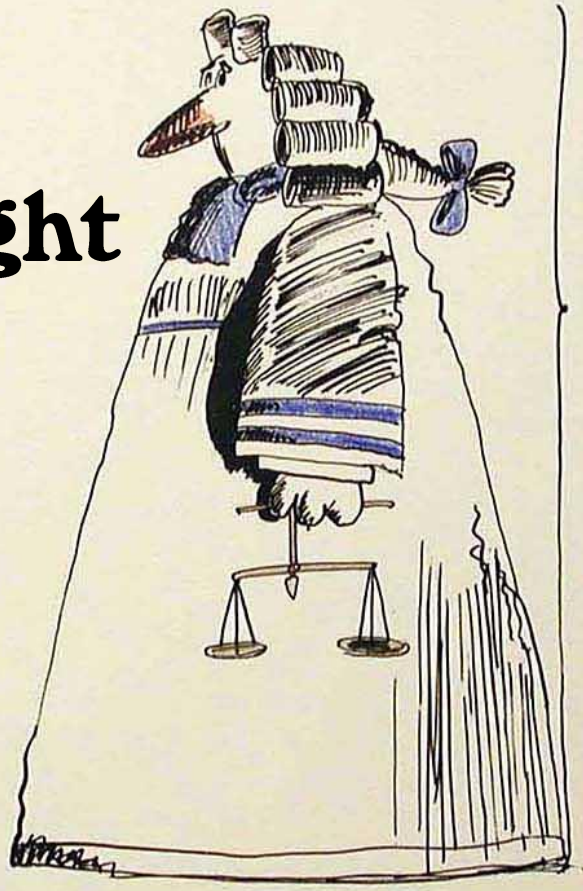
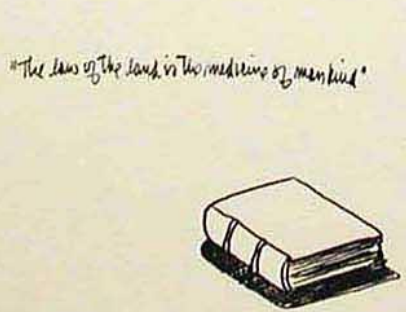
When Copyright and Cultural Collections Converge

