



Copyright and Digital Collections: A Data Driven Roadmap for Rights Statement Success

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Introduction

Standardized rights statements and licenses are a relatively recent development for digital collections and institutional repositories, with Creative Commons licenses debuting in 2001, and RightsStatements.org debuting much more recently in 2015. Using standardized rights statements in digital collections can guide users as to how they can interact with digital items, but determining the correct rights statement is not always straightforward. In 2016, a study of self-perceived librarian copyright knowledge found that librarians had a strong familiarity with copyright's relation to "Creative Commons issues, and copyright's role in digitization."¹ This study also found that librarians turn to articles, websites and colleagues when there is a lack of copyright expertise at hand. However, the study did not have a focus on the practical application of copyright law within a digital library setting, and participants were not queried about knowledge regarding copyright and licensing practices, or any particular tools that librarians turn to in order to determine copyright status. Furthermore, an analysis of rights statements in digital collection metadata from the Illinois service hub participants was at odds with the levels of confidence self-reported in the 2016 copyright knowledge survey, where only 25% of the statements included any information about copyright.²

In 2016, the Digital Public Library of America (DPLA)³ announced that they would soon require the use of standardized rights statements. As a result, many DPLA hub participants have begun implementing the statements in their digital collections metadata or are in the process of preparing to do so, while others, who do not have the resources to begin implementation, are aware of the movement to implement standardized rights statements. This provided an ideal pool of candidates to ask further questions as they had a familiarity with the statements, and were in some state of considering implementation.

The two questions that ultimately guided this research were: What are the challenges that metadata practitioners face when implementing standardized rights statements? And, for institutions that have implemented standardized rights statements, what made them successful? The authors began the investigation to fill in the practical gaps of the previous studies, and to determine if barriers to implementing standardized rights statements was due to a lack of copyright knowledge and/or access to a copyright professional, or if there were resource barriers limiting the ability to begin implementation.

Literature Review

In 2016, a survey was conducted to assess the confidence levels of librarians with respect to knowledge of copyright and fair use, which was a self-reporting of their copyright literacy levels. The study found that 95% of respondents ranked themselves as having "strong familiarity with Digital Institutional Repositories ...and copy-

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right's role in digitization.”⁴ Despite the reportedly high confidence of respondents to Saunders' and Estell's study, many other studies showed that there was a discrepancy between the self-reported knowledge and the practical application of that knowledge. In an assessment of their digital collections, the Penn State Libraries found that a boilerplate statement was often used, and 27 of the 65 collections had no rights statement at all.⁵ This issue was also found in the study at University of Miami, where practices for describing copyright in legacy metadata had evolved over the years, resulting in a myriad of rights statements.⁶

These two studies support the information reported in the whitepaper of the International Rights Statements Working Group for RightsStatements.org, which found that there were over 87,000 individual rights statements in DPLA alone at the time of review.⁷ This highlighted the need for standardization of the language in rights statements, and as a result, 12 rights statements were developed for international use. There are three categories that each of the statements falls into: In Copyright, No Copyright, and Other—which covers undetermined, un-evaluated, and no known copyright statuses. The lack of standardization in statements was an impetus for both DPLA and Europeana⁸ because it “undermines the core mission of these cultural heritage institutions to ‘expand [the] crucial realm of openly available materials, and make those riches more easily discovered and more widely usable and used.’”⁹

As more and more institutions are assessing their digital collections in order to implement standardized rights statements, the need for copyright determination tools has come to the forefront of the conversation around rights statements. One of the most widely used tools is the Copyright Term and Public Domain in the United States chart,¹⁰ originally maintained by Peter Hirtle. The chart breaks down copyright determination into published and unpublished works, and is an easy to read, and endlessly useful tool. Flowcharts, such as the Rights Statement Selection Tool¹¹ and the Rights Review: An Approach to Applying Rights Statements from RightsStatements.org¹² chart were recently developed to guide the user through a series of choices before making a determination for both the copyright status and whether to use one of the statements from RightsStatement.org or a license from Creative Commons.

