

3-28-2024

Copyright and Fair Use

Katie L. Coldiron
Florida International University, kcoldiro@fiu.edu

Wolfsonian Public Humanities Lab-FIU

Follow this and additional works at: <https://digitalcommons.fiu.edu/wphl-da>

Recommended Citation

Coldiron, Katie L. and Wolfsonian Public Humanities Lab-FIU, "Copyright and Fair Use" (2024). *Wolfsonian Public Humanities Lab (WPHL) Digital Archive*. 14.
<https://digitalcommons.fiu.edu/wphl-da/14>

This work is brought to you for free and open access by FIU Digital Commons. It has been accepted for inclusion in Wolfsonian Public Humanities Lab (WPHL) Digital Archive by an authorized administrator of FIU Digital Commons. For more information, please contact dcc@fiu.edu.

Copyright and Fair Use

Authored by Katie Coldiron



[This Photo](#) by Unknown Author is licensed under [CC BY 3.0](#)

Left: An original Ahol Sniffs Glue mural in Miami's Wynwood district. Right: A campaign created by retailer American Eagle Outfitters utilizing the mural without proper accreditation to the artist.

Introduction: A Street Art Story

In 2014, Miami artist David Anasagasti, aka Ahol Sniffs Glue, received a phone call from a friend in Nebraska, congratulating him on finally having "made it" with his artwork. The friend had seen advertisements in an American Eagle Outfitters store and online featuring the artist's work. Upon further investigation, Anasagasti found out that an entire campaign for the retailer had been created, prominently featuring his famous "Ocean Glass" mural in Miami's Wynwood district. However, no one from the retailer had ever reached out to Anasagasti regarding using his work. American Eagle Outfitters went so far as to have local graffiti artists in the Colombian city of Medellín recreate Anasagasti's work in their local store. Many attorneys in Miami, unfamiliar with the burgeoning world of street art, advised Anasagasti that there wasn't much hope of getting a settlement from the retailer. However, with persistence, Anasagasti and a copyright/trademark attorney named Andrew Gerber were able to successfully sue and reach a settlement with the retailer for copyright infringement.

For institutions interested in hosting online digital archives, this story should serve as both an inspiration and a cautionary tale. At the Wolfsonian Public Humanities Lab, we actively strive to elevate voices historically marginalized and/or underrepresented in traditional archival spaces and provide them in open-access formats to the public; we have actively worked with Anasagasti to make materials related to his "Geographies of Trash" project [freely available](#) via

FIU Libraries. However, we must also keep in mind the rights of all creators, and that work cannot be digitized and made freely available unless it has been copyright-cleared to do so. This section of the manual is a guide to determining if your archival holdings are copyright-cleared. *Please note that this manual follows the guidelines of the United States Copyright Office, and that materials from other countries will be subject to different restrictions.*

What is Copyright?

The definition of copyright as defined by the United States Copyright Office is "an intellectual property that protects original works of authorship as soon as an author fixes a work into a tangible form of expression" (2022). It is simpler to think of copyright in terms of "rights", or restrictions on the reproduction and/or publication of a particular work. Digital archiving is a form of reproduction, while displaying the items online is considered publication. Copyright is important for cultural heritage preservation because it informs decisions on what item(s) to digitize, as well as the level of risk assumed by making the content digitally available. For the user of the content, copyright informs decisions on how one might use the item (Zayas-Ruiz 2022).

Determining an Item's Copyright Status

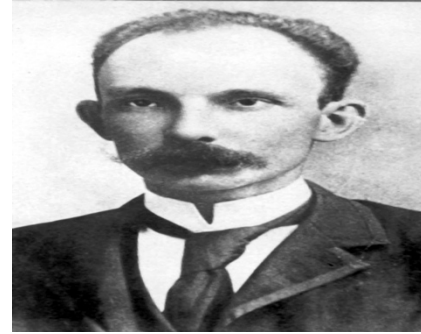
The first question to consider when evaluating an item's copyright status is whether the item is published or unpublished. Published materials are items that have been distributed to the public in some form, such as books, posters, brochures, websites, etc. Unpublished materials can include such items as private correspondence, most photographs, and anything not originally created for public distribution (Zayas Ruíz 2022).

For published items, the following questions are considered:

- Do you know the creator(s)/copyright holder(s)?
 - If you know/are in contact with the creator(s)/copyright holders of a particular work, then you can ask their permissions for digitizing their work and making it available online.
- When was it created?
 - As of 2022, items published before 1926 are considered "**public domain**" meaning that they are okay for a cultural heritage institution to digitize and make available online. On the user side, one is free to use the item without any sort of attribution to the original creator. Some more famous examples of items in the public domain include the poetry of African American poet Phyllis Wheatley and the writings of Cuban author José Martí would be considered in the public domain under U.S. Copyright Law.