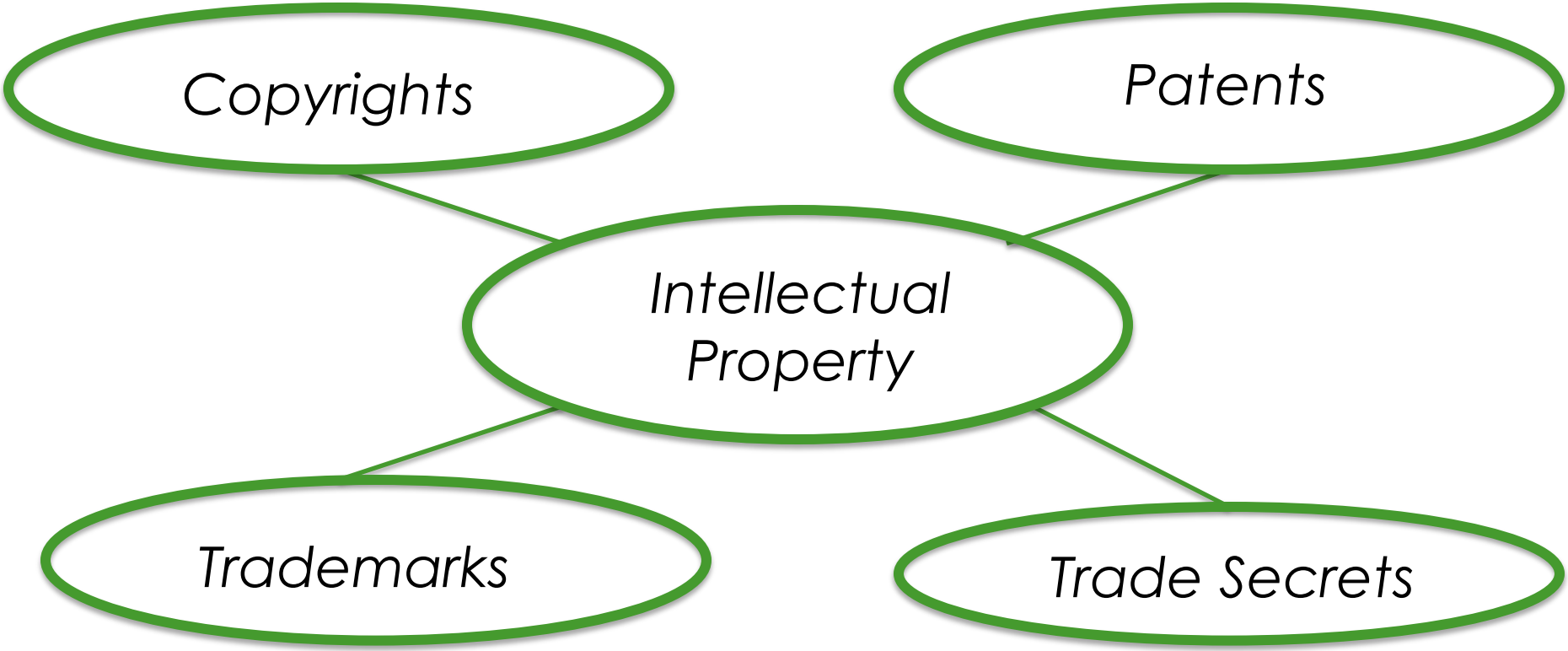




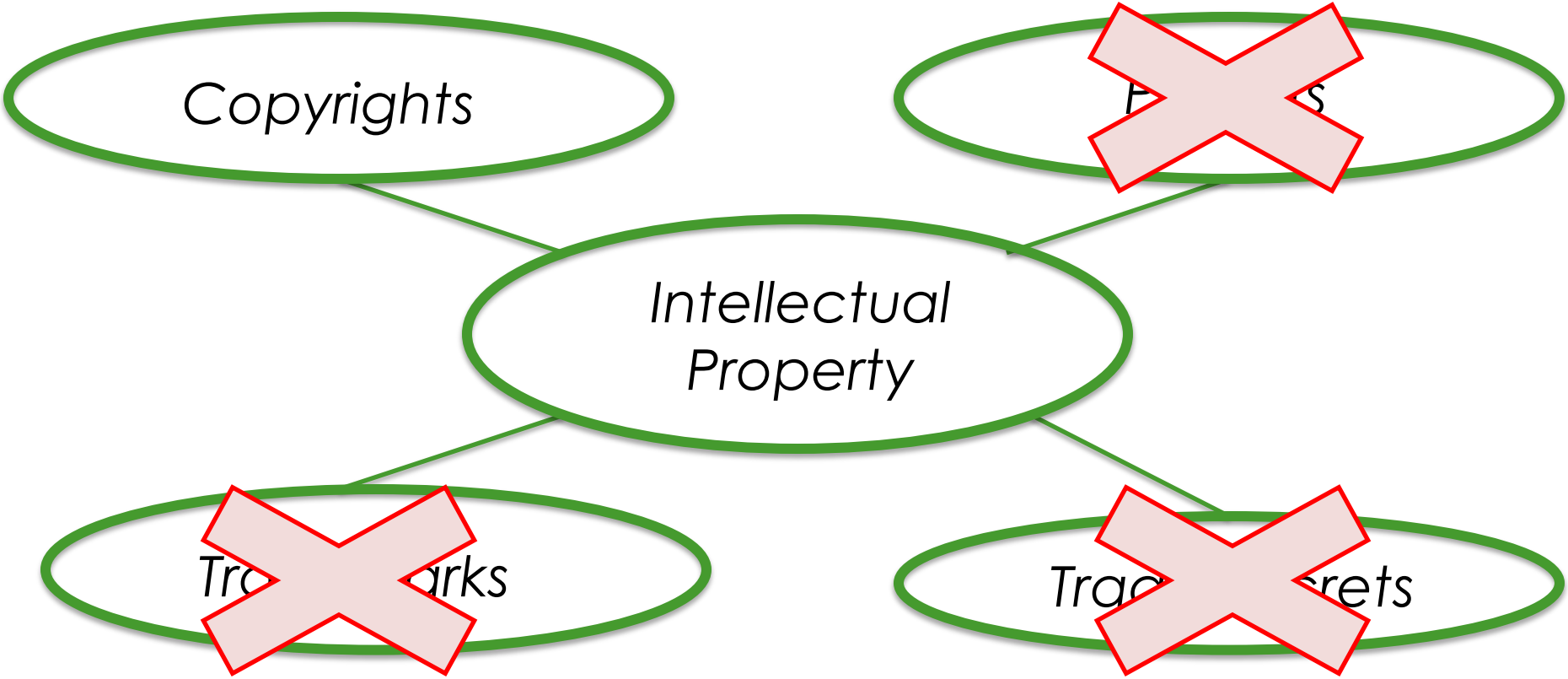
February 27, 2019
2:00–3:30pm (EST)

INTELLECTUAL PROPERTY

Types of Intellectual Property



Types of Intellectual Property



COPYRIGHT

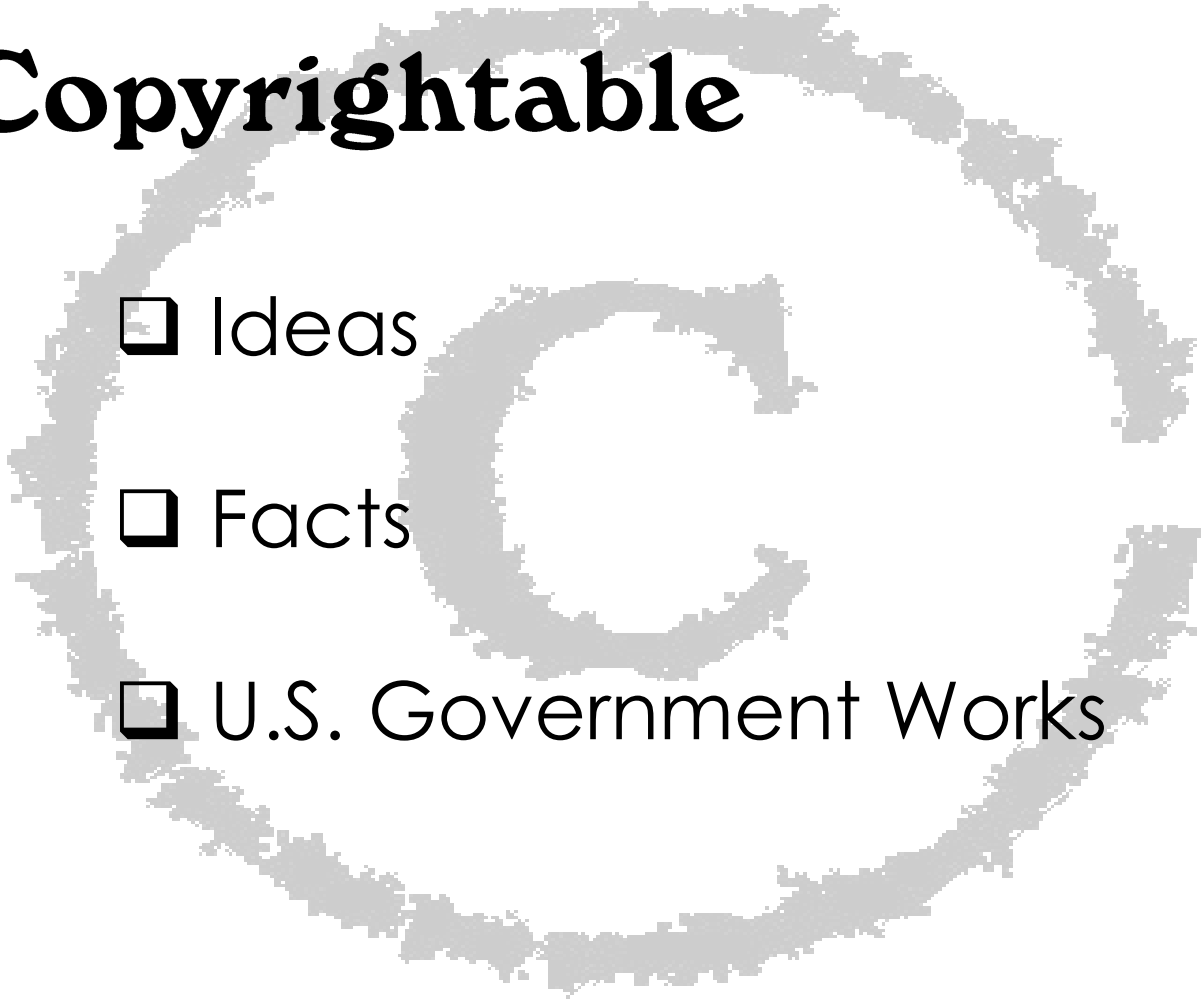
Copyright

"[O]riginal works of authorship fixed in any tangible medium of expression."

