). That more than three-quarters of the repositories represented in the study require users to obtain their permission to publish or otherwise disseminate copies of items in their holdings implies that the repositories are the rights holders. With few exceptions, the permission requirement extends to public domain material; only one-third of those studied stated that the permis-

38 Relatively few repositories prevent copying altogether, but to do so seems counterproductive, unless there are particular concerns. Low-resolution images are widely used for ease of web delivery, and it does not seem reasonable to routinely prevent copying of the image on the user’s screen for research and private study when the onsite user could obtain a photocopy.

sion requirement is based on their ownership of the physical property rather than the copyright. Consequently, many repositories are still open to the charge of copyfraud; that is, they are claiming (or at least implying) copyright ownership in material in which no copyright exists or in which they have no copyright interest. The other common conditions, such as one-time, non-exclusive use, no alteration, users' indemnification of the institution for claims arising from their use, and the like, reflect the language of copyright lawyers (as well as an earlier time when copying was relatively time-consuming and laborious and copies were easily distinguishable from the originals). One suspects that repositories simply took their onsite reprographic policies and put them online without reviewing them or adapting them to the online environment. However, the online environment is different, and the research participants acknowledged the inability to control what users do with online content. Furthermore, since repositories rarely monitor and enforce their terms of use, imposing detailed conditions seems rather pointless.

As demand for digital content and open access increases, and as archives move to large-scale digitization projects involving entire fonds, a review of institutional policies and practices governing use of both online and onsite content is sorely needed. Broadly speaking, institutions have three choices. They can put in place minimal conditions on reuse (e.g., attribution) and place all responsibility for copyright compliance on the user. This does not appear to be a realistic option, given that institutions have other reasons for controlling reuse. Alternatively, they can continue to impose extensive "quasi-copyright-like controls" over use of holdings, whether or not the institution is a rights holder. This perpetuates the traditional approach and leaves the repository open to the charge of copyfraud. Repositories have no legal right to authorize (or impose conditions on) the use of material in which they have no copyright interest, nor are they obliged to enforce others' copyrights.

A third option – to establish controls that are consistent with the repository's objectives – seems more desirable. All policies, procedures, and forms should be reviewed with the following question in mind: When is it appropriate for archives to limit reuses of their holdings? Where the repository is the rights holder, copyright-based controls may be necessary, and from the perspective of copyright, placing responsibility for copyright compliance on the user is entirely consistent with professional codes of practice.³⁹ However, when the repository's objectives have nothing to do with copyright, repositories would do well

39 See "ACRL/SAA Joint Statement on Access to Research Materials in Archives and Special Collections Libraries Copyright" (Association of College and Research Libraries, 2009), <http://www2.archivists.org/statements/alasaa-joint-statement-on-access-to-research-materials-in-archives-and-special-collection>, accessed 2 April 2013, which states, "It is the researcher's obligation to satisfy copyright law when copying or using materials found in collections."

to consider emulating those institutions that neither grant nor deny permission for reuse (unless the repository is the rights holder). As stated above, within the ordering process, it is entirely possible to provide a user with a copy, specify attribution, collect a fee to recover costs or generate revenue, review the proposed use, and generate use statistics without the repository granting permission for the reuse. This is not to say that repositories should not impose any conditions, rather that any controls necessary to achieve the repository's objectives should be expressed in a way that eschews inappropriate use of the language of copyright, permissions, and rights. Finally, in light of evidence that users often ignore what they consider to be unfounded institutional claims of copyright,⁴⁰ repositories would do well to consider consulting users about how they regard controls on further uses, what they are likely to respect, and their needs – for example, where they are most likely to look for terms and conditions on use.

It is unlikely that the same approach will suit all institutions. Institutional policy will depend on the repository's mission, the nature of its holdings, and its budget situation, as well as less tangible factors such as tolerance for risk and the availability of copyright expertise. Even within a single institution, policies will likely have to accommodate different situations, such as the mediated onsite and unmediated online environments, or the presence of the repository's copyright interests. Continuing education is a possible source of support for a review of institutional policies and procedures, and for more consistent practices across institutions. The SAA's Continuing Education Program includes a workshop on Rights and Permissions, which identifies aspects of reuse that repositories may wish to control and their reasons for doing so, and looks at examples of suitable wording to address particular issues. A useful by-product of such a workshop could be a compendium of best practices that separate copyright issues from other motivations.

Conclusion

Archival repositories have enthusiastically embraced the Internet to make their holdings more widely available. Wider access may be the goal, but repositories have continued to control reuse of their holdings in inappropriate ways. Their approach to further uses of their online holdings has been ambivalent and fraught with contradictions. This article has identified key aspects of present practices and calls for the separation of copyright issues from other motivations for controlling reuse in order to ensure that repository practices are more consistent with their core mission to make holdings available. While further empirical research is needed to illuminate these complex issues, a critical examination of repository practices with a view to developing less restrictive best practices is

40 Dryden, "Cavalier or Careful?"

also required. Perhaps, as the title of this article suggests, archives should just let some of their controls go in order to better fulfill their core mission.

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