



Risk Management Copyright Policy Framework for SFU Library Digitization Projects

Introduction

When undertaking digitization projects, the SFU Library has ethical and legal responsibilities to deal respectfully with the copyright in third party materials. As well, the Library is covered by SFU Policy R30.04 Copyright Compliance and Administration which clearly states that “University employees and students have responsibility for complying with Canada’s copyright law and Simon Fraser University’s copyright policy and related policy documents”. Dealing with copyright protected materials in digitization projects requires balancing the public interest and value in dissemination of works with the economic and moral rights of the copyright holder (or where copyright has been assigned, the moral rights of the creator).

The types of material the SFU Library digitizes are often unpublished works in Special Collections that is part of a specific collection, or fonds. These collections are aggregations of material and often contain third party copyright protected works. In many cases there is insufficient information to identify the copyright holder of these materials and there may be numerous different copyright holders represented in the collection. These difficulties have resulted in many archives and libraries, including the SFU Library, adopting an over cautious approach to digitization. In this respect we are acting no differently than other Canadian cultural heritage institutions. In other countries these same issues have led to institutions adopting a risk management approach. For example, the risk management approach is supported by the Association of Research Libraries and OCLC and is also supported by institutions such as Cornell University, the Wellcome Library and by copyright experts/scholars including Ronan Deazley and Peter Hirtle¹. Also, the clearance of rights imposes substantial burdens of both time and training of staff in cultural heritage institutions (Galleries, Libraries, Archives and Museums – GLAMs), and a risk management framework can reduce these burdens by focusing efforts on the highest-risk materials.³

Fair dealing and other exceptions in Canada’s *Copyright Act* normally do not apply to SFU Library digitization projects where the aim is to make works publicly available online. [Please note this framework does not address digitization for preservation purposes only, which is permitted under the terms of the “Libraries, Archives and Museums” exceptions in section 30.1 of the *Copyright Act*.] In some cases it is very difficult, or impossible, to obtain permission to reproduce copyright protected material due to issues such as the inability to locate the rights holder or the sheer numbers of rights holders.⁴ Furthermore, Canada lacks an orphan works regime, or even an orphan works proposal, and the Copyright Board of Canada’s unlocatable copyright owner regime only applies to published works (works made available to the public with the permission of the copyright holder). Therefore, when determining whether or not to digitize and disseminate third party copyright protected material where it is not feasible or possible to contact rights holders, the Library will use a risk management approach that aligns with the objectives and approach of the University’s *Risk Management Policy (GP 42)*, particularly those related to financial risk (4.1a) and reputational risk (4.1c). The Library’s approach will require the ability to assess the risk level associated with reproducing certain copyright protected works. The assessment will result in materials being deemed low-risk or high-risk; the Library will digitize low-risk materials without the authorization of the copyright holder but will only digitize high-risk materials with the permission of the copyright holder. The University Copyright Office will provide the expertise required to make this assessment.



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A copyright risk assessment process is guided by the Supreme Court of Canada's statement that "the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."⁵ Consequently, when determining between high-risk and low-risk we must acknowledge that any digitization is done with the knowledge that the reproduction may be an infringement, but also with the knowledge that the rights holder does not appear to be interested in taking any steps to enforce their interests that are protected under copyright.⁶ The copyright holder may be uninterested in enforcing their interests due to norms adopted in the digital environment by the general public regarding the re-use of works such as casual photographs. "Norms are patterns of behavior not constrained by statutory limits, but defined through popular practice."⁷

This process will utilize a Copyright Risk Analysis guide developed by the University Copyright Office to determine if a work is considered low-risk or high-risk. The Library's overall risk assessment guidelines for digitization of copyright protected works borrows from similar guidelines developed by University Archives, reviewed by the Copyright Office and approved by SFU VP Legal in 2015. The Library's risk assessment guidelines take into account issues such as copyright ownership, the type of material, the relationship of the rights holder to SFU, the rights holder's history of copyright defence, moral rights, any exceptions in the Copyright Act, and the importance of the material to the digitization project.

Risk assessment decisions will be documented and filed in the Copyright Office. These decisions are available for review at any time in keeping with the transparency requirements of SFU policy *Risk Management (GP 42)*.

