Abstract: This chapter addresses the copyright issues that might arise in the digitization of materials held in academic library collections. Developing a clear understanding of the copyright status of digitized materials can be complicated, frustrating, and even at times, with orphan works, impossible, leading to the copyright conundrum. Nonetheless, when curating and managing digitized library collections, a copyright review and management plan should be followed to maximize the availability of open access and public domain items and minimize the confusion of researchers and the public when using such digitized objects. A copyright review protocol, or a map of how to proceed through the copyright analysis, will aid librarians in making decisions regarding what rights metadata to include for a digital work and will, in turn, aid patrons in determining how digitized works can be effectively used.¹

Keywords: Library materials – Digitization; Copyright and digital preservation; Copyright (Orphan works)

Introduction

The majority of this chapter is written from the US law perspective and focuses mainly on Section 108 of the US Copyright Act, Title 17 of the US Code, Limitations on Exclusive Rights: Reproduction by Libraries and Archives, as well as fair use (US Copyright.gov n.d.). While there is no single source of international copyright law, the chapter begins with an overview of the Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention] (Berne Convention 1979) and also later addresses the Agreement on Trade-Related Aspects of Intellectual Property Agreement [hereinafter TRIPS] (World Trade Organization n.d.a), as they pertain to digitization issues in libraries. The Berne Convention and TRIPS Agreement are necessary starting points, not ending points, when con-


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sidering library digitization issues, as national laws vary. This chapter explains digitization issues from the perspective of one particular country that was a late adopter of the Berne Convention, the United States, which waited until 1989 to ratify the agreement.

There is a significant distinction that readers should note, however, between determining whether to digitize a particular item at all, say for preservation purposes, and whether to make a particular digitized work publicly available. While Section 108 of the US Copyright Act [hereafter Copyright Act] permits librarians to make up to three copies of works for preservation purposes, it does not always allow those copies to be available digitally outside of the premises of the library. Furthermore, when works are not in the public domain, a library may determine that it is willing to make a copy of the work available in a digital format on the library website either with the express permission of the copyright holder or, after conducting a risk assessment, by asserting a fair use right. It is important to note that these kinds of decisions may fall outside the scope of this chapter, which is more focused on workflows relating to opening up the public domain, such as with the HathiTrust digital library copyright review process, or with accurately labeling previously digitized works with the University of Miami’s digital library (University of Miami Libraries n.d.). The decision on whether to begin digitizing a particular collection at all, especially under a fair use analysis, very well may be the subject of another future book chapter, but it is outside the scope of this particular discussion.

The copyright conundrum begins with an initial copyright review to determine whether a digital copy can be made of a particular item. There are many models available for this type of copyright review, including the HathiTrust digital library copyright review process (Levine et al. 2016). Regardless of the method used, the process should be streamlined, and knowledgeable individuals should engage with the materials to determine their copyright status and, where possible, obtain permission to place the materials online in an open, publicly accessible digital collection. The copyright discussion continues by presenting the challenge of deciding whether and how to include a copyright notice on the online work. This chapter includes common mistakes and misperceptions, such as copyfraud and overreaching. The final piece of the copyright puzzle involves responding to public inquiries to use the library’s digital copy of the work in further academic or commercial pursuits. Rights metadata, when properly applied to a digital work, will include information allowing the patron to understand how the work may be used.
The Berne Convention and the TRIPS Agreement

Although there is no one international copyright law, as copyright law depends largely on the national laws of each country, almost all countries in the world are signatories to the Berne Convention, an international agreement concerning minimal rights protection for copyright (WIPO n.d.). Similarly, to be a member of the World Trade Organization, a Member State must adhere to the TRIPS Agreement and, as such, most countries are members of that agreement as well (World Trade Organization n.d.b). The Berne Convention requires signatory countries to adhere to some common requirements for their copyright laws (Berne Convention 1979), as does the TRIPS Agreement and, as such, it is easier to understand international copyright laws in the context of these international agreements.