Copyrightable

- ❑ Images
- ❑ Photos
- ❑ Drawings
- ❑ Music
- ❑ Video
- ❑ Sound Records
- ❑ Written Content
- ❑ Visual Works of Arts

Not Copyrightable



- Ideas
- Facts
- U.S. Government Works

Copyright begins…

…with original expression

- Registration NOT required (used to be)

- Today it is automatic upon creation

Copyright Gives Exclusive Rights to the Creator to...

1. …allow reproduction (make copies)
2. …allow distribution (sell, rent, lend)
3. …allow public performance
4. …allow public display
5. …allow derivative works (translate, adapt)
6. …the moral/intellectual rights

U.S. Copyright Term Duration

- In the US, the term for many works is a fixed number of years after the date of creation.
- Copyright protection does not last indefinitely.
- Rather, copyright protection expires when a work's copyright term ends.
- When the copyright term ends, the work enters the public domain and may be used by any member of the public without having to seek permission.

U.S. Copyright Term Duration

Works registered or first published in the US:

- Created before 1923…
  - Rule of thumb = public domain

- Created after 1923…
  - Maybe public domain, if never registered, not renewed, published w/out ©, etc.

U.S. Copyright Term Duration

Works never published or registered:

- If never published…
  - works from authors who died prior to 1949
- For unidentifiable authors…
  - works created before 1893.

- Life of the artist + 70 years
  - (or 95 years for corporate authors)

- 120 years from the date of creation applies…
  - When works are anonymous
  - When the death date of the artist is unknown

U.S. Copyright Term Duration

Additional factors considered in the length of the copyright term:

1) Type of work

2) Whether the work has been published (or not)

3) Whether the work was created by an individual or corporation

4) Country of origination

PUBLIC DOMAIN & LAW CHANGES

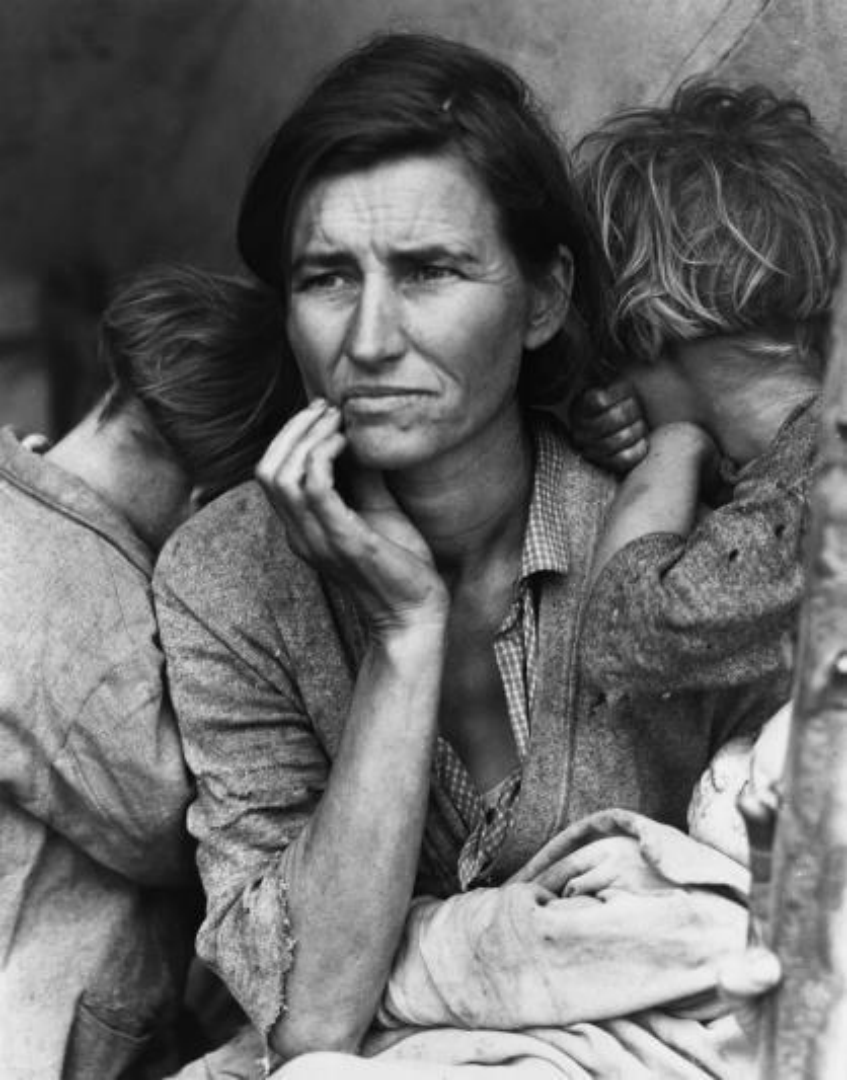
Public Domain

- Works in the public domain include those:
  - not covered by copyright
  - copyright has expired OR been forfeited

- Creator may dedicate to public domain
  - i.e. CC0 Public Domain Dedication

- Public Domain Day

- **ANYONE CAN USE THEM FOR ANYTHING!!**



Government Works = No Copyright & Public Domain

Slavish Copy = No Copyright

Accurate 2D reproductions do not receive a new copyright.

- See: *Bridgeman v. Corel,* 1999

The Sonny Bono Copyright Term Extension Act (1998)

- Increased the copyright term to life plus 70 years and 95 years for corporate authors — was not only granted to future works.
- Retroactively applied to works that were set to enter the public domain.
- ***None of these works entered the public domain until JANUARY 1, 2019!***
- ***Viva La Public Domain!***

The Digital Millennium Copyright Act (1998)

- Also referred to as the DMCA
- Liability exemptions for Internet service providers in cases of user infringement.

ORPHAN WORKS

What is an Orphan Work?

- It is copyrighted work.
- The creator or rights holder is either unknown or is known but can't be located.

What is NOT an Orphan Work?

- Copyrighted works for which rights holders are known but ownership is disputed.
- Works in the public domain.

How Works Become Orphaned

- When the creator or rights holder and the work become separated
- When the creator or rights holder cannot be identified or found
- Creator's use of a n*om de plume*
- Passage of time and lapses in recordkeeping
- Change in corporate ownership

Copyright of Orphan Works

- Copyright status and term of protection remain unchanged.
- Unlike property interests, copyright cannot be lost, mislaid or abandoned.
- A work does not become part of the public domain by virtue of being an orphan.
- Copyright does not vest in another person if the creator is unknown or cannot be found.

Exceptions & Exemptions

First Sale – Display Exception

Public Display

Owner of a copy…

- "… is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."