[This Photo](#) by Unknown Author is licensed under [CC BY 3.0](#)

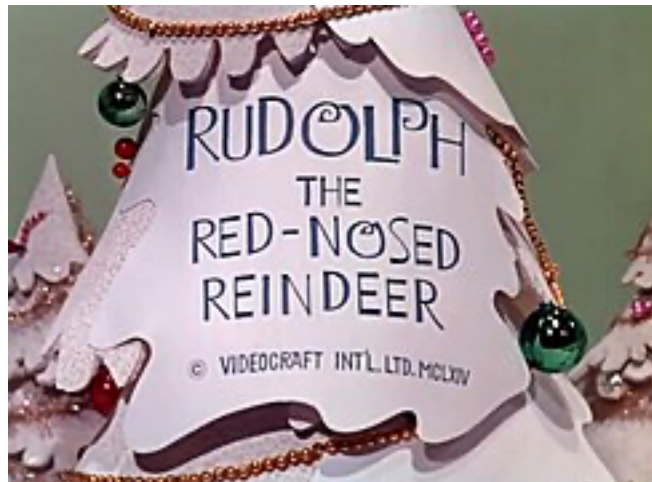


[This Photo](#) by Unknown Author is licensed under [CC BY-SA 3.0](#)

Copyright in Action

As stated previously, the writings of Phillis Wheatley and José Martí are considered public domain; Wheatley was alive during the 18th century, while Martí lived during the 19th century. However, any adaptation of their image or work created during or after 1926 could fall under the restrictions of copyright. Even if items are public domain, including the appropriate Rights Statement or Creative Commons license is considered best practice among cultural heritage institutions and users (more on that later). Under the above photos, one will see highlighted links to the appropriate Creative Commons licenses that designate the terms of their fair uses.

- An item is also considered in the public domain if it was **published between 1927-1977 without a copyright notice**. Copyright notices will usually have the word copyright and/or the copyright symbol, followed by the name of the copyright holder (Zayas-Ruiz 2022).



Misrepresented copyright

The image above is from the intro for the 1964 Christmas television special *Rudolph the Red-Nosed Reindeer* by Videocraft International, Ltd. As one can see, the company attempted to put a copyright statement below the word “reindeer.” However, the Roman numeral representing the year, “MCLXIV”, actually means 1164; the correct Roman numeral for 1964 would be MCMLXIV. While this mistake may seem small, it calls the copyright protections for the entire program into question. The above image was retrieved from [Wikimedia Commons](#), where it is listed as being in the public domain.

- Do you have external information about copyright restrictions, such as a deed of gift agreement?
 - A deed of gift agreement is a signed agreement between a donor and another individual/institution that legally transfers ownership of and legal rights to the materials being donated (College of Charleston Special Collections 2022). If digitization is desired by the receiving individual and institution, as well as (and most importantly) by the donor themselves, then a provisionary clause can and should be included in the deed of gift agreement. This clause might use language such as "I, (donor name), grant my permission for (receiving organization/individual name) to display digital reproductions of (resource/collection name) on the Internet for use by researchers. In my granting this limited permission, my intention is not to surrender my intellectual property rights to these materials, but only to promote scholarship by providing electronic copies for personal study and not-for-profit educational uses." (Zayas-Ruiz 2022)
- Can you contact the donor to find out what (if any) copyright restrictions apply?

- If the original deed of gift agreement did not include a clause on digitization, then the next best thing is to contact the donor of the materials in question and inquire about copyright restrictions.

For unpublished items, consider the following chart, adapted from the LibGuide "[Copyright at Cornell Libraries: Copyright Term and the Public Domain](#)" published by Cornell University Libraries:

Type of Work	Copyright Term	In the public domain in the U.S. as of 1 January 2022
Unpublished works	Life of the author + 70 years	Works from authors who died before 1952
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1902
Unpublished works when the death date of the author is not known	120 years from date of creation	Works created before 1902

Fair Use

In the cultural heritage sector, we rely on primarily two sources for language communicating to users how digital materials may be used: Creative Commons and RightsStatements.org. Both are free resources that provide comprehensive language to guide users on how they can utilize a resource while respecting copyright restrictions. The appropriate statement or license is incorporated into a metadata spreadsheet under the field pertaining to rights of use.