Methodology

Participants were recruited to participate in this qualitative interview study through an email directed to the DPLA service hub provider listserv members. The recruitment email requested participants to further distribute the call for participation to their DPLA hub member libraries. Participants were informed that the interview would take approximately thirty minutes, be conducted by telephone, and would be recorded for data analysis purposes. Participants were also informed that the purpose of the research was to better understand the workflows and current implementation of the Standardized Rights Statements.

The basic interview questions are attached to this article as Appendix A. The interviews were only semi-structured, to allow for additional appropriate follow up questions to be asked when necessary to identify further relevant data points.

The interviews were transcribed by an hourly graduate assistant and the transcriptions were uploaded into Atlas.ti—a qualitative analysis coding tool. Both researchers then independently coded the interviews using grounded coding principles, and then compared their codes together for inter-coder consistency. Once the codes were de-duplicated and any conflicting codes were resolved, the researchers analyzed the results looking for patterns among the respondents and topics discussed.

Demographics

A total of 19 interviews were conducted with 21 total interviewees (as two interviews had more than one partici-

TABLE 1
Types of institutions
represented in interviews

Institution Type	Total
Academic Library	9
Consortium	3
Public Library	3
Non-Profit	2
Research Library	1
State Library	1

TABLE 2
Number of items in
institutional digital collections

Number of items in collection	Number of institutions
Under 1000	2
1,000–5,000	2
5,001–10,000	5
10,001–20,000	2
20,001–30,000	2
30,001–50,000	1
50,001–100,000	1
100,001–500,000	1
Over 1,000,000	3

TABLE 3
Respondent roles at each
institution

Interviewee Role	Total
Digital Projects Manager	6
Archivist	5
Digital Services Librarian	4
Metadata Librarian	3
Director	2
Other	1

pant). Demographic information was collected from the interview participants, including the size and nature of the library in which the participant works, the role of the participant in the library, as well as the size and type of digital content the participating library collects. The demographic results are indicated in the charts below:

Of the nine academic libraries in **Table 1**, three institutions are large-sized institutions (1 private, 2 public), two are medium-sized institutions (1 public, 1 private), and four are small, private institutions. The size of the institution was determined by the Carnegie Classification of Institutions. The three institutions that identify as a consortium oversee public and academic libraries, as well as historical societies and research libraries. One public library identified as a large metropolitan public library serving a population of more than 800,000, and two public libraries identified as mid-size metropolitan libraries serving populations of between 100,000–200,000.

In addition to the totals in **Table 2**, all libraries indicated that the number of reported digital objects were from a mix of cultural heritage digital collections and institutional repositories holding scholarly materials. Many institutions did not differentiate between the two types of digital content when discussing the totals of digital items in their collections.

Respondents fell into six categories (see **Table 3**) for roles performed at their respective institutions. All respondents identified as a librarian or archivist with varying degrees of title.

Analysis

Copyright Knowledge

In order to accurately assign rights statements to the metadata of digital objects, a proficient knowledge of copyright rules is ideal. For instance, if a librarian assigning rights statements to digital objects did not know that the public domain expanded on January 1, 2019, that librarian might incorrectly assume that works were still in copyright when perhaps they are not. Such mistakes are at first glance innocent and of course free of malice, however, on a large scale these errors misinform library patrons and contribute to copyfraud.¹³ Thus, in designing the evaluative measures for this research project, the investigators chose to incorporate a baseline copyright knowledge question to determine whether the participants understood a basic copyright concept.

