

## Permissions Guidelines For California Revealed

This document was created to provide guidance for partner organizations that are participating in the California Revealed (CA-R) project to help determine copyright status and secure permissions to preserve and make available archival works as part of the California Revealed online collection.

California Revealed is a State Library initiative to help California's public libraries, in partnership with other local heritage groups, digitize, preserve, and serve online historically significant Californiana (e.g., books, documents, audiovisual recordings). Participating libraries identify and select from their collections, create discovery and rights metadata for the selected materials, and send materials together with associated metadata to a digital preservation repository.

The information contained in this document is not legal advice and California Revealed is not responsible for decisions made based on the information included here. For additional information about California Revealed, please visit [our project page](#).

### Overview

Many archival works in need of preservation have unclear copyright status. The following permission guidelines promote a practical approach to identifying rights related to digitizing *non-commercial* archival materials and providing online access for educational purposes. The accompanying permission chart illustrates the steps of what constitutes a good faith, reasonable effort to obtain permission as needed without prohibitive time or costs. This document and the chart contain embedded links to many useful resources – please follow the links for further guidance.

These guidelines have been written with the goal to strengthen your confidence in the permission process. The benefits of archival stewardship, preservation and survival of our state heritage are worth the time required to undertake a reasonable effort to locate copyright holders and obtain permission. This will minimize the risk of online access to a work being restricted due to copyright, privacy or publicity rights.

This document, along with the accompanying chart, will guide you through a reasonable effort to secure permission. To the best of your ability and resources, answer the following for each work you are considering to digitize:

1. *Who created the work?*
2. *Who holds the rights to the work now?*
3. *Where is the copyright holder now?*

Even if you don't find the answers, asking these questions ensures due diligence.

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## **Definitions and issues**

**Fair use:** Determinations of fair use are made on individual works and based on a balance of four factors under [section 107 of the U.S. Copyright Code](#):

1. The purpose and character of the use, and whether the use is for nonprofit educational purposes
2. The nature of the copyrighted work itself,
3. The amount used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work.

The argument for fair use is strong if you select works for digitization that have research value or use for nonprofit, educational purposes and do not have commercial value or use. Complete the Cornell Copyright Information Center's [Fair Use Checklist](#) to determine if factors favor a finding of fair use to bolster your claim to a fair use exception. Consult Columbia University Library's [Copyright Advisory Office](#) and Stanford University Library's [Fair Use page](#) for a greater understanding of Fair Use.

**Published and unpublished:** A published work means copies of the work were distributed or released for sale or rental to the public. For works published between 1924 and 1977, the copyright term is 95 years from the date of publication. For works published after 1978, the copyright term is the life of the last surviving author plus an additional 70 years. For anonymous works or corporate works for hire, the term is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. Works published after 1963 are likely copyrighted (though it could be in the public domain if it was published prior to 1989 and doesn't have proper © copyright notice).

An unpublished work means it was never distributed or released for sale or rental to the public. Note that a public performance or display of a work does not of itself constitute publication (see: "[what is publication?](#)" on the copyright.gov FAQ). Until 1978 it was unnecessary to register an unpublished work for copyright – works were covered by common law. Since 1978 unpublished works are automatically copyrighted and covered by federal law. The simple act of recording information in a "fixed medium" is sufficient to establish copyright – no copyright statement or © is necessary. Although there is no requirement that creators register copyright, they might have, so it's worthwhile to check with the Copyright Office just in case.

**Public Domain:** Work in the public domain is available for everyone to use without permission. Works of the government are automatically in the public domain. Work enters the public domain on the first day (January 1) of the year following the expiration of its copyright term. Consult Cornell's [Copyright Term and Public Domain in the United States chart](#), or the [Public Domain Slider](#) created by the ALA's Office for Information Technology Policy to determine when material is no longer copyright protected.

For published works, it is easier to determine if they are in the public domain because copyright term is directly related to the publishing date. All material published in the United States prior to January 1, 1923 is in the public domain. New material will begin entering the public domain in 2019, when material from 1923 falls out of copyright. Prior to 1989, law required a valid copyright notice (i.e. © or the word "Copyright," publication year date, and name of copyright owner) so if a work published from 1923 through 1989 doesn't have this notice, it could be in the public domain. It is also important to remember that material published after 1977 will expire 70 years after the death of its creator or, in the case of material with multiple creators, 70 years after the death of the last surviving creator.