One requirement of the Berne Convention, adopted in TRIPS, is that the national law must not require formalities, such as copyright notice or copyright registration, for a copyright to exist (Copyright Act Article 5 §2). Thus, when the US signed the Berne Convention in 1989, the copyright law of the US had to be changed. As a result, in the US no notice is required for a valid copyright; however, including a notice on a copyrighted work can invalidate the so-called innocent infringer defense whereby the infringer has a more difficult time arguing that s/he did not know that the work was legally protected (Copyright Act §405 and §504(c)(2)). Likewise, no copyright registration is required to have a valid copyright in the United States; however, registration is required to file a copyright infringement lawsuit in a court of law (Copyright Act §408(a) and §411).

The Berne Convention (Article 7 §1) and TRIPS (Article 12) require a minimum copyright term of the life of the author plus 50 years after death. In the US, the current copyright term is the life of the author plus 70 years after death of the author as contained in the Copyright Act’s §302(a), which complies with the minimum term provided for in the Berne Convention. Another requirement of the Berne Convention is that any exceptions to the exclusive rights of the author must meet a three-part test. Article 9 sub-part 2 requires it to “be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”. As such, exceptions to the exclusive rights of the copyright author must be (1) “special cases” where (2) “reproduction does not conflict with normal exploitation of the work;” and (3) “does not unreasonably prejudice the legitimate interests of the author” (Electronic Frontier Federation n.d.).

TRIPS also adopts the three-part test, but adds in Article 13 that the exception may not unreasonably prejudice the legitimate interests of the “right holder”. The Berne Convention also adopts the national treatment principle, which is incorpo-
rated in Article 5 §3. This means that an author of a work from another country will be protected in the same manner as an author from the home country when considering copyright laws. Indeed, in the US, authors from different nations are often given greater rights than authors from the US, for example in Copyright Act §104A which emanated from the Uruguay Round Agreements Act. When preparing to digitize works from authors of other nations, it is important to recognize that they have, at least, as many rights to their works under national law as home authors do, and perhaps even more.

Article 6bis of the Berne Convention provides for moral rights enforcement, as further developed in the laws of the signatory country. In the US, for instance, moral rights are quite narrow and in Copyright Act §106A are restricted to authors of works of visual art, which is defined as a painting, drawing, or sculpture or photograph that is limited to a single signed copy or a series of less than 200 copies. In countries where moral rights are more robust, however, they must be considered when digitizing works for library collections.

The Copyright Law Landscape in the United States

Elements of the copyright law in the US have already been described. In the US today, there are no formalities required for copyright to attach to a given work. If a literary, musical, dramatic, choreographic, pictorial, graphic, or sculptural work, a motion picture and other audiovisual work, a sound recording, or an architectural work is minimally creative and fixed, generally meaning that it was written or recorded, it is protected by copyright (Copyright Act §102). Copyright for works created today in the US lasts a considerable time period: the length of the author’s life plus 70 years if the author is an individual. For works authored by a corporation, or works made for hire, the length of copyright is longer: either 95 years from first publication or 120 years from the year of creation, whichever is the shorter length of time as indicated in the Copyright Act §302.

In determining who the actual copyright holder might be when undertaking a copyright review, the US Copyright Act provides some guidance. The Copyright Act defines in §101 the work of employees and certain independent contractors: “(1) a work made by an employee within the scope of his or her employment; or (2) a work specifically ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire”. The Copyright Act §305 stipulates that all terms of copyright run through the “end of the calendar year in which they would otherwise expire”.
In contrast to the law that is in effect today after US accession to the Berne Convention, which mandated that the United States omit the use of formalities for copyright protection, the copyright status of works first published in the US between 1925 and 1978 can be more difficult to decipher. This is due to changing laws in that era, and the requirement of copyright formalities such as including a copyright notice on the work, registering the work with the US Copyright Office, and renewing the registration at the appropriate time with the agency concerned. Failure to comply with the formalities led to many works published in the period between 1925 and 1978 falling into the public domain, which means that they are not subject to copyright protection, although what constitutes the percentage of the total published works from the period that are in the public domain is disputed (Wilkins 2017). It is important to understand some basic principles when searching for rights information during the era.