Creative Commons



[This Photo](#) by Unknown Author is licensed under [CC BY](#)

For individual creators and institutions that hold copyright over their materials, a Creative Commons license works best. Creative Commons relies on six main "licenses" that a creator/copyright holder can designate for use of their respective work(s), which include the following:



- Attribution (CC-BY): Allows others to distribute, remix, adapt, and build upon your work, even commercially, if they credit the creator/copyright holder for the original creation. This is the most accommodating of licenses offered. Recommended for maximum dissemination and use of licensed materials.



- Attribution-ShareAlike (CC BY-SA): Allows others to remix, adapt, and build upon your work even for commercial purposes, if they credit you and license their new creations under the identical terms. This is the license used by Wikipedia and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.



- Attribution-NoDerivs (CC BY-ND): This license lets others reuse the work for any purpose, including commercially; however, it cannot be shared with others in adapted form, and credit must be provided to you.



- Attribution-NonCommercial (CC BY-NC): This license lets others remix, adapt, and build upon your work non-commercially, and although their new works must also

acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.



- Attribution-NonCommercial-ShareAlike (CC BY-NC-SA): This license lets others remix, adapt, and build upon your work non-commercially, if they credit you and license their new creations under the identical terms.



- Attribution-NonCommercial-NoDerivs (CC BY-NC-ND): This license is the most restrictive of our six main licenses, only allowing others to download your works and share them with others if they credit you, but they can't change them in any way or use them commercially.

RightsStatements.org



[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

Providing "statements" rather than "licenses", RightsStatements.org is more commonly used among institutions that do not generally hold copyright for materials in their collections. **Please note that all community partner content that is put into FIU's digital repository must use Rights Statements.**

There are three categories of Rights Statements: In Copyright, No Copyright, and Other. The Statements themselves are generated from these categories, as shown below:

Rights Statements: In Copyright

- In Copyright: This Rights Statement can be used for an item that is in copyright. Using this statement implies that the organization making this Item available has determined that the item is in copyright, and either is the rights-holder, has obtained permission from the rights-holder(s) to make their work(s) available, or makes the item available under an exception or limitation to copyright (including Fair Use) that entitles it to make the Item available. URL: <http://rightsstatements.org/vocab/InC/1.0/>
- In Copyright-Educational Use Permitted: This Rights Statement can be used only for copyrighted Items for which the organization making the item available is the rights-holder or has been explicitly authorized by the rights-holder(s) to allow third parties to use their Work(s) for educational purposes without first obtaining permission. URL: <http://rightsstatements.org/vocab/InC-EDU/1.0/>

- In Copyright-Non-Commercial Use Permitted: This Rights Statement can be used only for copyrighted Items for which the organization making the item available is the rights-holder or has been explicitly authorized by the rights-holder(s) to allow third parties to use their Work(s) for non-commercial purposes without obtaining permission first. URL: <http://rightsstatements.org/vocab/InC-NC/1.0/>
- In Copyright-Rights Holder(s) Unlocatable or Unidentifiable: This Rights Statement is intended for use with an item that has been identified as in copyright but for which no rights-holder(s) has been identified or located after some reasonable investigation. This Rights Statement should only be used if the organization that intends to make the item available is reasonably sure that the underlying work is in copyright. URL: <http://rightsstatements.org/vocab/InC-RUU/1.0/>

Rights Statements: No Copyright

- No Copyright-Contractual Restrictions: This Rights Statement can only be used for items that are in the Public Domain but for which the organization that intends to make the item available has entered into contractual agreement (**such as a deed of gift agreement**) that requires it to take steps to restrict third party uses of the item. For this Rights Statement to be conclusive, the organization that intends to make the item available should provide a link to a page detailing the contractual restrictions that apply to the use of the item. URL: <http://rightsstatements.org/vocab/NoC-CR/1.0/>
- No Copyright-Non-Commercial Use Only: This Rights Statement can only be used for works that are in the Public Domain and have been digitized in a public-private partnership as part of which, the partners have agreed to limit commercial uses of this digital representation of the work by third parties. It has been developed specifically to allow the inclusion of works that have been digitized as part of the partnerships between European Libraries and Google but can in theory be applied to items that have been digitized in similar public-private partnerships. (**Note: Beyond the scope of public-private partnerships, the WPHL respects partner wishes for what content is made available online and how it is displayed. The collections published on FIU's digital repository are the property of the partners first and foremost.**) URL: <http://rightsstatements.org/vocab/NoC-NC/1.0/>
- No Copyright-Other Known Legal Restrictions: This Rights Statement should be used for items that are in the Public Domain but that cannot be freely re-used as the consequence of known legal restrictions that prevent the organization that intends to make the item available from allowing free re-use of the item, such as cultural heritage or traditional cultural expression protections. For this Rights Statement to be conclusive, the organization that intends to make the item available should provide a link to a page detailing the legal restrictions that limit re-use of the item. URL: <http://rightsstatements.org/vocab/NoC-OKLR/1.0/>