17 USC §109 (c)

Classroom Use Exemption

Public Performance

- Non-profit, in-classroom teaching (face-to-face)
  - NOT for online courses and distance education teaching
- Performance or display
  - NOT simply handing out copies
- Copies must be legitimately obtained

17 USC §110 (1)

The Technology, Education, and Copyright Harmonization Act (2002)

- Also known as the TEACH Act
- Provided use of copyrighted works by accredited nonprofit educational institutions in distance education

Library Exceptions

Reproductions

- MUST be a "library or archives" to qualify
  - Museums stay tuned to Copyright Office for pending changes to add museums to Section 108 (fingers crossed)

- Must be open to the public and/or available to researched (not affiliated with the library or archive)

- NOTE: many works don't qualify [insert sad face]

17 USC §108

Library Exceptions

Reproductions

- Must not know (or have reason to know) that aggregate distribution of multiple copies

  17 USC §108(g)

- *(Likely)* not liable for patron/guest uses of "…unsupervised…reproducing equipment…" IF "…equipment displays a notice that the making of a copy may be subject to the copyright law…"

  17 USC §108(f)(1)

Library Exceptions

Reproductions

- BUT, libraries are allowed to share copies across libraries, sadly with many restrictions…

  17 USC §108(d) and (e)

- Those restrictions include…allowance of ILL, BUT only where receiving library does not loan "in such aggregate quantities as to substitute for a subscription to or purchase…"

  17 USC §108(g)(2)

Library Exceptions

Reproductions

- May produce copies for preservation, security, or replacement, with many applicable restrictions, notably ONLY UP TO 3 COPIES for these purposes.

17 USC §108(b) and (c)

FAIR USE

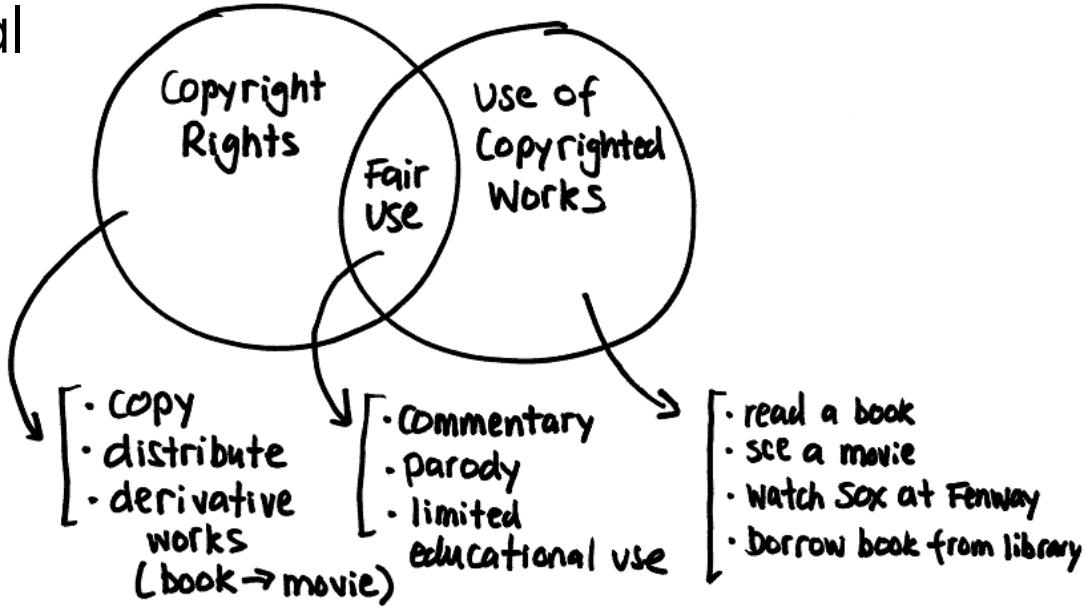
Fair Use

"… the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as *criticism, comment,* news reporting, *teaching (including multiple copies for classroom use), scholarship, or research*, **is not an infringement of copyright**."

17 USC §107

When to Utilize Fair Use

- Scholarship, research and education
- Commentary, criticism and reporting
- Non-commercial



Determining Fair Use (4 Factor Test)

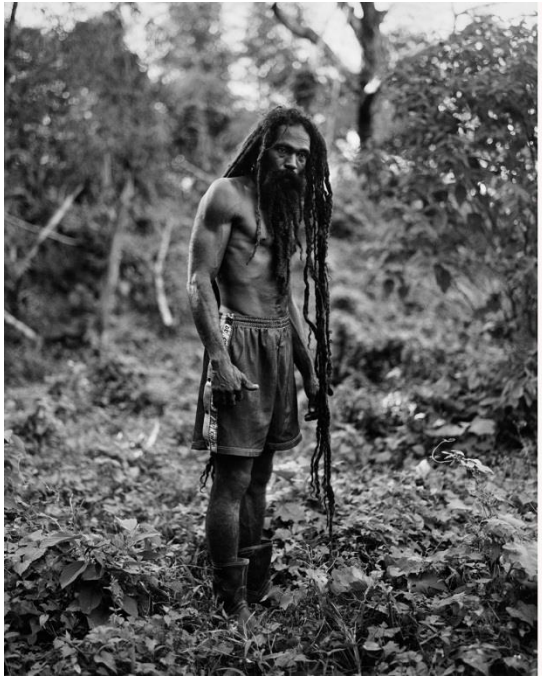
1. Purpose and character of use
2. Original nature of the copyrighted work
3. Amount and substantiality of work used
4. Effect of the use upon the work

Transformative Use

- Doing something new (and valued)
- Using no more than is necessary to achieve that valued use
- *Rogers v. Koons,* 1992

Transformative Use & Appropriation Art

- Liability with display or distribution?
- *Cariou v. Prince*, 2011 and 2013



PRIVACY & PUBLICITY

Right of Privacy

- Protects private individuals against unwanted public exposure, including damage to reputation or personal dignity (e.g., emotional distress or defamation).
- Right of privacy also includes collection and use of personal information.
- In the U.S., privacy rights are governed by a patchwork of federal, state and local laws.

“Right to be left alone.”

Right of Privacy

1) *Unreasonable intrusion on personal solitude*

2) *Public disclosure of true but embarrassing private facts*

3) *False light*

4) *Appropriation of name and likeness*

Right of Publicity

- The right to control the commercial exploitation of elements of personhood including name, likeness, voice, image or other identifying characteristics.
- Rights of publicity in the U.S. are creatures of state law.
- Depending on the state, rights of publicity may survive the person's death.