Between 1925 and 1978, formalities, such as a copyright notice and renewal of copyright registration, were required for the copyright in works to be fully enforceable. For instance, a work published in the US without a copyright notice between 1925 and 1977 is in the public domain, as is a work published between 1925 and 1963 with a copyright notice but a failure to renew the copyright registration (Hirtle, Hudson, and Kenyon 2009, 45). Furthermore, during that time period, the length of the copyright was 95 years from the date of publication, whereas it is generally the life of the author plus 70 years beginning in 1989 (Hirtle, Hudson, and Kenyon 2009, 45). In the period between 1978 and 1989, the failure to include a copyright notice did not push a work into the public domain, so long as the copyright owner registered the work within five years of publication (ibid, 45; Cornell University 2021).

However, a significant challenge in examining digital collections is that many works were never published, which is further complicated by a lack of knowledge regarding the identity of the works’ creators, let alone the date of the death of the works’ creators. It is worth noting that the definition of an “unpublished work,” while it may seem fairly straightforward, gets complicated quickly. The Copyright Act defines publication as “the distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending”. The Act also notes in §101 that “the offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication”. But the Act excludes public performance or the display of a work, alone, from constituting publication. And courts, when interpreting the language of the Act, also struggle with the definition of what it means for a work to be published, often in cases predating the 1976 Copyright Act, which provided the above definition (Gerhardt 2011, 163). In the era before 1976, it was even more difficult to determine what kind of work was an unpublished work, and it was even
more crucial in that era to make a decision due to the attachment of copyright formalities as detailed above. The cases from this era demonstrate that judges tended to “rely heavily on the copyright owner’s intent with respect to authorized copies. When the facts show that [works] are distributed freely, it weighs in favor of publication. When the work is made accessible in a way that demonstrates that the copyright owner is retaining control over the copies, publication is less likely to be found” (Gerhardt 2011, 204). Determining the publication status for works created before 1976 gets complicated quickly and can depend on what a court might interpret as publication.

For previously unpublished works, such as diaries, photographs, manuscripts, and the like, the default rule for copyright term in the US applies when the date of death of the author is known: the life of the author plus 70 years. Unpublished works by authors who died before 1950 are in the public domain in 2020, for example. If the death date of the author is unknown, the term extends to 120 years from the date of creation. Finally, for unpublished anonymous or pseudonymous works, or for works that were commissioned by an employer in a work made for hire situation, the length of copyright is also 120 years from the date of creation (Hirtle, Hudson and Kenyon 2009, 42).

When analyzing copyright ownership, one should also consider any transfer of copyright through contractual agreement. With older copyright agreements, even if the publisher owns the copyright and could ostensibly provide permission for the use of the work, the potential exists that the publisher is currently defunct or that the copyright has been further transferred to another party. A further complication in locating the owner of the copyright may arise because in certain circumstances authors or their heirs can take back their copyright from a publisher or other owner within a given period of time, 35 or 40 years after the execution of the transfer of copyright by the author after January 1 1978, depending on the circumstances as described in Copyright Act §203. Additional rules apply to pre-1978 transfers as outlined in Copyright Act §304. As already noted, potentially in a copyright review, a reviewer may run into the problem of so-called orphan works, where no copyright owner can be determined at all (Wilkins 2011). Or the reviewer may encounter foreign works, which may have even longer copyright protection terms in the US, due to restoration, than in their home countries (Hirtle, Hudson, and Kenyon 2009, 49–51).

If a particular two-dimensional work, such as a painting, is determined to be within the public domain, then an exact picture of that piece of art is also in the public domain, as found in Bridgeman Art Library v. Corel Corp. In this case, a photographer attempting to merely document an exact “slavish” copy in a photo-

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graph of a public domain work was deemed not to represent the minimal amount of creativity necessary to create an original work capable of copyright protection (Bridgeman Art Library 1999). Thus, if a library attempts to make an “exact” digital replication of an existing two- or three-dimensional work of art without additional creative choices added to the process of digitization, including the photography, the library likely does not hold a copyright in the digital replication (Sims 2017, 80). As such, libraries in the US generally do not treat duplicate copies of images as having a separate copyright.