The Library must be prepared to respond to a rights holder's request for material to be removed, and will have information available to rights holders to make a takedown request. More information on this subject is contained in the Takedown Protocol document.

1. Hirtle, P. (2014) *Understanding Rights and Responsibilities*. Digital Directions, Portland, OR. July 21, 2014.
2. Hansen, D. R. et al (2013). "Solving the orphan works problem for the United States." *Columbia Journal of Law and the Arts*, 37, 10 and note on pages 10 & 11.
3. Stobo, V., Deazley, R. and Anderson, I.G. (2013). Copyright & Risk: Scoping the Wellcome Digital Library Project. *CREATe Working Papers*, 10. University of Glasgow, Glasgow, UK. <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/>
4. See "Dickson, M. (2010). Due diligence, futile effort: copyright and the digitization of the Thomas E. Watson papers". *American Archivist*, 73 (Fall/Winter), 626-636" for the work involved in attempting to track down copyright holders and the limited results of such efforts.
5. CCH Canadian Ltd v Law Society of Upper Canada, [2004] 1 SCR 339. Para 23.
6. Wilkinson, Margaret Ann. *Access to Digital Information* in Knowledge Policy for the Twenty-first Century: A Legal Perspective. Mark Perry and Brian Fitzgerald eds. Irwin Law: Toronto (2011). 315.
7. See Bartow, Ann (2003). "Copyright norms and making cyberspace more like a book". *Villanova Law Review*, 13, 20-21, AND Feliu, Vicenc (2015). "Normalizing copyright in the electronic environment". Villanova Public Law and Legal Theory Working Paper Series no. 2015-1018. <http://ssrn.com/abstract=2691489> for a discussion of how copyright norms can be different from sanctioned activity under copyright legislation.



LIBRARY SERVICES
Copyright Office

Copyright Risk Analysis for SFU Library Digitization Projects

Date:

Client and Department:

Description of material (title(s), creator(s), medium/media, date(s) of creation and/or publication, source(s), any additional information):

Confidential information/trade secrets?	YES	NO	NOT SURE
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Protected by copyright?	YES	NO	NOT SURE
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Copyright owner:

License?	YES	NO
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If yes:	Creative Commons?	Other?
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Amount copied:	MUCH/ALL	LITTLE/SOME
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Insubstantial?	YES	NO	NOT SURE
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Fair dealing analysis done?	YES (attach documentation)	NO
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Commercial value?	YES	NO	NOT SURE
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Owner history of copyright defence?	YES	NO	NOT SURE
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Details:

Owner/author relationship with SFU?	YES	NO	NOT SURE
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Details:

Potential effect on moral rights?	YES	NO	NOT SURE
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Details:

Other reason for careful consideration?	YES	NO
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Details:

Copyright Office's final recommendation and comments:



Copyright Risk Analysis for SFU Library Digitization Projects

Guidance

Does the work contain confidential information, trade secrets or other information that is protected in some way?

Yes – high risk (do not disseminate)
No or not sure – go to next step

If the material contains trade secrets or is otherwise confidential, it was never intended to be made public or shared beyond the intended recipient. Confidentiality will generally be an automatic “no go” for digitization.

At this point any privacy implications should also be addressed.

Is the work protected by copyright?

No – disseminate
Yes or not sure – go to next step

Does copyright belong, or has it been assigned, to SFU?

Yes – disseminate
No or not sure – go to next step

There is an expectation that intellectual property created with SFU resources will be shared within the University and beyond, for the “greatest possible public benefit.”¹ This would certainly include dissemination through an educational or research-based website.

Is the work licensed in a way that allows dissemination (e.g. Creative Commons, open access)?

Yes – disseminate
No or not sure – go to next step

How much of the work is being copied?

Little or some – disseminate if insubstantial or perform a fair dealing analysis (if substantial and not fair, go to next step)
Much or all – perform a fair dealing analysis (if not fair, go to next step)

Does the work have (actual or potential) commercial value and could dissemination potentially compete with the original work?

Yes – high risk (disseminate only with permission of copyright owner)
No or not sure – go to next step

While “effect on the work” is only one criterion in a fair dealing analysis, potential commercial impact could be a likely impetus for a copyright owner to complain or allege infringement. This makes it a weighty risk factor to consider even if the dealing is otherwise fair.

