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Controlling goods or promoting the public good: Choices for special collections in the marketplace

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I'm taking a different perspective than our previous speakers and looking at special collections as a purveyor or seller of goods in the marketplace.
I'm as asking how we, as special collections, behave in the marketplace for reproductions of our content. Specifically, I'm taking to task how we try to control the market for publishing our content, by requiring permissions to publish, and charge permission fees that, in effect, penalize or discourage widespread use.
At UNLV, we have a brisk business in the sale of photographs. Imagery of Las Vegas history has wide appeal, whether of the rat pack, the wild west, showgirls, neon lights, or the Strip’s distinctive architecture.
Our content is used not only for scholarly works, but also for television, films, wall décor, memorabilia, and more. We have required that anyone who wants to publish or display our images ask us for permission, and we assess use fees, in addition to scanning fees, to those who use our materials for commercial purposes.

We make enough money to cover half the salary of a library technician who manages this process, but it’s a very stressful job and many of us often get involved in dealing with difficult people.

But lately, I’ve been in turmoil, because our business-like stance on reproductions often comes into conflict with our altruistic motives for digitizing our content and making it widely accessible.

These are tightly interdependent, because the more we digitize and put our material online, the more people discover our content, and want to purchase it and do something with it.
So, I began to ask, “Why are we insisting that users ask us permission to publish, and why are we charging additional fees for publishing and commercial use?” Possible answers include:

• Because we own it.
• Because many special collections have always done this.
• If others make a profit from our content, we deserve some reimbursement, especially because we’ve spent a lot to collect, organize, describe, and digitize this content.
• Because our mission focuses on the academic enterprise, we should charge anyone who’s not using our materials for teaching, learning, or scholarship.
• Because we want to control our content and prevent it from getting loose on the web without proper attribution or used disrespectfully.
• Or because we want to make sure parties sign our forms so we’re not liable for any misuse.

But we began to notice that our permission requirements and use fees penalized the good citizens, that is, those who made the effort to contact us before using material they found on the web. We were focused on the bad citizens, those who redistributed our content without asking or paying us.

We thought about how we might lock down our digitized collections to ensure permissions and payment and try to prevent medium or high quality downloads of the site, but this was hard to justify, especially when we got grants to digitize the material for integration into the classroom. We thought about how we might erect some barriers, like click through agreements, to reduce risk from people reusing digitized content without respect for copyrights or publicity rights.
In a 2011 American Archivist article, Jean Dryden asked 150 Canadian repositories why they controlled downstream usage of their digitized content. Reasons included:

• loss of revenue;
• threats to the authenticity of documents from improper captioning or manipulation;
• potentially compromising the repository or not mentioning the repository as a source;
• or fear of legal liability from researchers misusing material

Likewise, she noticed the “tension between an archival repository’s mandate to provide access to its holdings and a desire to control further uses of them.”
Survey of 125 Special Collections in U.S. Research Libraries

- 70% require permission to publish any material
- 15% only require permission to publish if the repository owns the copyright for the material

- 55% charge use/permission fees for any material, beyond reproduction fees, for publication or commercial use
- 25% do not charge use/permission fees beyond reproduction fees

So I looked at the forms and procedures of 125 special collections in research libraries in the United States to better understand how we, as a profession, handle permissions and fees for those who wish to publish or distribute our content for commercial gain.

First, for permissions
- 70% of special collections require users to seek permission to publish any content from their collections. This includes seeking permission for public domain content, content copyrighted by others, and content with copyrights held by the institution. Many special collections explain in their forms this permission is required because they are the physical owners of the material.
- In contrast, 15% say that permission is only required when the institution owns the copyright.

Second, for use fees
- 55% charged use fees or permission fees, in addition to scanning fees, for publishing any content from Special Collections.
- The vast majority of use fees provided different price points for different kinds of use. Smaller or more scholarly publications were charged less than uses for larger audiences or bigger profit potential. Some special collections explain in their forms that these fees help support the very expensive processes for collecting, processing, and digitizing materials.
- In contrast, 25% don’t charge any use or permission fees beyond a scanning fee.
It's probably no surprise that so many use reproductions to generate revenue or offset their costs, as just over 10 years ago, an Ad Hoc Committee of RBMS, called the Licensing and Reproduction of Special Collections Committee, were charged to "create a reasoned and articulate defense of libraries' right to charge licensing fees for commercial uses of their materials."

In the course of doing research on this topic, I've had a change of heart and will now argue for the opposite.

Today, I'm arguing that we need to review and change these practices, especially as digital reproduction and delivery is the new norm for promoting access to our holdings.

As a profession, I'd like to encourage us to question our permission requirements and use fees, especially for public domain materials and when we don't own the copyright.