To further test these self-assessments, the investigators asked a more specific copyright knowledge question to interview participants. Interview participants were asked: In their understanding, do physical and digital objects have the same copyright status? They were further provided with the example if, for instance, a librarian scans a newspaper article, whether the physical newspaper and the digital object have the same copyright status. This particular question was used because it has a fairly standard, uncontroversial answer. Relying on case law, the answer should be “yes” because the digital object is just a slavish rendition of the original object—in other words, the copy lacks originality and therefore does not obtain its own copyright status.¹⁴ Furthermore, the ex-

ample of a newspaper was used in this instance to delineate between three dimensional and two dimensional objects, where there may be some debate as to the “correct” answer to this question.¹⁵

Although the sample size was small for the interviews, the specific question and answer allowed for a more nuanced view into the copyright knowledge of the participants. In the interviews, 4 of the 21 participants incorrectly stated that the copyright status of the two objects were distinct. Some qualified their answer by noting that although the digital copy created a new copyright, the library would not assert copyright over the digital object. Other participants noted that although they had previously believed this to be true (that the digital object had a new copyright status), through continuing education learned that this was not the case. Yet others, even when they answered correctly seemed to second guess their response and seek clarification or assurance from the interviewers. Although only 4 participants were incorrect about this baseline copyright understanding, this particular copyright principle is fairly crucial when assigning rights statements because if a library asserts a “digital copyright” over an otherwise slavish copy, copyfraud results.

Copyright Uncertainty

The interviews yielded a relatively high incidence of copyright uncertainty and the need for clarification in a few key areas detailed below in descending order from most to least frequently mentioned by interviewees:

- Orphan Works (4)
- Deed of Gift Legacy Issues (3)
- Other Legal Issues, such as Privacy (3)
- Layers of Copyright (2)
- Publication Status of the Work (1)
- International Copyright (1)

Orphan Works (4)

Four participants mentioned the challenge of addressing orphan works in rights metadata. It is not surprising that those implementing the rights statement would struggle with handling orphan works as even the US Copyright Office has been endeavoring to address the challenges of managing such works. Similarly, legislation has been proposed (although not adopted) in the Senate to address such issues. Guidance (similar to that provided by the EU) regarding how to adequately document a diligent search for the copyright owner of the work and the failure of such efforts would be a step towards meeting the challenge of digitizing orphan works.

Deed of Gift (3)

Three participants mentioned issues with older collections and problematic or lacking deeds of gift. Either the deed of gift could not be located, or there was none, or the language in the deed of gift was problematic in that it did not clearly indicate a transfer of copyright. One library had a novel solution to this problem in its current deed of gift language wherein it not only asked for a copyright transfer but for the permission to digitize the accompanying work. And, where the copyright was not transferred to the library, the form asked whether the digital work could be made available for only non-commercial uses, any kind of re-use, or no re-use except with express permission of the copyright owner.

Other Legal Issues (3)

Three participants mentioned that they struggle not only with copyright, but with other legal issues when determining how to apply rights statements to digital works. One issue to consider is whether the work should be

widely disseminated due to privacy concerns. Other legal issues also include federal statutes protecting student health and information or university policies (especially relating to legacy collections of archival materials from campus). One interview participant noted that there are issues with ownership of microfilm relating to the organization that sold the library the microfilm asserting ownership over the copyright.

Layers of Copyright (2)

A given work can involve layers of copyright. For instance, in a published court case, the United States postal service asked for permission from the creator of a photograph of a famous sculpture to put the sculpture on US postal stamps.¹⁶ What the postal service failed to do, however, was to obtain permission to feature the sculpture on the stamps from the author of the sculpture itself. In that way, the Postal Service violated copyright by failing to recognize that there were multiple layers of copyright involved (i.e. the author of the photograph as well as the author of the sculpture).¹⁷ At least two interview participants noted that they, too, struggle with layers of copyright when determining how to apply rights statements to digital works.

Publication Status (1)

One interview participant mentioned that they struggled with determining whether a work would be considered published or unpublished for copyright purposes. It is often difficult to determine whether a given work would be considered published under the Copyright Act, especially before the 1976 Act when the term “published” was defined by case-law.¹⁸ Even after 1976, with a definition of the term established, a given work “may be an earlier instance of a published work” and require further investigation.¹⁹

International Copyright (1)

The Society of American Archivists lists 1835 as the likely date for works to have entered the public domain internationally, as the longest known copyright is that of Mexico dating 100 years from the death of the author.²⁰ If the author is assumed to have lived about 80 years, then subtracting 180 from 2015 (which is likely when this was calculated) yields the year 1835. Given that the year is now 2019, at least one librarian interviewed wonders whether this date should be recalculated to 1839.