Library patrons consulting digital collections will also note that there may be terms of use or terms of service associated with the library’s website. By accessing the web page, patrons consent to the contractual terms of service. Copyright provisions do not preclude contractual terms, at least in the US although jurisdictions may vary. Should a library wish to charge for access to a particular item, even if that item is in the public domain, the library may do so under a value-added or fee-for-service proposition, a charge for the staff time used in producing the image, or the argument that the preservation and archiving of the particular item is worth the licensing fee provided for in the terms of service (Browar, Henderson, North, and Wenger 2002, 129). This is not to say that the author condones such a practice, but rather to note that contract law and copyright law are different legal regimes.

The Potential for Copyfraud

The term copyfraud was coined by Jason Mazzone and is intended to describe instances when a non-copyright holder asserts rights in a work over which s/he has no copyright ownership (Mazzone 2006, 1038–9). For instance, if a work is in the public domain, but a library asserts that it holds copyright over the work with a copyright statement such as “© 2017 Library,” then Mazzone would likely assert that the library is engaging in “copyfraud.” Note that if a person does this intentionally and with a fraudulent intent, the individual may be guilty of a criminal violation as well. Criminal penalties may be assessed under the Copyright Act if a person “with fraudulent intent, places on any article a notice of copyright ... that such person knows to be false” (Copyright Act § 506(c)). The term copyfraud is quite serious because, technically, fraud is an act involving malicious intent. The library is typically not engaged in an intentionally illegal act, but rather is merely unclear or ignorant of the copyright laws. A library may inadvertently mislead the public, but not in any malicious or intentional way. Regardless, the consequence is the same: the public may be left with the impression that the copyright of the
object in question is owned by the library when, indeed, it is not. Because of errors or imprecision in rights metadata and an absence of a standard approach to rights statements in general, the Digital Public Library of America (DPLA) and Europeana created standardized rights statements (International Rights Statements Working Group 2015) with a white paper which has since been updated and made available under Rightsstatements.org through a larger collaborative group (Rightsstatements.org. 2018). The standardized rights statements will be discussed later in this chapter.

Local Approaches to Rights Statements

In order to accurately describe digital collections, and before the development of standardized rights statements (SRS), a few conscientious librarians had developed local approaches to rights management system processes.

One locally produced system was developed by Maureen Whalen in 2009 for the Getty Museum. Whalen developed rights metadata to apply on a consistent basis across the Getty Museum's online digital collections (Whalen 2009, 17–18). It is helpful to note that all of the works held in the Getty Museum were owned by the Getty family and explicitly willed to the museum, so in that respect, this particular system may not be as useful to other librarians wishing to apply standardized rights metadata to their own digital collections. Nonetheless, the choices made by Whalen regarding which fields to incorporate into the Getty rights statements are informative. The Getty included five priority metadata fields: creator name, copyright status of the work, publication status, copyright notice, and credit line (ibid, 23–6). Other fields were also included, such as potential claimants, creator role, special notes, and the like (ibid, 26–8). The copyright status field was further divided into eight separate sub-indicators: copyright owned by institution; copyright limited license to institution; copyright owned by third party; public domain; orphan work; unknown where “research was conducted and, as of that date, no reliable rights information has been found”; additional research required where “research had been conducted, but it is [in]conclusive”; and not researched (ibid, 23–4). Interestingly, many of the copyright fields map well onto the subsequently developed standardized rights statements. However, the SRS do not take into account rights other than copyright, such as potential claimants based on a right of privacy or publicity, while the Getty metadata does, perhaps because of the fact that many of the individuals featured in the photograph collection are or were famous.
The system for rights metadata developed in 2005 by Karen Coyle, who worked for over twenty years at the California Digital Library, to address copyright in all digital collections was a precursor to the project which developed the standardized rights statements. Coyle asserts that copyright metadata should be accurate, even when licensing agreements exist, because “a license does not remove the copyright status of an item; it establishes an agreement between the parties that is founded on the ownership rights that copyright law defines” (Coyle 2005). Thus, while she recognizes the importance of licensing, her metadata development does not include a field to input licensing information. Rather, she included the following rights fields in her copyright metadata:

- General rights information
  - Copyright status: copyrighted, public domain, unknown
  - Publication status: published, unpublished
  - Dates: year of copyright or creation, year of renewal of copyright
  - Copyright statement: from the piece
- Country of publication or creation
- Creator: creator name, dates, contact
- Copyright holder: contact
- Publisher: publisher name and contact, year of publication, and
- Administrative data: Source of information (piece itself or other resources), contact information, the rights research contact (Coyle 2005, 7)

This important work predates the development of standardized rights statements. Although local approaches have been helpful, and better than including no copyright metadata at all, a standardized approach across institutions is preferable so that librarians and patrons can best understand the copyright status of a work.

Copyright Review Models

First, it is important to note that there may be no one-size-fits-all copyright review process, even though there is a standardized metadata input mechanism such as the SRS. Why? Because each institution’s holdings are different and their records may be more or less detailed. Additionally, library staff at individual institutions may be more or less familiar with copyright laws as well, and may feel uncomfortable conducting any type of copyright review if the materials in the digital collection are not owned by the institution. Although it is preferable to conduct a thorough copyright review of each digital item in a given online library collection, it is understandable that a library may not have the staff or the time to do
so. However, at the bare minimum, libraries should attempt to input accurate data, and not use a default metadata rights identifier such as “©Library” when it is incorrect.

Second, copyright is often impacted by licensing and/or terms of use limitations. However, when licensing or terms of use details are placed in the rights field, the user may be unnecessarily confused. Information about licensing and/or terms of use should be separated from the rights information in a clear fashion; when appropriate, libraries should also use the “No Copyright—Other Known Legal Restrictions” label for the metadata (Coyle 2005, 28). Various models have been developed for copyright review and are outlined below.

*Copyright and Cultural Institutions Guidelines* by Hirtle, Hudson, and Kenyon

Peter Hirtle, Emily Hudson, and Andrew Kenyon detail helpful information for librarians wishing to engage in rights status analysis for digital collections in their open-access digital book: *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*. Some of the most useful portions of the book, from the perspective of a librarian conducting a copyright review, are the charts and checklists. Specifically, Table 3.2.1 details the copyright term length for unpublished works (Hirtle, Hudson, and Kenyon 2009, 42). Table 3.2.2 similarly details copyright term length, but for works first published in the US (ibid, 45). Flowchart 3.2 explains how to determine the rights status for works published in the United States between 1925 and 1989 (ibid, 48). Table 3.2.3 demonstrates how to calculate the rights status for foreign works (ibid, 49). Finally, flowchart 6.1 details when digitized copies of works may be made available under Section 108 of the Copyright Act, specifically when they are in the last twenty years of the copyright term and the work is not subject to normal commercial exploitation, no copy of the work can be obtained at a reasonable price, or the copyright owner has notified the Register of Copyrights that either of these preceding two conditions have been met (ibid, 110). Of course, the entire book is helpful to those wishing to engage in a thorough rights analysis, but the checklists and charts highlighted are very handy guides to apply when devising a review process.

More recently, the Society of American Archivists (SAA) further built on the work by specifically writing a guide for the implementation of rights statements “produced by the SAA Intellectual Property Working Group for the use of archivists and other cultural heritage professionals making digital materials available

**HathiTrust Copyright Review Management System Model**

The HathiTrust Digital Library is “a digital preservation repository” that provides “access services for public domain and in copyright content from a variety of sources, including Google, the Internet Archive, Microsoft, and in-house partner institution initiatives” (HathiTrust Digital Library n.d.a). It has a very detailed copyright review model, the Copyright Review Management System (CRMS), which is documented through an open access ebook (Levine et al 2016). The most interesting part of the CRMS model, perhaps, is that it is collaborative in nature. Many libraries dedicate staff members to participate in HathiTrust’s review process, resulting in a large-scale review of the copyright of published works. In the review process, each book is reviewed by two non-experts and one expert reviewer, in case of a conflict between the reviews by the non-experts (Levine et al 2016, 115). Only following rigorous review is the book made openly available through the HathiTrust Digital Library if it is in the public domain. Alternatively, if a book is still in copyright, the record display in response to a search includes the page numbers and the number of times the search term appears on relevant pages. Verified researchers can access in-copyright materials for non-consumptive, or text-mining, research, through an application process to the HathiTrust Digital Library (HathiTrust Digital Library n.d.b; HathiTrust Digital Library 2017).