Our colleagues at institutions such as the Library of Congress, Cornell, Yale, University of Virginia, UNC Chapel Hill, the Getty, and others have already paved the way for change.
Reasons for Scrutiny and Change

1. Requiring permissions and charging use fees aren’t always legal. They may put you at risk.
2. Ethics - It’s the right thing to do.
3. Costs often outweigh benefits.
4. There are better ways to generate revenue.

Why? 4 reasons
1) These practices aren’t always legal and they probably put you at risk.
2) It’s the right thing to do.
3) The costs of the infrastructure necessary to manage permissions and charge use fees are probably not worth the benefits.
4) There are better ways to generate revenue or to advocate for needed funding.
First, many of the practices for permissions and use fees are not consistent with copyright law and may put you more at risk.

If you own the copyright to materials in a collection, then you certainly have the right to grant permission to publish, and to assess publication fees.

But, in many manuscript or photograph collections, you probably aren’t able to easily tell who holds copyright in every item, even if you have a gift agreement transferring rights.

Copyright is the exclusive, legal right to publish, distribute, transfer ownership, reproduce, perform, display, and adapt a work, or the exclusive legal right to authorize these activities.

It is designed primarily to protect an author or artist against any unauthorized copy of her works for a reasonable period time.

After that time, material passes into public domain to ensure the “progress of science and useful arts.”
Many institutions and collectors erroneously believe that physical ownership gives them rights to determine how material is used. They think that physical ownership gives them a “quasi-copyright like control” (in the words of Peter Hirtle).

But the Copyright Act of 1976, and even the earlier 1909 law, clearly distinguished property rights from copyrights.

Physical ownership means that you own the medium on which the intellectual content is stored. Physical ownership allows you to govern access to your material. We can allow or deny access, or make access conditional on researchers agreeing to certain behaviors. We can assess fees for the privilege of accessing the material, or assess fees for the act of creating the reproduction.

But copyright is an exclusive right to authorize the reproduction of a work, to publish, and create copies for sale.
Only the copyright owner, or designee, can grant permission to publish, and charge for this permission.

If we don’t own the copyright, we don’t have these rights. If we create contracts with users that infringe on the copyright owner’s *exclusive* rights to control publication, we’re putting ourselves at risk.

If we make users ask us for permission to publish as a condition of access, remember that the exclusive rights of a copyholder are guaranteed by federal law and will mostly likely pre-empt our demands.

“The repro fee represents a not-so-subtle claim to the right to authorize the reproduction of a work, which...is the functional basis of copyright and not an automatic privilege of the owner of the material object.”
It's also problematic to assess fees that are explicitly tied to authorizing commercial use of a copyrighted work when you don't own the copyright.

There are certainly exemptions to copyright law that allow us to furnish copies of copyrighted material for private study, scholarship, and research.

And fair use is increasingly seen as a way we can digitize and provide online access to our collections without us having to engage in burdensome permission processes, because frankly, for us to seek permission to digitize every item we put online is prohibitive. (highly recommend those ARL Best Practices on Fair Use, by the way.)

But, when we insist on granting permission and charging for publication, when you don't own copyrights, we put these exemptions in jeopardy.

So, I ask, are permissions and permission fees worth the risk?
Next, let’s move to ethics.

After the term of copyright expires, material enters the public domain. Justice Brandeis proclaimed that the material is “free as the air to common use.”

There is some ambiguity in case law, and a lot disagreement among legal scholars, about whether you can impose restrictions through contracts on the use of public domain works.

Legal issues aside, restricting access or charging for use of public domain works is not the right or ethical thing for libraries to do. When material is in the public domain, the content belongs to everyone.

Anyone should be able to use or sell copies of this material without penalty or permission.
As Peter Hirtle noted in his 2003 presidential address to the Society of American Archivists,

"Efforts to try to monopolize our holdings and generate revenue by exploiting our physical ownership of public domain works should not succeed. Such efforts make a mockery of the copyright balance between the interests of the copyright creator and the public. They ignore the public's ownership interest in our holdings, may be legally unenforceable, and, depending upon the implementation, may actually be criminal."

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They ignore the public's ownership interest in our holdings...."
Are you part of an institution committed to the advancement of knowledge through teaching, research, and scholarship?

Making public domain material freely available is consistent with this mission to disseminate knowledge, encourage appreciation of our cultural heritage, and inspire creativity. Moreover, it’s consistent with our professional values that emphasize access.

Rather than treating our content as goods we control in the marketplace, let’s see our responsibility as promoting the public good.
In recent literature, you may have noticed the dire rhetoric about the public domain, that there is a war against it, that is shrinking and in danger of being lost, and we need a call to arms to preserve it.