Before the current 1976 Copyright Act, if a work was published between 1923 and 1963, the copyright had to be renewed 28 years later or the work entered the public domain. Many copyrights were not renewed. You can search copyright registration, including renewal records online in the [Copyright Catalog](#).

Very few unpublished audiovisual recordings are in the public domain. For works with known authorship, the copyright term for works created before 1972 is subject to state statutory and common laws and for works created after 1972 the term is the life of the author plus an additional 70 years. For anonymous

works, the term is the life of the author plus an additional 120 years from date of fixation. The earliest most unpublished audiovisual recordings will enter the public domain will be in 2067.

**Copyright complexities:** Copyright for audiovisual materials is complex because moving image and sound works are usually collective or collaborative—multiple creators, authors, artists, interviewers and interviewees might have contributed to the work (“joint” ownership), and also because copyright applies to the recording itself (when the work was “fixed”) as well as to the underlying compositions and texts (such as lyrics for a song, a screenplay or transcript, or music added to a movie’s soundtrack). A film may be a derivative of some earlier work, like a novel, in which case copyright applies to the underlying base as well as to the derivative. A video may use licensed images and clips from multiple sources, in which case there may be a bundle of rights within the work. Also, changed material or a new version of the work may have extended copyright protection; for instance when a silent black and white movie is colorized or a soundtrack is added to it. Publicity and privacy rights (governed by state law) of the donor or depositor, or of those featured in the work, should be considered too.

### ***California Revealed Selection Criteria***

California Revealed selection criteria favor works for which the right to digitize and provide online access is not likely to be contested:

- the work was created in the U.S. and is non-commercial
- intellectual property is held by the participating institution (the copyright in a work has been transferred in writing to the archive) or
- intellectual property is in the public domain or
- intellectual property is secured from the rights holder
- no known restrictions on access to the digitized work

If your institution doesn’t own the copyright, the work (published or unpublished) can be included as long as you go through reasonable steps to identify, locate, and attempt to obtain permission from the rights holder.

If the identity or location of the rights owner cannot be determined, the item is known as an “orphan” and can be included for purposes of education and research if a disclaimer that the person closest to the collection, the archivist, has followed reasonable steps with due diligence and in good faith to find the rights holder.

For items with an unknown copyright status, a copyright statement will be attached to the digital object to provide an option for potential rights holders to contact the library or archive to remove material from public view while rights are being established. Online rights metadata can be updated as needed.

### ***Securing permission***

Begin by assuming that most items in your collection are under copyright. Ideally, permission for digitization and online access is obtained in writing. How do you go about obtaining permission? According to the Society of American Archivists’ [Orphan Works: Statement of Best Practices](#), a “reasonable” search involves answering three questions in this order: *Who created the work? Who holds the rights to the work now? And where is the copyright holder located now?* Using common sense and simple language, [Orphan Works](#) provides steps to help you investigate the trails of copyright for unpublished works, which can be applied to published works as well. The steps below give you the essentials; read [Orphan Works](#) to more fully understand best practices, which also includes a bibliography and links to online resources.

1. *Who created the work?* Ideally, the item or container will be labeled with names, initials, logos, a publisher or distributor, or perhaps an address.