Note that HathiTrust is currently focused on reviewing works that were published in the US between 1925 and 1963 (class A books), published in the United Kingdom before 1943, or published in Canada and Australia before 1963. Other areas of work include the ongoing evaluation of US state and local governmental material that was published between 1925 and 1977.

The copyright management decision tree is one piece of the documentation created by the CRMS project that is valuable to anyone wishing to review the copyright for works published in the United States between 1925 and 1963 (“Copyright Review Management System Decision Tree 1.5.6.” n.d.). Indeed, all of the decision review documents created by the CRMS team, as well as the book published on the subject: *Finding the Public Domain* are invaluable tools for those wishing to engage in a metadata rights determination project with an example to build from (Levine et al 2016; University of Michigan 2017). Once the rights decision tree is followed and an appropriate copyright determination is made, the DPLA/European SRS may be applied. HathiTrust currently uses metadata through Zephir, a
bibliographic programming system managed by the University of California and the California Digital Library.

University of Miami Libraries

In 2015, the University of Miami Libraries commenced a project to assign rights statements to their digital collections by using standardized rights statements. The libraries noted that before the project was undertaken, “a review of the digital collections revealed that most metadata records contained little to no rights-related information” (Capell and Williams 2018, 6–7). In some ways, the lack of metadata may have made the implementation of the SRS easier, since it is probably simpler to add a rights field than to change imposed rights data. The libraries created a copyright decision matrix (University of Miami Libraries 2016), drawing largely on the work of Peter Hirtle outlined above. In essence, the University of Miami Libraries combined a decision matrix with SRS implementation to provide a model approach for libraries wishing to begin assigning rights statements to their digital collections. Interestingly, large amounts of the University of Miami Libraries collection came from Cuba, so the decision matrix includes a country of creation designation specifically to notify staff when a given work had been created in Cuba. The University of Miami undertook an effort to understand Cuban copyright law for similar reasons (Capell and Williams 2018, 8, 14). Additional information about the approach taken by the University of Miami is available on the libraries’ website (University of Miami Libraries n.d.).

Pennsylvania State University’s Workflow

The Pennsylvania State University Libraries, commonly known as the Penn State Libraries, are the most recent example of the implementation of standardized rights statements. In spring 2016, the Penn State Libraries held a retreat with relevant library stakeholders to discuss the workflow surrounding metadata for digital collections (Ballinger, Karl, and Chiu 2017, 152). Many currently digitized collections at the Penn State Libraries require metadata revisions to satisfy the requirements for deposit to the DPLA collection (ibid, 152). Newer collection deposits would, of course, follow the new protocol for rights metadata. The first step in the digitization process at the Penn State Libraries is for the copyright officer to determine whether the collection items are public domain, whether the library owns the rights, or a fair use determination positively supports digitization. If not, the process may be put on hold pending permission requests to the
Rights Issues in the Digitization of Library Collections

Copyright holder (ibid, 153). Next in the process, the copyright officer assigns a relevant rights statement using the language of the SRS. Finally, the metadata librarian records the rights information in the record for the item (ibid, 154). Penn State discovered through trial and error that the Uniform Resource Identifiers (URIs) for the rights statements are case-sensitive which in DPLA will resolve “to display the official [rights statement] icon near the item’s thumbnail image” (ibid, 155).

Standardized Rights Statements

As noted above, standardized rights statements were launched in April 2016 by the Digital Public Library of America (DPLA) and Europeana to create an unambiguous, uniform system for inputting rights metadata. DPLA provides many services including the DPLA Exchange, an e-content acquisitions platform for public libraries across the US, online exhibitions, and sets of primary source materials from libraries, archives and museums across the United States, making millions of materials from cultural institutions across the country available to all in a one-stop discovery experience. Europeana is an initiative of the European Union and seeks to empower cultural institutions across Europe in their digital transformation. Europeana works with thousands of archives, libraries and museums to share cultural heritage and provides online exhibitions and galleries.