VARA

Visual Artists Rights Act (VARA)

In addition to and independent of the U.S. Code, VARA grants artist the rights to:

1. claim authorship of his/her work
2. prevent the use of his/her name in the event of distortion, mutilation or other modifications of a work which would be prejudicial to his/her honor or reputation

Visual Artists Rights Act (VARA)

In addition to and independent of the U.S. Code, VARA grants artist the rights to:

3. prevent any intentional distortion, mutilation, or modification of the artists' work
4. prevent any destruction of the work

17 USC §106A

BV: Before VARA (pre-1990)

Owners—NOT artists—had complete control of works,

which meant…

BV: Before VARA (pre-1990)

1989: Richard Serra had NO RECOURSE when *Tilted Arc* was cut into 3 pieces and dismantled

AV: After VARA (post-1990)

Artists—NOT owners—have complete control of works,

which means…

AV: After VARA (post-1990)

2017: *Charging Bull* vs. *Fearless Girl*

- Arturo DiModica claims Kristen Visbal's work changes the intent or message, but does it mutilate his work or hurt his reputation?

QUIZ 1

1) For a work to be copyrightable it has multiple requirements including...

A. Meets originality requirements
B. "Fixed" in a tangible medium
C. Is a source of consumer confusion
D. Subject matter is copyrightable

1) For a work to be copyrightable it has multiple requirements including...

A. **Meets originality requirements**
B. **"Fixed" in a tangible medium**
C. Is a source of consumer confusion
D. **Subject matter is copyrightable**

2) What are the exclusive rights of the copyright owner?

A. Distribute the work in copies to the public
B. Display the work publicly
C. Prepare derivative works
D. Reproduce the work in copies
E. Perform the work publicly
F. All of the above

2) What are the exclusive rights of the copyright owner?

A. Distribute the work in copies to the public
B. Display the work publicly
C. Prepare derivative works
D. Reproduce the work in copies
E. Perform the work publicly
F. All of the above

3) 17 U.S.C. § 107 states: "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright." This is...

A. Rights exception
B. Fair dealing
C. Fair use
D. Rights limitation

3) 17 U.S.C. § 107 states: "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright." This is...

A. Rights exception
B. Fair dealing
C. Fair use
D. Rights limitation

4) Does the U.S. have a statute version of Europe's moral rights laws?

A. No, it does not exist
B. Yes, it's the Visual Artists Rights Act
C. Yes, it's the Artists Moral Rights Act

4) Does the U.S. have a statute version of Europe's moral rights laws?

A. **No, it does not exist**
B. Yes, it's the Visual Artists Rights Act
C. Yes, it's the Artists Moral Rights Act

DETERMINING RIGHTS STATUS

"Due to the many revisions to U.S. copyright law, the rules for calculating COPYRIGHT terms are now based on a maze of specific factors..."

Copyright Term & the Public Domain in the United States

a.k.a. “Hirtle’s Chart”
https://copyright.cornell.edu/publicdomain

Copyright Term and the Public Domain in the United States

(See footnote 1)

Never Published, Never Registered Works[2]

Type of Work	Copyright Term	In the public domain in the U.S. as of 1 January 2019 [3]
Unpublished works	Life of the author + 70 years	Works from authors who died before 1949
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1899
Unpublished works when the death date of the author is not known[4]	120 years from date of creation[5]	Works created before 1899[5]

Works Registered or First Published in the U.S.

Date of Publication[6]	Conditions[7]	Copyright Term [3]
Before 1924	None	None. In the public domain due to copyright expiration
1924 through	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities

General Rules for Broad Determinations

1. *"Assume all works by the creator are unpublished or unregistered."*

General Rules for Broad Determinations

2. *"Works by living creators or creators who died within the past 70 years are under copyright for the life of the creator plus 70 years."*

General Rules for Broad Determinations

3. *"Works by anonymous creators or creators whose death date is unknown, and works made for hire, are under copyright for 120 years from the date of creation."*

General Rules for Broad Determinations

4. "REMEMBER!

There are exceptions such as U.S. government works that DO NOT receive copyright protection."

Research Registration Status & Determine Publication Status

Look particularly for *first* time published.

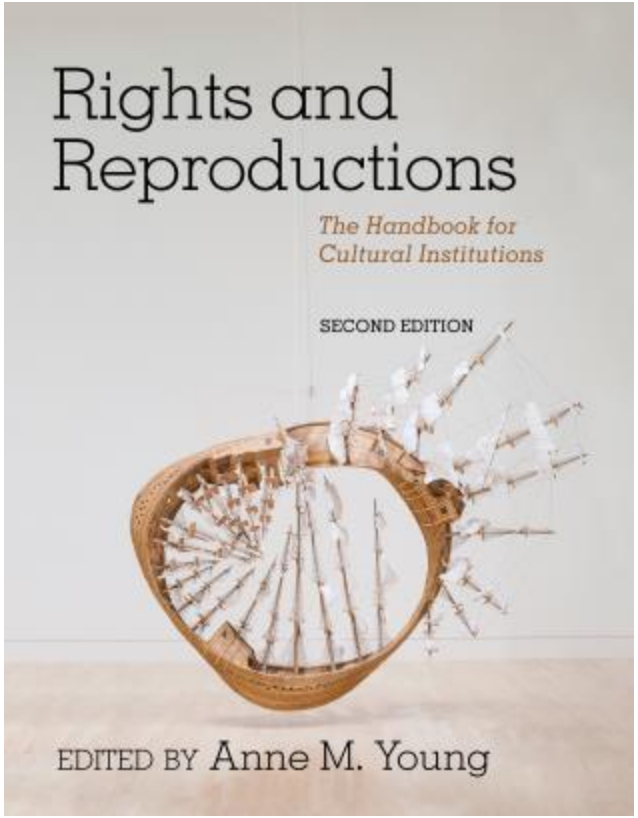
IDENTIFYING RIGHTS HOLDERS

Where to Start?

1. Copyright Notice
2. Background Research
3. Check Institutional Records
4. Check Aggregate Databases

Where to Start?