- o Video-- If in good condition and there is no risk of damage, and playback equipment is available, play the work and look for credits (identify the main creators- the writer(s) and the filmmaker(s) or director).
  - o Film-- If in good condition, carefully unwind it over a lightbox and check for credits (identify the main creators- the writer(s) and the filmmaker(s) or director).
  - o Audio-- For musical works, identify the composer(s) and performer(s) involved. For oral histories, identify the interviewee(s) and interviewer(s).
  - o All audiovisual recordings-- If a work has been published or distributed, it is important to identify the creator/producer, publishing entity or distributor, and publication date, if possible.
  - o Photographs and print material -- If a work has been published or distributed, it is important to identify the publisher, creator name/signature, distributor, and publication date, if possible..
  - o When creators can be identified, confer with a reference librarian or genealogist to locate the creator's specific identity in space and time, and possibly the creator's heirs.
2. *Who holds the rights to the work now?* The creator(s) of the work very well could be the copyright holder(s). There are three cases in which the initial creator may not be the copyright holder: the creator died then the copyrights transferred to heirs under the terms of the will, the creator or copyright heirs transferred copyright to a third party (such as an archive or library, publisher or distributor), or the work was produced as "[work made for hire](#)" in which case the employer of the creator is considered the "author" and owns the copyright.
- o Check if the work was registered or renewed, or check if any of the author's work was registered, at the U.S. Copyright Office. You can search the [Copyright Catalog](#) online for works registered after 1978. Copyright Office staff can search [card records](#) for works registered prior to 1978, for a fee. For more information about copyright duration, see the Copyright Office's [Circular 15A](#).
  - o Check professional membership associations. Use the databases, [ASCAP](#) (American Society of Composers, Authors and Publishers) and [WATCH](#) (Writers, Artists, and Their Copyright Holders) – both track copyright of prominent authors and artists. For published audiovisual materials, [OCLC](#), [Facets](#) and [Amazon](#) are useful sites to locate publishers and distributors. You can also check [A-V Online](#), but you'll need a subscription to access the database.
  - o Search for other archival collections that might have the creator's work - archives staff may have information about the creator or heirs in their accession files.
  - o Check works about a creator – the notes may contain acknowledgements or other information about copyright holders.
3. *Where is the copyright holder now?* You will need contact information (address, phone number and email) in order to ask permission. There are several approaches:
- o Do a simple internet search for an individual, an organization's website, heirs or executors. Use a precise name and search for all possible variant forms, along with qualifiers like the person's city and state or the term "Obituary."
  - o Search [Secretary of State records](#) for registered distributors and production companies.
  - o If you know a copyright holder's residence, you can turn to a [phone book](#) or city directory.
  - o Post your inquiry on a professional archivist listserv such as [ARSClist](#) (for sound recordings), [AMIA-L](#) (for moving images), or [Society of California Archivists](#) (for California and Western US-specific materials).

Use archival approaches to make decisions. Check donor or depositor files and accession records for permissions, rights or restrictions. Assess rights and privacy issues at the appropriate level, most often at the collection- or series-level. Sometimes other documents in the same file as the work contain clues about the creator(s). For instance, look for employment contracts in a collection file- these could be clues that some work might have been made for hire which means the employer and possibly the creator as well might need to give permission. If possible, confer with the archivist or curator responsible for the collection, or who initially brought in the collection – they might have relevant donor/acquisition documentation.

Document your processes and findings as you search for rights holders. List and date each step taken and source consulted. If a search involves correspondence, keep copies of all letters sent and received,

and you might want to request return receipts in case a letter of inquiry is undeliverable. Take notes when you're on the phone, and summarize and date each conversation.

What constitutes a reasonable effort in locating contact information for a rights holder and obtaining permission depends on a number of factors. A greater effort might be warranted to locate a professional creator than an amateur since it is easier to find professional creators (individuals who have earned their living through their creative works have a vested interest in their intellectual property rights and presumably want to be found). A greater effort might be merited if work was published or widely distributed compared to an unpublished work that was distributed (if at all) on a limited basis. In some ways, published works can be easier to investigate—at least the trail of copyright is usually documented. On the other hand, though the trail might be treacherous, and might feel like a dead end at times, you are more likely to obtain permission directly from the creator(s) and their heirs once you find them rather than going through a publisher, distributor or reproduction rights organization.

The time and expense a rights search can take can be significant, and it can be endless. When is due diligence *done*? It is unclear in the law. Go as far as you can within your means - it's not necessary to thoroughly explore every trail. What is the likelihood of success? Follow one step at a time and use common sense. As Orphan Works advises, "Effort should be expended in contexts and situations in which it is likely to bear fruit." Make assessments based on your best knowledge of the facts, as you know them.