One of the villains are those who commit copyfraud, that is when you claim copyright ownership over public domain content or when you overreach the law to restrict access to content that you don’t have the rights to.

Jean Dryden concluded that some Canadian institutions were guilty of copyfraud when they required “end-users to obtain the repository’s permission to publish even if the repository has no copyright interest in the work involved.

A more common copy fraud perpetrator are those who send out cease and desist letters to prevent lawful action online (like fair use) or when they don’t have all the rights they claim.

So in this battle for the public domain or the exchange of culture within the bounds of law, what side do you want to be on?
Permission requirements and permission fees may also have a chilling effect on scholarly publishing. Authors and publishers will publish less when the costs are high. Our permission fees function to create disincentives or barriers, and limit the amount of our material that is exchanged.

Consider this statement from the College Art Association: “These fees … are contributing to overall rising costs of scholarship in the field; but worse, they may be contributing to an actual decline in the quality of scholarship. That is to say, the presence of such charges undoubtedly inhibits the use of visual support for argumentation. In some documented cases the level of costs involved has resulted in cancellation of an important publication project.” Is this the restrictive influence we want on the publishing market?

Our barriers may also drive researchers off. We don’t always have the monopoly on content; and if our demands are too high, our customers will seek alternative suppliers for content, or they will just decide to do something different entirely. The end result is that fewer people will ultimately become aware of, see, or appreciate our content.

For the 70% or the 55% I mentioned, is this your intention?
Another irony is that although we want more people to appreciate us and our holdings, we charge the highest use fees for those projects that will allow the most people to see and appreciate our content.

Why? So what if someone makes money off the content we collect? Think instead of the potential reach to new audiences, or the opportunity to demonstrate your economic impact.

Are we charging more for wider distribution as a way of discouraging consumption, to prevent the devaluation or cheapening of our content by ensuring its rarity or perhaps to ensure that it’s used in respectful contexts? Are we engaging in self-preservation?

I would argue that we improve our society by increasing the distribution of our heritage, by making it more visible and available for inclusion in public discourse. Katherine Butler, in her article “Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets” encourages the democratization of cultural heritage, for museums to allow the transformation of art into usable images that people can use in their everyday lives. This works for special collections too. Widespread visibility of our content would make for a better, not a worse, world.
Onto my third reason, the costs of maintaining a permissions infrastructure are usually not worth the benefits.

In the spirit of Las Vegas, I’m willing to wager that for the majority of institutions in this room, the total costs in time and staff, as well as the amount of headache and ill will generated, to control reproductions, manage permissions, and charge permission fees, exceed the benefits from revenue and control.

If you found ways to furnish reproductions with less mediation, and let go of permissions and permission fees, think of how you might spend time doing other things that fulfill your mission and generate good will. Maybe do more outreach and events to engage your community, or spend more time on friend and fund raising.

For me, as our staff are often cast as bad guys in big reproduction orders, I rather find a way to be the good guys.
Finally, if you really need to generate revenue, there are other ways to profit from your holdings by competing in the marketplace, rather than trying to control it. Perhaps take a cue from museum stores and look to corporate partnerships.

Here at UNLV, we forged a deal with a local company to sell repositionable wall stickers of Vintage Vegas, and we receive a percentage of sales. Zazzle offers a similar deal; the Bancroft has done it.

In his 2003 SAA address, Peter Hirtle described how Cornell provided online, free access to an image of Abraham Lincoln, but the New York Times store offered the same image, with an easy-to-use order form, offered to matte and frame it, and charged a lot. The New York Times offered a value-added service that was worth paying for.

So, if you need a revenue stream, I suggest looking to a more commercial approach for marketing your holdings. Find creative ways to satisfy demand in the market for the vintage vibe, without compromising your professional commitment to providing equitable access to your holdings.
As I was writing this plenary, I rewrote UNLV’s permission policies and fee structures, and implemented a more modern approach very much like the Beinecke at Yale and others. These work better in our new environment where we’re delivering more and more content online.

- We eliminated use fees (but still charge scanning fees)
- We eliminated the requirement to ask us for permission when we don’t own copyright;
- And we’re working towards making high quality downloads available any public domain content as well as when own copyright.

Some day, I hope to make most of our digitized materials available for high quality downloads, of course with disclaimers about fair use and rights when it is copyrighted, of course.

In conclusion, if your institution belongs to the 70% or 55%, I encourage you to go back and reexamine your permissions processes and permission fee structures.

- What values do you want your institution to represent?
- What role should your institution have in the marketplace for historical content?
- How do you want to help, or hinder, the progress of our culture?