

Copyright and the Digitization of State Government Documents: A Preliminary Analysis

Brett Currier
UT Arlington Libraries
Central Library, Box 19497
Arlington, TX 76019-0497
+01 817-272-5127
brett.currier@uta.edu

Anne Gilliland
UNC Libraries
Davis Library, CB #3900
Chapel Hill, NC 27515-8890
+01 919 843 3256
agillila@unc.edu

David R. Hansen
UNC School of Law
160 Ridge Rd., CB #3850
Chapel Hill, NC 27599
+01 919 962 1605
drhansen@email.unc.edu

ABSTRACT

In this paper we explore the copyright status of state and local government documents and address some of the legal issues encountered when digitizing them.

General Terms

Institutional opportunities and challenges; Infrastructure opportunities and challenges; Frameworks for digital preservation; Preservation strategies and workflows.

Keywords

Copyright; Government documents; Public records; Fair use; Digitization; State documents; North Carolina.

1. INTRODUCTION

State and local government documents make up an important and unique part of library and archives holdings. In addition to educational, scholarly, and research uses that motivate preservation and access to many other collections, libraries and archives have special care for state government records, which they maintain both to save the cultural history of their state and, especially for state institutions, to further promote open government. Copyright law poses a potentially significant obstacle to digitization and online access to state and local government documents, as it does for many other materials. Copyright Law grants owners six exclusive rights, covering reproduction, public distribution, public performance, public display, the right to control the preparation of derivative works, and a special right to control public performances of certain digital sound recordings.[24] Most important for digitization is the reproduction right, which has been interpreted broadly. Unless an exception such as fair use applies, mere reproduction into a dark archive—even with no associated distribution or display to the public—would implicate the copyright owner’s rights.

This is important because digital duplication and reproduction is becoming an archival standard as analog items are shifted to and preserved in digital formats and digital items are preserved in their original formats. One strategy for preservation of analog materials includes shifting the material into a digital format.[17] But again, mere reproduction of an analog item in a digital format

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implicates the copyright owner’s rights. Archival standards of preservation of digital items may include web hosting by a memory institution instead of the original content creator,[10] creating a copy through routine backups,[11] or creating duplicate copies of the items on backup servers.[1] All three of those implicate the copyright owners’ reproduction right. Thus, as decisions are made regarding work flow and preservation strategies of state and local government documents, an analysis of relevant copyright law should be included as those workflows and preservation strategies are created.

Copyright law affects preservation of state government records as it does preservation of many other types of works. But in terms of laws governing their reuse, government records are unique because their creation and use is governed not just by federal copyright law, but by state and local laws, such as public records acts, that provide additional opportunities for use. And even in cases where state public records laws are unclear, several common characteristics of state and local government records collections make them more amenable to use because they are either non-copyrightable subject matter (e.g., factual data sets), in the public domain, or usable under fair use or other copyright limitations. This paper provides a preliminary analysis of relevant copyright law for documents produced by the state and local government and collected by libraries and archives, emphasizing uses in one state—North Carolina—as an example. It includes ideas about how librarians and archivists can use that law to further digitization efforts and to provide access to these materials.

2. COPYRIGHTABILITY OF STATE AND LOCAL GOVERNMENT DOCUMENTS

Copyright applies, in general, to any “original work of authorship fixed in a tangible medium of expression.”[21] Within that definition of protectable works are several significant limitations. First, the work must be original, meaning that an exact reproduction (for example, a digital surrogate of print work) does not itself receive protection.[2] Second is that protection extends only to a work of authorship. As a matter of statute and the U.S. Constitution, courts have held that copyright can only extend to creative works; publications that merely report unadorned facts are not protectable.[6] And third, the work must be fixed—typically not something in question with government publications.

In addition to those general limitations, Congress has created a categorical exclusion for some government works. Under Section 105 of the U.S. Copyright Act, federal government works are not protectable in the U.S.,[23] nor are works “. . . prepared by a [federal] government employee as part of the employee’s official

duties.”[28] While this rule is limited (Congress excepted from this rule, for example, many works created by government contractors),[28] most federal government documents are not protected by federal copyright law.

When it enacted Section 105 of the Copyright Act, Congress considered and rejected applying the same exclusion from protection to state governments and to works of foreign nations.[7] Thus, works of state and local governments, as a category, are not excluded from federal copyright law protection.