- No Copyright-United States: This Rights Statement should be used for Items for which the organization that intends to make the item available has determined are free of copyright under the laws of the United States. This Rights Statement should not be used for Orphan Works (which are assumed to be in-copyright) or for items where the organization that intends to make the Item available has not undertaken an effort to ascertain the copyright status of the underlying work. URL: <http://rightsstatements.org/vocab/NoC-US/1.0/>

Rights Statements: Other

- Copyright Not Evaluated: This Rights Statement should be used for items for which the copyright status is unknown and for which the organization that intends to make the item available has not undertaken an effort to determine the copyright status of the underlying Work. URL: <http://rightsstatements.org/vocab/CNE/1.0/>
- Copyright Undetermined: This Rights Statement should be used for Items for which the copyright status is unknown and for which the organization that has made the Item available has undertaken an (unsuccessful) effort to determine the copyright status of the underlying work. Typically, this Rights Statement is used when the organization is missing key facts essential to making an accurate copyright status determination. URL: <http://rightsstatements.org/vocab/UND/1.0/>
- No Known Copyright: This Rights Statement should be used for items for which the copyright status has not been determined conclusively, but for which the organization that intends to make the item available has reasonable cause to believe that the underlying work is not covered by copyright or related rights anymore. This Rights Statement should not be used for Orphan Works (which are assumed to be in-copyright) or for items where the organization that intends to make the item available has not undertaken an effort to ascertain the copyright status of the underlying Work. URL: <http://rightsstatements.org/vocab/NKC/1.0/>

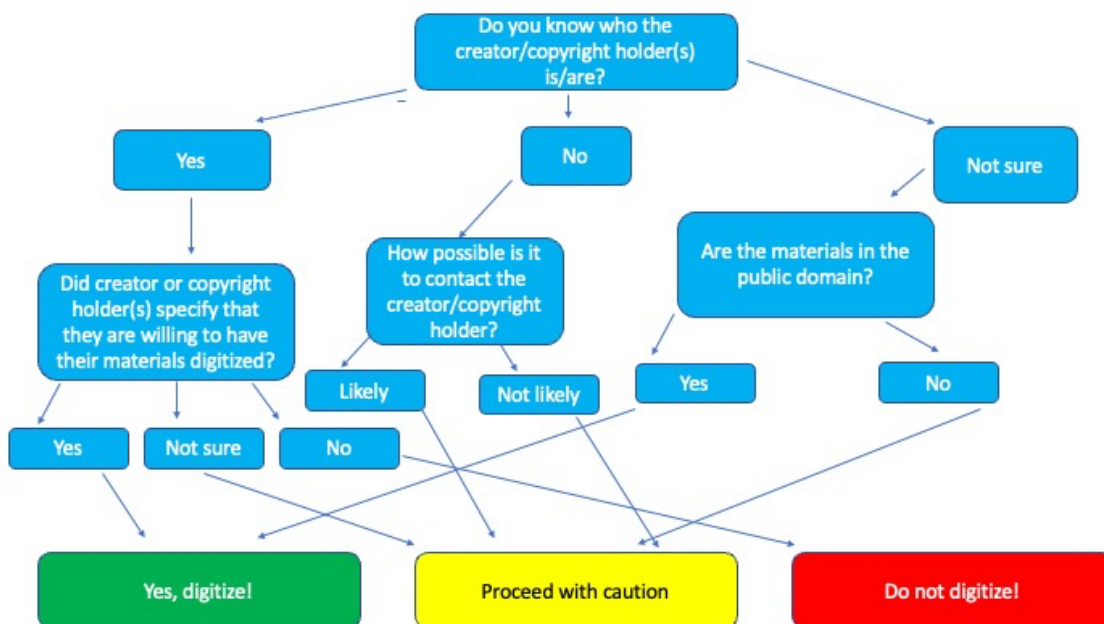
Orphan Works

Per the U.S. Copyright Office, an “orphan work” is categorized as “any original work of authorship for which a good faith prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law” (U.S. Copyright Office 2015). An item can only be considered an orphan work after it is 1. Safely assumed to be under some sort of copyright restrictions and 2. A due diligence effort has been undertaken to identify the copyright holder(s), but to no avail. For materials created outside of the European Union, the appropriate Rights Statement to use would be In Copyright-Rights Holder(s) Unlocatable or Unidentifiable.