5. Mine the Web
6. Confer with Colleagues
7. Evaluate Priorities



IP Considerations

- Copyright
- Underlying rights
- Privacy
- Public domain
- Trademarks
- Publicity
- Licensing content
- Fair Use

"Other" Considerations

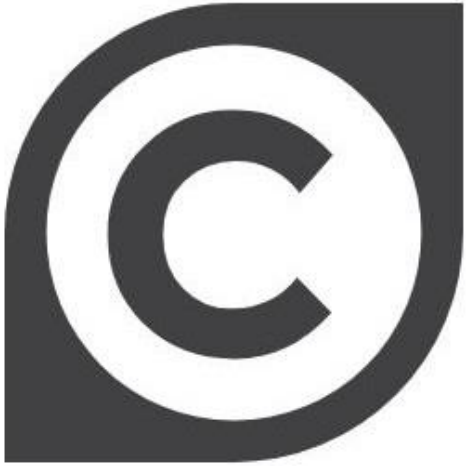
- Indigenous peoples
- Obscenity
- Violence
- Sensitive materials
- Creator restrictions
- Security concerns
- Proper interactions
- Contractual restrictions

RIGHTS STATEMENTS

RightsStatements.org

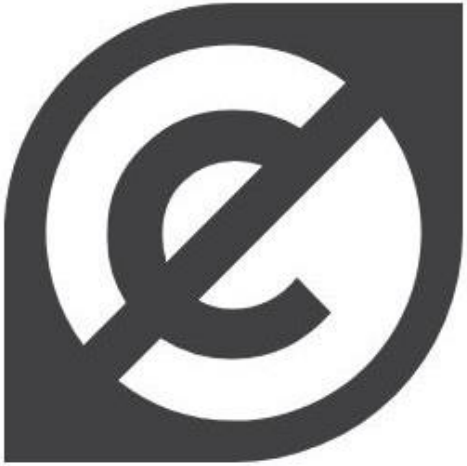
3 Categories
12 Statements

IN COPYRIGHT



Statements for works that are in

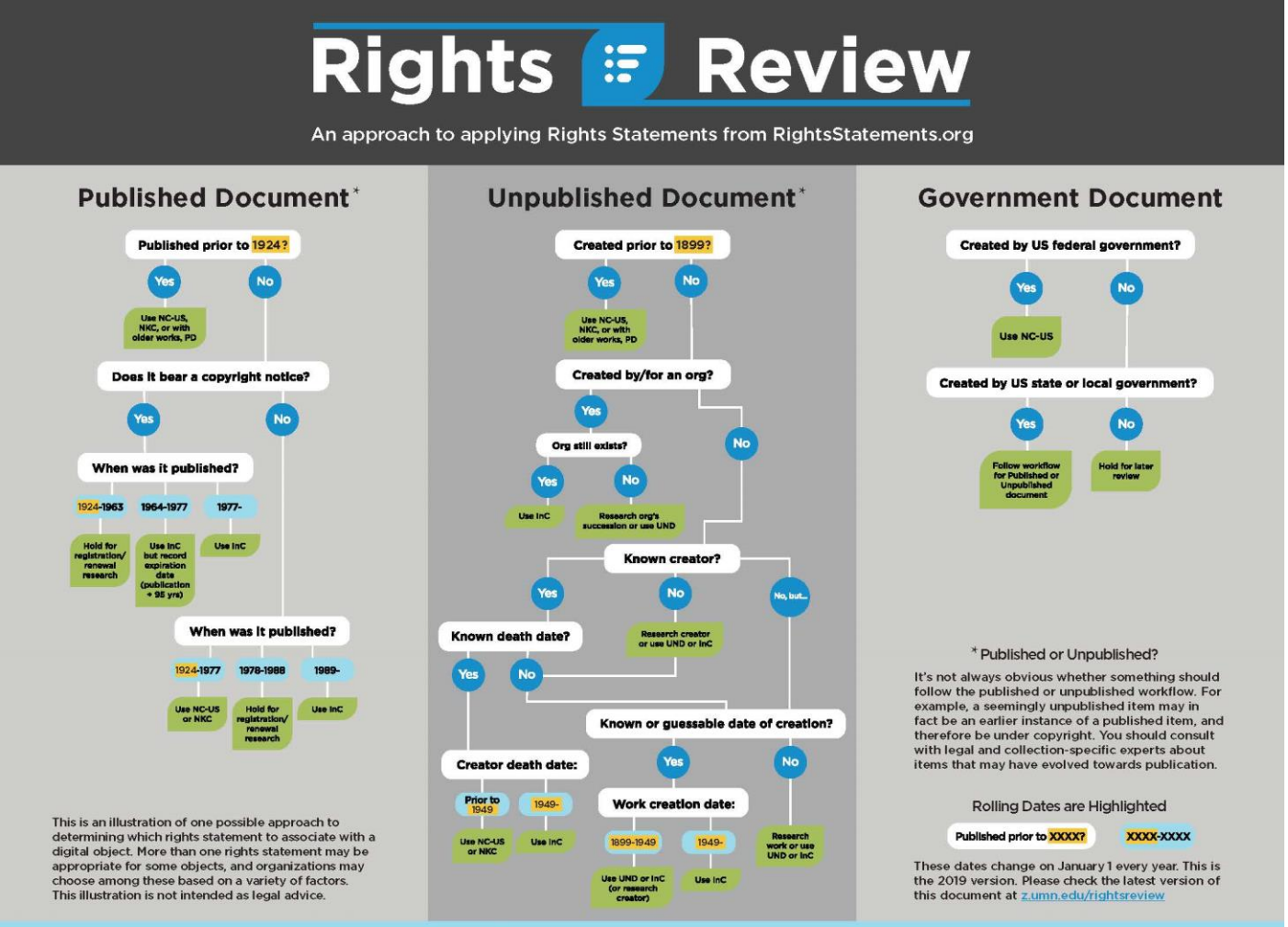
NO COPYRIGHT



Statements for works that are not in

OTHER

Statements for works where the



Minnesota Digital Library / University of Minnesota Libraries
http://hdl.handle.net/11299/201539

Licenses

Non-exclusive Licenses

1. Scholarly research, research partnerships and databases, including image distribution partners.
   ☐ yes ☐ no ☐ with the following conditions*

2. Educational projects, editorial content, on-site visitor wayfinding, press review, and publications, including, but not limited to, books, exhibition catalogues, annual reports, and member magazines.
   ☐ yes ☐ no ☐ with the following conditions*

3. Promotion and advertising related to the Newfields' programs and mission.
   ☐ yes ☐ no ☐ with the following conditions*

4. In any and all media worldwide, whether now known or later developed.
   ☐ yes ☐ no ☐ with the following conditions*

5. Non-commercial photography by the public while on exhibit (use of flash and photo shoots are restricted).
   ☐ yes ☐ no ☐ with the following conditions*

6. Should Newfields acquire additional work(s) after the date of this agreement, the above uses and following Terms of Reproduction shall also extend to and include such work(s).
   ☐ yes ☐ no ☐ with the following conditions*

7. Extension of the permission(s) agreed upon above to institutions borrowing the work(s).
   ☐ yes ☐ no ☐ with the following conditions*

Commission Contracts

REPRODUCTIONS AND PHOTOGRAPHS

Artist retains copyright in the Work. Artist grants Newfields a non-exclusive license and agrees to permit Newfields to photograph the Work and use the resulting photographic materials without restrictions or royalties paid to Artist by Newfields, for archival, promotional, marketing, website, educational, commercial, and such other purposes as Newfields determines in perpetuity. Such photographic materials are the property of Newfields. Artist further agrees to permit guests to Newfields to photograph the Work while on display for their personal noncommercial use. Flash photography, tripods, monopods (including selfie sticks), and other photographic equipment are not permitted inside Newfields' Galleries. Any reproduction or subsequent exhibition of the Work produced as a result of this Agreement will be credited as follows:

_____ [insert Artist name], _____ [*insert Work title*], 20__, Commissioned by the Indianapolis Museum of Art at Newfields, _____. © _____.

