



February 4, 2013

201 DAVIS LIBRARY
CAMPUS BOX 3900
CHAPEL HILL, NC 27514-8890

T 919.962.1301
F 919.843.8936
www.lib.unc.edu

**COMMENTS OF THE UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL
LIBRARIES IN RESPONSE TO THE COPYRIGHT NOTICE OF INQUIRY
CONCERNING ORPHAN WORKS AND MASS DIGITIZATION**

The special collections of the University of North Carolina, Chapel Hill (UNC-Chapel Hill) are an integral part of our rich holdings. These materials are among the most crucial to digitize, but they pose special challenges for mass digitization and location of rights holders, particularly for non-textual and unpublished works from the mid-twentieth century. These comments will describe the implications of orphan works legislation for these special collections materials.

At UNC-Chapel Hill these materials include photographs, unpublished manuscripts, letters, and diaries, and published, textual material that is ephemeral, such as pamphlets, posters, and the like. The Southern Historical Collection contains over 16 million primary source documents. The Southern Folklife Collection contains 8 million feet of motion picture film along with many ephemeral items. The North Carolina Collection includes 1.8 million photographs. The Rare Book Collection contains over 160,000 printed volumes, as well as substantial holdings of original graphics and literary and historical papers.¹

Special collections materials are what make our collections truly unique. They provide a window into the experience of both famous and everyday people throughout history. They tell us about culture, attitudes, and mores. At UNC-Chapel Hill these materials chronicle events in Southern social, political, and cultural history, such as the story of the Civil Rights Movement in many communities, and the cultural life in Appalachian regions of our country, as well as broader global literary and historical themes. Our collections are of immense value to historians and literary scholars, but they are also of great use to researchers in other disciplines, such as economics and medicine. Digitization of these collections is highly desirable for two reasons. The first is the uniqueness of the collections. Digitization promotes access to materials that cannot be found anywhere else. The second is, that as part of UNC-Chapel Hill's status as the oldest public university in the country, it is our mission to make our collections as widely available as possible

In many cases, people whose names are lost to history created these materials. In other cases, we know who created the materials but can no longer locate those creators or their heirs. Many works were never published, or we can no longer identify their publishing history because of their obscure origins. Often we cannot definitely ascertain whether the works have entered the public domain

A diligent search to discover these works' creators and their copyright statuses is often

¹ See University of North Carolina-Chapel Hill Libraries. Welcome to the Wilson Special Collections Library. http://www.lib.unc.edu/about/pubs/Wilson_Library_Guide_F2012.pdf.

extremely difficult or impossible. In *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, Maggie Dickson detailed the challenges and impossibilities of researching the copyright status and locating rights holders for a collection in UNC-Chapel Hill's Southern Historical Collection. The Watson Collection consists of 7.5 linear feet of correspondence written between 1873 and 1986. Dickson found that after significant work in identifying rights holders, researching death dates, and seeking permissions, she could only clear 35% of the collection definitely. In many cases, it was impossible not only to find the rights holder but also to determine whether the material had entered the public domain. Staff spent 450 hours on the project, and spent \$8,000 over 9 months. They were only able to obtain express permission to digitize letters in 4 instances.² The mixture of materials in the Watson Collection is common throughout our special collections, and, indeed, throughout most library special collections.

Court decisions and our own experience over the last few years, along with our own increasing familiarity with the analysis process, have given us greater confidence that we can rely on fair use when making decisions to digitize non-textual or unpublished orphan works.³ Our assertions of fair use occur as part of a scheme of analyzing the origin and type of material, taking into account what might be in the public domain, the feasibility of obtaining permissions, the strength of the fair use argument, and the provision of a mechanism to resolve challenges to digitization.⁴ *Content, Contest, and Capacity: A Collaborative Digitization Project on the Long Civil Rights Movement in North Carolina* is a good example of this approach undertaken with our Triangle Research Library Network partners.⁵

In a fair use analysis, all four factors from the statute must be considered, but both the first factor and the fourth factor weigh heavily in favor of a finding of fair use when we are digitizing special collections and archival material for scholarly and educational use. The first factor, the nature and purpose of the use, favors fair use because our use is non-commercial and transformative. We do not digitize these materials for commercial purposes but in order to further scholarship and understanding of the periods and attitudes the materials represent. In addition, for example, a letter that was originally written to convey information to a relative becomes, with digitization, a document that chronicles attitudes of a past time in a particular place. The fourth factor, the effect on the market or on the work's value, also favors fair use because creators of these types of works either never intended to monetize them (such as private papers, photographs, or letters) or never intended to realize significant revenue from them on a long term basis (such as ephemeral materials like pamphlets).⁶

² Maggie Dickson. *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*. *American Archivist* 73 (Fall/Winter 2010) 626-636

³ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) and *Authors Guild, Inc. v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012, among others.

⁴ See Triangle Research Libraries Network. *The Triangle Research Libraries Network's Intellectual Property Rights Strategy for Digitization of Modern Manuscript Collections and Archival Record Groups* (2011) <http://www.trln.org/IPRights.pdf>.

⁵ Triangle Research Library Network. *Content, Contest, and Capacity: A Collaborative Digitization Project on the Long Civil Rights Movement in North Carolina* (2013) <http://www2.trln.org/cc/index.htm>.

⁶ 17 U.S.C. § 107.

Fair use provides a reasonable framework for making decisions about digitization of special collections material. However, if there is a decision to pursue a legislative solution for digitizing orphan works, we offer the following:

- The definition of a diligent search should not be codified in great detail and should be sensitive to the types of works involved and the likelihood that a search will be successful. Orphan works legislation should provide a safe harbor for the user who has made a diligent, reasonable effort to discover a work's copyright status and the rights holder. The trier of fact should have the discretion to assess the circumstances of a diligent search and waive statutory damages
- A compulsory licensing scheme for making use of special collections orphan works would be inequitable, because it is highly unlikely that rights holders will appear to collect the revenue, because most of these rights holders never had an expectation of commercial gain or of long-term gain, and because it is often impossible to state definitely what materials are orphaned.

We appreciate the opportunity to comment on orphan works and mass digitization as they pertain to libraries. These issues are crucial ones for education and scholarship.

Yours sincerely,

A handwritten signature in cursive script that reads "Anne Gilliland".

Anne Gilliland
Scholarly Communications Officer
University Libraries
University of North Carolina—Chapel Hill