Scenario	What do we do?
Your institution is setting up your own digital repository, and you would like to make digitally available materials for which your institution holds copyright (internal documents, photographs, etc.)	If your institution is the copyright holder, then you should have complete discretion over if/how the materials are presented online. In this case, you would select the Rights Statement/Creative Commons license that best fits the items and perhaps your own institutional policy on how items are presented digitally.
A local writer decides to donate their materials to your institution, and you would like to broach the subject of making these materials digitally available on your institution's FIU-hosted collection.	While discussing the terms of the deed of gift agreement to be signed by both parties, present the donor with multiple options for making their items digitally available (for example, putting items online after a certain date, restricting access, which Rights Statement or Creative Commons license used to make the work available, etc.) Whatever is agreed upon should be included in the final deed of gift agreement.
You receive a donation of materials, which include prominent newspapers and magazines.	Major newspapers and magazines are usually available online already, depending on their age and place of origin. For example, The Miami Herald has made available all its issues from 1911 to the present via newspapers.com . Unless the donor holds copyright for some part of the publication (like an article they authored) these items should usually not be digitized. However, there are exceptions, such as the recent digitization of the newspaper Miami Life by FIU Digital Collections Center, which was loaned by the descendant of the last owner of the newspaper to be made digitally available.
Your institution has decided to undertake an oral history project, with the hopes of making them available online via FIU's digital repository and the institution's website.	Draft a consent form that informs the narrator of their rights; as best practice, we at WPHL recommend that narrators maintain copyright over their oral histories. As a group, decide which Rights Statement best fits your needs (most likely one under the "In Copyright" section) and make sure to communicate it clearly both in the consent form and to the narrator directly.

Green, Yellow, Red: A Copyright Matrix

Below is a matrix, intended to be used on an item or collection-level basis. Starting from the top, follow the arrows to the bottom, where you will end at one of three options: green: "Yes, digitize!", yellow: "Proceed with caution", and red: "Do not digitize!". The yellow option is meant to represent the risk that institutions sometimes take by putting things online for which they are not able to identify a copyright holder or contact them (more on that in the Conclusion). As those of us who work in the cultural heritage sector know, we have a responsibility to users to make content widely available where appropriate.



Conclusion: Consequences of Violating Copyright Restrictions in Digital Collections and Assessing Your Risks

Very rarely in the cultural heritage sector, and especially in community archives, do we face lawsuits regarding digital collections. If a digital item is found to be infringing copyright restrictions by a third party, your institution will first receive a takedown **notice** or **request**. The difference between the words "notice" and "request" is critical; a takedown notice is a legal document that, per U.S. copyright law, requires that the content be taken down or have access to it disabled immediately after receiving a properly drafted notice of infringement (Digital Millennium Copyright Act, Section 512(c)). A request, however, does not constitute a legal action, and requests should be considered on a case-by-case basis. There are also certain types of materials that, if made digitally available, could be at higher risk for copyright infringement. Such materials include international materials, orphan works, unpublished materials, works by someone famous, and photographs depicting famous individuals.

It is true that larger and widely used digital collections face more risk regarding copyright infringement. Furthermore, larger institutions usually are better resourced to deal with the consequences of copyright infringement. However, due to the scarcity of take down requests and notices for even larger institutions (The New York Public Library receives 10 a year on average, many of which are invalid), the fear of receiving one should not deter your institution's digitization efforts. Additionally, there are creative ways to approach digitization on a case-by-case basis; for example, the World AIDS Museum has digitized a set of AIDS trading cards, but only the side depicting artwork, as they received permission from the artist to digitize, but not the author of the text on the verso. Another example is a collection [pulp fiction covers from South Asian countries](#) housed at the University of Texas Libraries. The decision was made to digitize and make available the covers, rationalizing that publishers who own the rights would be pleased to have their work publicized. However, digitizing the text was judged to be an infringement of copyright restrictions. The latter example is an example of a risk, determined to be low, taken to make content digitally available to the public. In community archives and museums, as well as at FIU, we have a responsibility to the communities we represent to make content available wherever we can.

Works cited

U.S. Copyright Office. 2022. "What is Copyright?" Washington D.C.: U.S. Copyright Office.
<https://www.copyright.gov/what-is-copyright/>.

Zayas-Ruiz, Keila. 2022. "Copyright for Digital Libraries." Sunshine State Digital Network (SSDN).
<https://youtu.be/oDpwZWI87k8>.