THE VISUAL ARTISTS' RIGHTS ACT OF 1990

Pursuant to the Visual Artists Right Act of 1990, Artist hereby specifically waives any and all rights that may be granted under such an act with respect to destruction of the Work and acknowledges understanding that the Work to be produced under this Agreement may, under Newfields' discretion, be dismantled and destroyed after the Exhibition Period unless Artist has received the Work back or can remove Work from the premises by within thirty (30) days of notice from Newfields.

License Elements

Parties

Licensor: person or organization *granting* the rights

Licensee: person or organization *receiving* the rights

Third Parties: other parties with an *ownership interest* in the work

License Elements

License Material

Use available information:

- Identification numbers
- Titles and Dates
- Medium and Dimensions
- Photographer, Artist, etc.

What if there is no identifying information available?

Create it

What if there are several items to license?

Use an Appendix

License Elements

Ownership

- Who owns the Licensed Material?
- What rights do they own?
- Who is responsible for determining ownership?
- If you can't determine ownership, how do you proceed?

License Elements

Rights Granted

- **Exclusive v. Non-Exclusive**
- **Irrevocable v. Revocable**
- **Identify Rights Granted:**
  - Reproduce
  - Create Derivatives
  - Distribute Copies
  - Perform Publicly
  - Display Publicly
- **Specific Limitations or Restrictions:**
  - i.e., Digital or Web Use

License Elements

Use(s)

Known & Unknown Uses:

- Educational
- Commercial
- Non-commercial
- Museum
- Library
- Archive

License Elements

Use(s)

How to Measure Use:

- Single v. Multiple Uses
- Exhibition Use
- Publication Use
- Website Use
- Consumer Products

Territory:

- State Specific
- Regional
- USA
- Worldwide

License Elements

Use(s)

Media/Medium:

- Print Materials
- Photographs
- Digital
- Video
- Sound Recordings
- Web
- Social Media

Languages:

- Single Language
- All Languages
- Translation Rights
- Braille

License Elements

Term

Defined Number of Years

Perpetual / Perpetuity

Other measures:

- Print run
- Multiple editions
- Exhibition duration

License Elements

Credit Line

- Requested by the © holder, usually the author/creator.
- Information to be included, ideally, with all the uses of the work.
- Often a condition of use.

Copyright Notice

- The official notice to be placed on the work indicating the copyright holder and year, if applicable.

License Elements

Fee Exchange

State the fee in the license.

Clarify when additional fees may apply.

No fee? Say so.

License Elements

Warranty & Limit of Liability

Warranty: promise that a fact is true; a further promise to indemnify if fact is proven untrue

Representations: statement of present or past fact that induces one to enter an agreement

Limitation of Liability: outline of risk between the parties

Indemnification: guarantee to pay another party for loss or damage that may occur in the future

License Elements

Signatures

Signature: traditionally a script signature associated with a specific individual indicating acceptance of terms and conditions.

E-Signature: any electronic indication that a person or organization agrees to the contents of the electronic document at hand.

Click to Agree: clicking a button or checking a box to indicate acceptance of certain terms and conditions. Binding effect still uncertain.

CREATIVE COMMONS

Creative Commons

Share—Remix—Reuse

https://creativecommons.org/

A series of standardized prescriptive licenses made available by Creative Commons that a copyright owner may voluntarily attach to works otherwise protected by copyright, giving permission to use the work for certain purposes specified in the license without the need to contact the owner. Creative Commons licenses allow for a range of permitted uses and may impose certain requirements such as attribution (CC BY) and pass-through (CC SA "Share and ShareAlike") as follows:

Creative Commons

Share—Remix—Reuse

https://creativecommons.org/

PDM: public domain mark; "no known copyright"
CC0: waives all rights; places the work in the public domain
CC BY: attribution required
CC BY-ND: attribution required, no derivatives allowed
CC BY-NC-SA: attribution required, noncommercial only, sharealike
(allows derivatives as long as licensed under identical terms)
CC BY-SA: attribution required, sharealike
CC BY-NC: attribution required, noncommercial only
CC BY-NC-ND: attribution required, noncommercial only, no derivatives

UTILIZING FAIR USE

Remember to Assess

- Scholarship, research & education
- Commentary, criticism & reporting
- Non-commercial

DETERMINING FAIR USE

Four factors

- **Purpose** (of the use in question)

- **Nature** (of the source work)

- **Amount & Substantiality** (of the source work)

- **Effect on the potential market** (for the source work)

Orphan

1. INTRODUCTION

Purpose of the Report

"Orphan works" is a term
be identified and located
permission of the copyrig
2008 (H.R. 5889) and the
for infringement if an infr
copyright." This statemen
reasonable efforts to iden
of materials that are likely
obtain rights information

Although the statement fo
usually found in archives,
rights holders for unpubli
published materials.

Acknowledgments

Heather Briston, Mark A
Aprille Cooke McKay, R
statement, which was app

SAA gratefully acknowle
Research and the RLG Pr

STATEMENT O
OF IMAGES I
RESEARCH

Code of Best Practices in Fair Use for the Visual Arts

COLLEGE ART ASSOCIATION

LINES FOR THE
F COPYRIGHTED
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OF ART BY
SEUMS

only and should not be construed as legal
an attorney licensed in your jurisdiction
you are dealing. The content of this
d is designed only to give general
ded to be a comprehensive summary
ubjects covered, provide legal
sed from time to time to reflect new