### ***Grant of permission form***

Once you've located the copyright holder(s) and contact information, it might be easiest and most direct to pick up the phone and call them to introduce yourself and the Project. Then you can send a certified letter explaining the Project along with a form seeking permission. A sample letter and grant of permission is attached – feel free to modify them. The letter includes the provision that the recipient may not be the rights holder; in that case they are asked to send current contact information for the appropriate rights holder(s), if known. Some copyright holders may want acknowledgment or attribution for their work – if so, be sure to include this specific language in your grant of permission. Feel free to share with the copyright holder the California Revealed project's boilerplate "Copyrighted" statement and let them know what intellectual property metadata we are including for each object (see next section ***Recording rights management data***). Nota bene: Some existing donor or depositor agreements grant permission for on-site access only; be sure to check when contacting the rights holder for permission to provide online access.

### ***Recording rights management data***

Once items are assessed for copyright status, gather the following metadata. This information is displayed with the digitized work specifying that the items are available online for non-commercial educational and research purposes only. (Please note that you can specify rights information on both a collection-level and item-level.)

- Copyright Status (Copyright status unknown/Copyrighted/Public Domain) – Required
- Copyright Statement (a boilerplate statement - depending on status) – Required
- Publisher (if published) – Preferred
- Copyright Holder (if copyrighted) – Preferred
- Copyright Date (if copyrighted) – Preferred
- Copyright Notice (if copyrighted) – Ideal
- URL to online Rights Statement if supplied by Library/Archive – Ideal

Based on the information entered in the Copyright Status field, the following boilerplate Copyright Statements are recommended:

- When the copyright status is "Public domain":
  - Public domain. No restrictions on use.
- When the copyright status is "Copyrighted":

- o Copyrighted. Rights are owned by [Library/Archive or Copyright Holder]. Copyright Holder has given Institution permission to provide access to the digitized work online. Transmission or reproduction of materials protected by copyright beyond that allowed by fair use requires the written permission of the Copyright Holder. In addition, the reproduction of some materials may be restricted by terms of gift or purchase agreements, donor restrictions, privacy and publicity rights, licensing and trademarks. Works not in the public domain cannot be commercially exploited without permission of the copyright owner. Responsibility for any use rests exclusively with the user.
- When the copyright status is "Copyright status unknown":
  - o Copyright status unknown. This work may be protected by the U.S. Copyright Law (Title 17, U.S.C.). In addition, its reproduction may be restricted by terms of gift or purchase agreements, donor restrictions, privacy and publicity rights, licensing and trademarks. This work is accessible for purposes of education and research. Transmission or reproduction of works protected by copyright beyond that allowed by fair use requires the written permission of the copyright owners. Works not in the public domain cannot be commercially exploited without permission of the copyright owner. Responsibility for any use rests exclusively with the user. [Library/Archive] attempted to find rights owners without success but is eager to hear from them so that we may obtain permission, if needed. Upon request to [email address at Library/Archive], digitized works can be removed from public view if there are rights issues that need to be resolved.

If the library or archive owns copyright or has permission, in addition to boilerplate copyright statements, you have the option in the Internet Archive to attribute the work with a [Creative Commons Derivatives 3.0 license](#) (Attribution-Non-commercial-No derivatives) which allows the work to be available for non-commercial use, and can be shared and copied (if you have permission to make the files downloadable; otherwise the files will be streamed). The license also specifies that attribution is necessary and users are not allowed to create derivative works by altering, transforming or building upon the work. The 3.0 license is the most restrictive Creative Commons license. Other Creative Commons licenses are also available to creators. The Internet Archive will identify work in the public domain with a [Public Domain Mark](#), embedded with the work's title, the author and the identifying Library/Archive.

### **Additional Resources**

Urban Copyright Legends—Brandon Butler

<http://publications.arl.org/rli270/17>

Public Domain Slider—American Library Association (ALA)

<http://librarycopyright.net/resources/digitalslider/>

Copyright & Fair Use—Stanford University Libraries

<http://fairuse.stanford.edu/charts-and-tools/>

Thinking Through Fair Use —University of Minnesota Libraries

<https://www.lib.umn.edu/copyright/fairthoughts>

Orphan Works: Statement of Best Practices—Society of American Archivists (SAA)

<http://www.archivists.org/standards/OWBP-V4.pdf>

Getting it Right on Rights—Digital Public Library of America (DPLA)

<https://dp.la/info/about/projects/getting-it-right-on-rights>