Rightsstatements.org has developed from the initial impetus of DPLA and Europeana who developed the basic principles and technical infrastructure, and comprises six organizations with the addition of the National Digital Library of India; Trove, a partnership of the National Library of Australia and other Australian cultural institutions; the Canadian National Heritage Digitization Strategy/Stratégie canadienne de numérisation du patrimoine documentaire (NHDS/SNPD) which is working on the digitization of Canadian memory institutions’ collections and the National Library of New Zealand.

Rightsstatements.org provides best practice for use by both international, national and regional aggregators of cultural heritage data on simple and standardized terms or rights statements to summarize the copyright status of objects in the collections of cultural institutions, as well as describing how those objects may be used so that cultural heritage institutions might communicate details of digital objects to their users. The White Paper already mentioned in this chapter sets out the details of the statements which are also available separately on the rightsstatements.org website. There are three main categories of rights statements contained in the statements:
The three categories are further subdivided. **In Copyright** works, for instance, include the following subcategories:

- **In Copyright**
- **In Copyright – EU Orphan Work**
- **In Copyright – Rights–holder(s) Unlocatable or Unidentifiable**
- **In Copyright – Educational Use Permitted, and**
- **In Copyright – Non-Commercial Use Permitted.**

The EU Orphan Work subcategory applies only in Europe and is not discussed here. Separate rights statements for each subcategory are provided by rightsstatements.org. The simplest subcategory is **In Copyright**. When a work is still protected by copyright and the rightsholder is known, the ‘In Copyright’ rights statement would be deemed appropriate and used. Other designations listed permit **Noncommercial** or **Educational** uses only. Finally, a designation for **Unlocatable or Unidentifiable Rights Holder** is appropriate when the work is clearly still in the copyright term, but the rightsholder is unknown, and would be appropriate for an orphan work.

Each category of rights statements is fully described and detailed both on the rightsstatements.org website and in the White Paper (Rightsstatements.org. 2018). The **No Copyright** rights statements are further subdivided into four subcategories:

- **No Copyright – Contractual Restrictions**
- **No Copyright – Non-Commercial Use Only**
- **No Copyright – Other Known Legal Restrictions, and**
- **No Copyright – United States.**

The first subcategory, **Contractual Restrictions**, would be appropriate if a work was no longer under the copyright term restrictions, but by license or contractual obligation the work has additional restrictions. For example, if a vendor has commercialized a public domain work and has imposed terms of use, the designation ‘Contractual Restrictions’ would be deemed appropriate. The **Non-Commercial Use Only** subcategory would be suitable for works that are designated with a license to be open, but only for noncommercial uses. The **Other Known Legal Restrictions** designation would be used for a work not restricted by copyright, but rather by other legal rights such as privacy or moral rights. In the US, the only recognized moral rights are those contained in the **Visual Artists Rights Act** (VARA) 17 U.S.C. §106A. In other countries, however, moral rights may include...
rights such as attribution and integrity, including rights against the mutilation of the work, and may last indefinitely (Rigamonti 2006, 357). Finally, the No Copyright—United States designation would be an appropriate license for US public domain materials, such as those published in the US prior to 1923. Public domain terms can vary by country and by one country’s treatment of foreign works under its own law, such as the restoration of foreign copyrights under US law, and the statement has been vetted for the US public domain term only (Rightsstatements.org 2018, 29).

The Other category is akin to providing catchall provisions and is further divided into three subcategories:

- Copyright Not Evaluated
- Copyright Undetermined, and
- No Known Copyright.