However, large numbers of state and local government works do not receive copyright protection because they are not copyrightable subject matter under the more general exclusions—that is, because they are not sufficiently original, or because they contain only facts and no creative expression. Courts have most notably dismissed claims of copyright material if an individual had attempted to copyright primary law or edicts of government, such as case law, statutes, state regulations, or municipal codes. [29] Along with Constitutional concerns with applying copyright to those materials, courts have concluded that those edicts of government are facts, and thus cannot be protected.[27] While some of these materials have been registered with the U.S. Copyright Office, that alone does not establish copyrightability [5]

State and local government also produce an array of data sets and factual publications, covering everything from vital statistics to agriculture. Likewise, states and local governments are now large producers of geographic data, created for a wide variety of GIS mapping applications. The selection and arrangement of those facts, if creative and not merely dictated by convention, may, as a whole, be protectable as a copyrighted compilation.[22] But the underlying data is free to be reused because it is not a work of authorship, but fact. What protection there is in the compilation is limited to the creative elements of the compilation.

However, not all or even most state and local government publications would be considered non-copyrightable subject matter. Many state and local publications are highly creative. One good example of highly creative work by a state agency is the North Carolina Film Board (NCFB), the first state sponsored documentary film division of any state government.[12] The NCFB created at least 30 documentary films during its existence from 1962-1965.[15] Works need not be nearly so creative, however, to qualify for copyright protection. Even relatively straightforward reporting and summation—for example, in an environment impact report—could qualify for protection. Thus libraries and archives must look to other legal provisions to make uses of those works.

3. STATE LAW EXCLUSIONS FROM FEDERAL COPYRIGHT PROTECTION

In addition to federal limitations on copyright’s application, states have self-imposed rules that limit the application of copyright to government works. Typically, these declarations are contained in states’ public records laws that seek to provide transparency and access to state and local government activities. There is no uniform state public records law, however, and in the rare instances in which state governments and courts have weighed in on the interaction between public records laws and copyright, results have varied. In New York, for example, the U.S. Court of Appeals for the Second Circuit held that New York’s public records law “does not prohibit a state agency from placing restrictions on how a record, if it were copyrighted, could be

subsequently distributed.”[5] Similarly, South Carolina has stated that so long as the public records are sufficiently creative and original, nothing in the state public records law would prohibit the state or local governments from exerting copyright protection.[16] Florida and California courts, however, have concluded that end-user restrictions imposed by copyright would be incompatible with the purpose of their public records acts, to provide public transparency.[13]

Many states have no clear statement about whether their state’s records are subject to copyright protection. North Carolina’s Public Records Act, for example, declares that public records—defined broadly to encompass all documents produced in connection with public business regardless of format—are “the property of the people.”[14] Federal law sometimes refers to the “public domain” (though it is not statutorily defined), but does not anywhere use the phrase “property of the people.” Because of the lack of a definitive statement about the copyright status of North Carolina state documents, librarians and archivists are left to make their own conclusions. The North Carolina State Library has done just that, putting users on notice that, for public records, it asserts that those works are in the public domain and eligible for reuse.[19]

4. THE PUBLIC DOMAIN

Modern copyright protection lasts longer now than at any time in the past. In the United States, the standard term of protection extends for the life of the author plus an additional seventy years.[8] Life plus seventy years is also a common international norm. For U.S. institutions, however, requirements under prior law that copyright owners renew their copyright term via registration and provide a copyright notice means that many older works, both government publications and private works alike, have entered the public domain.

Public domain analysis can be complex, though some clear rules apply. For example, state government works published in the United States before 1923 are clearly in the public domain. Likewise, state government works published in 1989 or later (and not excluded from protection because of one of the earlier-discussed exceptions) are protected by copyright law. Distinguishing between “published” and “unpublished” state government documents—a necessary inquiry to determine public domain status, as different rules apply to those two categories—can require significant investigation into how the document was acquired and how it was originally released. There are a significant number of state government works published between 1923 and 1989 that, in order to receive copyright protection, must have complied with federal formalities. To determine the copyright status of those works requires significant research into copyright office records and the work itself. Several efforts to develop a methodology and workflow for this analysis are in development, notably through the IMLS-funded Copyright Review Management System (CRMS) at the University of Michigan Libraries.[26]

Libraries and archives that do undertake this analysis using processes like those developed by CRMS are likely to find that many state publications, especially those never offered for sale and distributed freely, were published without required notices or were never renewed, causing the work to enter the public domain and thus available for reproduction and other reuses.