Maintaining Relationships

NEWFIELDS

A PLACE FOR NATURE & THE ARTS

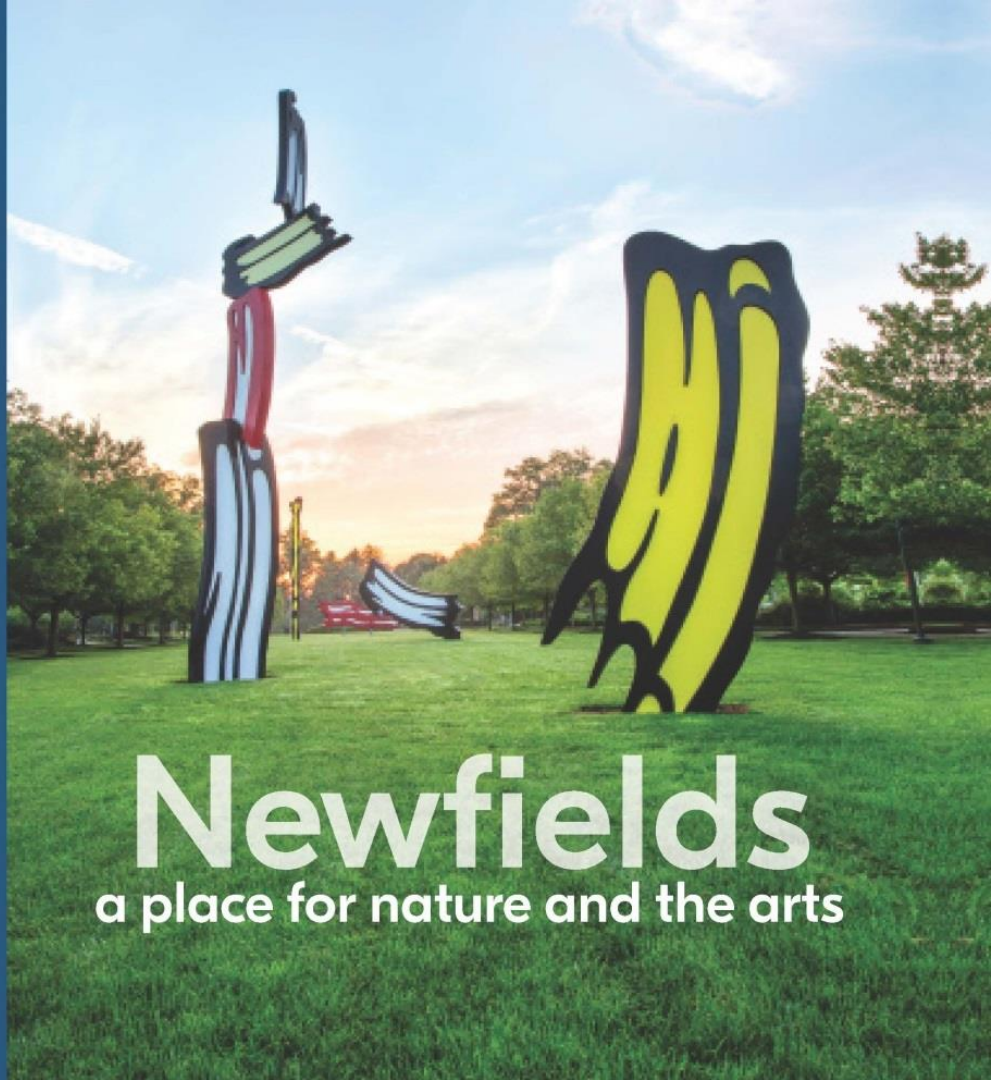
redwoods underplanted with annuals and perennials. Around the fountain are large concrete planters filled from May to October with colorful foliage and flowering plants. Outside the adjacent Café, they are planted with evergreens and twig dogwoods in winter, while a large curved bed in front of the fountain is filled with bright annuals and tropical plants for the summer months.

Running east from the fountain for 300 feet is the Dudley and Mary Louise Sutphin Mall. Indianapolis-based architect Jonathan R. Hess designed the Sutphin Mall as part of the museum's 2004–05 expansion. The Mall is the largest green roof in Indiana, ingeniously concealing a large, underground parking garage beneath it. Another ecological benefit of the Sutphin Mall is its collection of rainwater to feed the wetlands in the Virginia B. Fairbanks Art & Nature Park to the west of the main museum building. However, what the public sees and enjoys is the Sutphin Mall's expansive green lawns, paired rows of red maples, flower beds, and artwork.

In the middle of the Mall stands *Five Brushstrokes*, a monumental work by Roy Lichtenstein. It is considered to be one of Lichtenstein's most ambitious creations and consists of five separate elements, the tallest of which soars 40 feet into the air. The piece was the gift of the museum's Robert L. and Marjorie J. Mann Fund and the Roy Lichtenstein Foundation. The sculpture's installation on the Mall in 2014 was made possible by a gift from Ersal and Izabela Ozdemir.

Newfields

a place for nature and the arts



Copyright Fees

vs.

Image File Fees

3
Artistic Evolution
3
Artistic Evolution
3
Artistic Evolution

"Nevertheless, fair use does not cover all possible uses, and ethical users *must* consider that permissions may be necessary."

QUIZ 2

1) What risk does an institution assume if it uses an orphan work?

A. Licensing invoice
B. Infringement claim
C. Rights holder distraction
D. Copyright protection

1) What risk does an institution assume if it uses an orphan work?

A. Licensing invoice
B. Infringement claim
C. Rights holder distraction
D. Copyright protection

2) Hirtle's Chart includes which categories for determining copyright status?

A. Architectural Works
B. Never Published, Never Registered Works
C. Works Registered or First Published in the U.S.
D. Sound Recordings
E. Works First Published Outside the U.S. by Foreign Nationals or U.S. Citizens Living Abroad
F. All of the above

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3) When reproducing a core work that includes a work depicted there may be additional layer(s) of copyright to clear.
This is referred to as?

A. Under-copyright
B. Layered rights
C. Underlying rights
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4) What are reasons to request one-time permission for a use?

A. Rights holder previously noted a preference to handle each request individually
B. Project has imminent deadline; needs a fast reply
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5) Because of the Visual Artists Rights Act, attribution is a legal requirement when an institution uses a creator's work.

A. True
B. False

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Credits

- Robert Israel, *Lawyer,* 1970. Indianapolis Museum of Art at Newfields, Director's Discretionary Fund, 74.238 © Robert Israel.
- *Fez Pigeon*, 2016, drawing. © Theodore Young, age 5.
- Dorothea Lange, *Destitute pea pickers in California. Mother of seven children. Age thirty-two. Nipomo, California,* 1936. Library of Congress Prints and Photographs Division.
- Drawing by Erik J. Heels. CC-BY-NC-SA
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- Tim Hawkinson, *Mobius Ship,* 2006. Indianapolis Museum of Art at Newfields, Contemporary Art Society Fund, Koch Contemporary Art Purchase Fund, Purchased with funds provided by Michelle and Perry Griffith, 2008.247 © Tim Hawkinson.
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Thank you!

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Anne M. Young
Manager of Rights & Reproductions
ayoung@DiscoverNewfields.org
317.923.1331 ext. 171 | @AYoungRandR