¹ Simon Fraser University, *Intellectual Property Policy*, R30.03, s 3.3.2.



Copyright Risk Analysis for SFU Library Digitization Projects

Does the copyright owner have a history of copyright defence?

Yes – high risk (disseminate only with permission of copyright owner)

No or not sure – go to next step

If an individual is known for diligently and forcefully defending their copyright, digitizing the work may invite conflict. Even if there is a fair dealing or other reason to be able to disseminate the work, the project team may want to consider contacting the individual in advance.

Does the author or copyright owner have a relationship with SFU or a relevant community or organization that would justify more careful consideration of their works?

Yes – high risk (disseminate only with permission of copyright owner and/or author)

No or not sure – go to next step

An individual's or organization's relationship with SFU may impact the way we treat their works. Depending on the individual or organization and the nature of the relationship, this could mean making considerations from notifying the individual about the digitization so they are not blindsided, to reaching out to a community with information about the nature and purpose of your project, to not digitizing the works without permission or possibly not at all.

Could online dissemination alter the work to the detriment of the author's moral rights?

Yes – high risk (disseminate only with permission of author)

No or not sure – go to next step

Moral rights can pertain to any type of work, but are most often exercised in relation to artistic works, and include the right for the creator to be identified in association with the work, for the work not to be modified in any way, and for the work not to be used in a way that may be detrimental to the creator's reputation.² Many types of works can be reproduced digitally without affecting these rights, but it is possible that the digitization process or online environment could affect the way the work is presented and therefore implicate moral rights in some way.

Are there any other factors which may result in a need for further consideration, a finding of high risk or a need to contact the author and/or copyright owner?

Yes – high risk (perform a fair dealing analysis if applicable, or disseminate only with permission of copyright owner and/or author)

No – disseminate

Are there any other factors relating to the work itself, the author or creator, the copyright owner, the digitization process or the online platform that may indicate a high risk in digitizing this material?

² *Copyright Act*, s 14.1.



Takedown Protocol for Digitized Material Disseminated Under a Risk Management Decision

The University Library digitizes material under six different situations:

1. The material is in the public domain
2. The material is made available under an applicable Creative Commons or similar licence
3. The copyright owner has granted permission
4. SFU owns the copyright in the work
5. The SFU Copyright Office conducted a risk assessment and determined that the material is low risk as defined in the Risk Management Preamble.
6. The material is deteriorating or at risk of deteriorating or becoming damaged or lost, and must be digitized for preservation purposes. [Note that digitization for preservation purposes only – and not public dissemination – is permitted under the terms of the “Libraries, Archives and Museums” exceptions in section 30.1 of the *Copyright Act*. Such material would not be subject to takedown requests.]

Why would the Library be asked to remove material?

The University may be asked to take down material if it was made available under the risk assessment protocol since it would have been made available without the copyright owner’s permission, or if it comes to the attention of the Library that the digitized material is a violation of the relevant protection of privacy legislation or policies.

Who can request that material be removed?

Those who may request material be taken down are the copyright holder; the individual or organization whose personal/confidential information is identifiable in the materials; a member of SFU who believes that information has been disclosed in violation of British Columbia’s protection of privacy legislation.

What is the process?

The website for the project, or the repository homepage, or other obvious space, should have a statement similar to:

“Simon Fraser University wishes to hear from any copyright owner, or their representative, who believes that this project has not properly attributed their work, has used it without authorization or has released confidential information in violation of the BC Freedom of Information and Protection of Privacy Act.”

This would lead the user to a webform for submitting a takedown request. This form would include contact information, identity and URL of allegedly infringing material, and a confirmation that the request is accurate and made in good faith.

How will the Library respond?

Upon receiving a takedown request from a requester, the Library will engage in a conversation with the individual/organization to determine if they truly wish to see the material removed, or if instead they are amenable to leaving their material available online once they learn more about the purpose of the digitization project.



LIBRARY SERVICES
Copyright Office

Takedown Protocol for Digitized Material Disseminated Under a Risk Management Decision

If the requester still wishes to have their material removed, the Library will remove the material and record the takedown.