5. FAIR USE AND OTHER EXCEPTIONS

Finally, U.S. libraries and archives have access to fair use and other copyright exceptions that allow for certain types of uses of state government works even when the work is protected by copyright law.

The fair use doctrine, created by courts and now codified in the U.S. Copyright Act, asks users and the courts to consider several factors, four of which are explicitly identified in the statute: (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used, and finally, (4) the effect of the use upon the marketplace.[25] Courts must weigh those factors together, in light of the purposes of copyright law.[3] Although there are few reported cases challenging library and archive uses, at least one court has now weighed in on fair use as applied to library and archive uses. In that case, *Authors Guild v. HathiTrust*, the Second Circuit Court of Appeals found that the HathiTrust Digital Library's digitization for purposes of preservation and search were fair use.[1]

Fair use is highly fact dependent, and so it is helpful to analyze its applications to common scenarios: a library's digital preservation and full-text online access to a technical report that was published by a state agency and distributed in print free of charge. Applying the fair use factors, factor one (the purpose and character of the use), would likely weigh in favor of a finding of fair use because the purpose of the reproduction and distribution is to promote access and openness to government and to preserve them for the future. Factor two, the nature of the work, would likely also weigh in favor of a finding of fair use; the work was distributed to the public for free, and copyright law was unlikely to have motivated this work's creation.[4] In addition, as a technical report its contents are likely factual. While still sufficiently creative to trigger copyright protection, factual reporting of this nature is likely to be favorably viewed for use under the second fair use factor. Factor three, the amount and substantiality of the portion used, would if anything weigh against a finding of fair use because the entire work is digitized, but courts have often found even this to be unavailing if the amount taken is appropriate within the context of the other factors. Finally, factor four, the effect of the use upon the marketplace, would likely weigh in favor of a finding of fair use. Most copyrighted materials produced by state and local governments are information providing and not revenue producing materials. For many materials produced by state and local governments, the government is only able to recoup the actual cost of reproduction.[14] Some materials are more similar to traditional revenue producing models like The North Carolina Museum of Art, a division of the North Carolina Department of Cultural Resources, which produces exhibition catalogues. A finding that the fourth factor favors fair use would be more likely once the work is no longer published, remains out of print, and is no longer for sale from the copyright owner.

All in all, it is likely that fair use supplies a good rationale for the digitization of many state documents, particularly for those that are highly factual and not commercialized. In addition, other copyright exceptions, such as the exceptions that allow libraries to make reproductions for preservation, may be relevant.

6. RISK MANAGEMENT

The actual risk of litigation and the risk of losing any lawsuit brought against a digitizer of state documents is unknown. Certainly most cultural institutions that might start such projects are ill equipped, both financially and temperamentally, to engage

in an extended defense of their practices, even if they are likely to win in the end. There is ample precedent to argue the public domain status of state legal codes of all kinds, but there are little or no cases on point with regard to the copyright status of other state documents.[9] At the same time, there are costs to be paid for inaction, both by losing information if the historical record is not preserved and also in depriving the public of easy access to its government's publication. In some cases, there is a concern that keeping governmental publication and records can be a form of censorship.

Generally, the strategies of risk management used in many libraries' large-scale digitization projects will also apply for digitization of state government information. These strategies include identifying work that is likely not to have passed into the public domain and then further making attempts to identify and contact rights holder. Essentially, the idea is to focus on clearing rights in instances where identifying a rights holder is likely to be both possible and prudent. Other material is digitized and posted online with an invitation for rights holders and others to get in touch, either in order to provide information on copyright status or contribute more background and identification for the material.[20]

CONCLUSION

The copyright status of state and local government documents is not a settled issue, and thoughtful consideration of a variety of factors must precede plans to digitize this material. The first is whether the material is copyrightable under federal law. Statistical information, for example, may have no copyright as factual material. In addition, state law may yield clues to the copyright status of state documents, either directly or indirectly. In North Carolina, public records laws, federal copyright law and public policy considerations lend some credence to the idea that many state documents are in the public domain and should be freely reproduced and distributed for preservation and access by the public. Finally, fair use and copyright exceptions for libraries may provide a rationale for digitization.

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