Copyright Not Evaluated is a provision that lets the user know that the copyright has yet to be evaluated by the hosting institution in any way, for instance, with the mass digitization of works. Although the digitizing institution may believe that the materials it is digitizing belong in the public domain, it has not done an individualized assessment of each piece in the collection. The Copyright Undetermined designation is intended for use when the institution has reviewed the item and has “made the item available, but the organization was unable to make a conclusive determination as to the copyright status of the item”. A library may wish to use this designation if it has done a copyright review, but been unable to determine the status of the item because the author’s date of death is unknown and it is necessary to calculate copyright length. Finally, No Known Copyright is an appropriate designation for a work made between 1925 and 1968 where a reasonably diligent online search has been conducted and no copyright can be located. It indicates that the instance is not a simple case, like a work published in the United States prior to 1925, and that a copyright search has been made, but that the organization cannot warrant the accuracy of the information to an infallible degree.

Note that all of the rights statements include a disclaimer that there is no warranty as to the accuracy of the rights statement and that the user of the work is ultimately responsible for his or her own use. The following table indicates the details provided in each rights statement.
Table 8.1: Rights Statements Inclusions

<table>
<thead>
<tr>
<th>Short name of RS</th>
<th>Name of Rights Statement (linked to statement text on test server)</th>
</tr>
</thead>
<tbody>
<tr>
<td>URL of Rights Statement</td>
<td></td>
</tr>
</tbody>
</table>

One sentence description of the Rights Statement. This will not be displayed as part of the Rights Statement. Intended for use in documents or on websites describing the Rights Statements.

Text of the Rights Statement

Notices:
- One or more notices related to the Rights Statement

Disclaimer regarding this being a Rights Statement and not a legally operative License summary.

Generic selection criteria for the Rights Statement. Short text that describes when this Rights Statement should be used, aimed primarily at data providers. This text will not be displayed as parts of the Rights Statement.

Extra metadata | For some statements it is possible to provide additional metadata that triggers the display of optional information at the text of the Rights Statement (and above the notices). If this is the case this will be noted here. Specific behavior is indicated by keywords in bold as described by RFC 2119 (Bradner 1997)

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Traditional Knowledge Labels

For countries that have protection for moral rights or a sui generis law protecting the right to traditional cultural expression, or for anyone wishing to recognize community rights that are not generally protected under US copyright law, Traditional Knowledge Labels (TK Labels) are available. Local Contexts was founded in 2010 to enhance and legitimize locally based decision-making and Indigenous governance frameworks for determining ownership, access, and culturally appropriate conditions for sharing historical, contemporary and future collections of cultural heritage and Indigenous data. Digital strategies for Indigenous communities, cultural institutions and researchers are provided through the TK (Traditional Knowledge) and BC (Biocultural) Labels and Notices as “an extra-legal educative metadata intervention” and the “goal was to develop a new and complementary set of licenses that addressed the diversity of Indigenous needs in relation to intellec-
tual property” (Local Contexts n.d.). The TK Labels are digital markers that define attribution, access, and use rights for Indigenous cultural heritage. Twenty TK Labels have been developed through direct community partnership and collaboration. Each TK Label can be adapted and customized to reflect ongoing relationships and authority including proper use, guidelines for action, or responsible stewardship and re-use (Local Contexts n.d.; Christen 2015). Another chapter in this book addresses indigenous intellectual property issues in more detail.

**Conclusion**

Although it may be time-consuming and difficult to correct errant online digital rights statements, it is important that libraries make the effort to do so. Otherwise, as noted above, there is a risk of copyfraud. Thankfully, the standardized rights statements documentation provides librarians with guidance on the appropriate inclusion of rights metadata for the materials in their online collections. Librarians no longer need to invent home-grown systems for copyright metadata. However, using correct terms for metadata is only half of the copyright battle. The more challenging part is to develop systematic approaches for copyright review. Luckily, the HathiTrust, the University of Miami Libraries, and Pennsylvania State University Libraries have taken the lead in providing road maps for such decisions. The many examples and case studies listed, along with the copyright flowcharts from Hirtle, Hudson and Kenyon’s *Copyright and Cultural Institutions* book (2009), provide librarians with guidance on how to appropriately chart copyright decisions to determine which rights statements should apply to works housed in a digital collection. Hopefully, many more libraries will follow this lead and standardized rights statements metadata will become the norm and not the exception to the rule for digital collections.

**References**