Risk Assessment

A large part of digitizing collections is assessing risk associated with making the collections available to the wider public. However, despite the fact that risk assessment is necessarily part of the process, the way that libraries and museums assess risk is often undisclosed. As such, the investigators sought to discover how librarians working with digitization define the term “risk assessment” to better understand how individuals making decisions about digital collections assess risk.

All of the participants viewed risk assessment principally through the lens of copyright law. In other words, they mentioned that they assess risk primarily by thinking about whether there would be a copyright owner who would object to the digital distribution of their work without express permission to do so. Another common theme addressed by participants was the level of comfort the organization had with being sued or taken to court for digitizing copyrighted materials without permission to do so. Most organizations were comfortable with low risk in that regard.

Participants also frequently mentioned that they mitigate against these risks in a variety of ways, including:

- **Low Risk Collections:** public domain materials, collections for which they have permission to digitize, very old collections where the risk of receiving a copyright notice is low

- Takedown Policies: participants mentioned that they would readily take down collections where a copyright holder emerged with a complaint about the collection to avoid litigation
- Due Diligence: participants mentioned that they would use copyright checklists, fair use checklists, and attempts to locate or contact copyright holders (or demonstrate that the work is an orphan work) in good faith

Most participants mentioned the fact that they prioritize low risk collections when digitizing works. However, a few participants were bold. One librarian stated that their organization had a “pretty high” comfort level with “releasing ...things and letting people use them.” Another stated that although they “might not know the copyright status or who the holders are” for a given collection, they might put it “online anyway because of research value in putting it out there.”

Access to Copyright Professionals

Due to the numerous complicated copyright issues that arise in implementing rights statements for digital collections, access to a copyright professional, either an attorney or a copyright librarian, is a crucial resource for librarians. However, out of the nineteen institutions participating in the interviews, only two had access to a full time staff member whose job included copyright specialization, such as a copyright librarian or copyright advisor. A further four had access to a member of the general counsel team of the institution, for high level copyright issues, while an additional two had access to an attorney or copyright librarian on an as needed or hourly basis. On the whole, this indicates that strong copyright education is necessary for those engaging in copyright metadata analysis because most frequently they must understand copyright and handle these issues independently. Similarly, a working group available to answer complicated questions on an as needed basis would also be a helpful tool.

Implementation Challenges

Libraries, archives, museums, and other cultural heritage institutions increasingly understand the benefit of using standardized rights statements (e.g., consistent language, correct legal terminology, linked data capabilities), but in spite of the desire to implement standardized rights statements, there are barriers that complicate or altogether hinder this process. Certainly, there are the intangible issues of time and staffing that can make implementation difficult, but there are also more practical aspects of implementing rights metadata that can be challenging. These include legacy issues with both the content management system—used for displaying digital content—and, old metadata that may have been added when different, or non-existent, best practices were in place. Another issue that was discussed was the concern of buy-in from local administration, without which moving forward with implementation was unattainable.

Interview participants described their content management systems (CMS)—CONTENTdm, Luna, Omeka, and DSpace—as a significant hindrance to implementation. One of the issues noted is the lack of uniform resource identifier (URI) support in the various systems. Both RightsStatements.org and Creative Commons rely on the use of URIs to link to the full language associated with each rights statement²¹ or license,²² respectively, and without URI support, digital collection creators are left to piece together workarounds that do not align with best practices.

Batch editing content in some systems was another limiting factor for implementation. Some systems (CONTENTdm) have built in batch editing tools, which is useful for homogeneous collections where the copyright status is the same for all items, or when consistent language was used for previous descriptions of copyright. However, variation in language can make the built-in batch editing tools nearly useless. One participant’s meth-

od for overcoming this challenge was to batch edit outside of the CMS by importing metadata into OpenRefine²³ where they could group legacy rights statements that had similar but inconsistent rights language describing the same rights status. After grouping like-statuses, the rights statuses could be updated with the URI and the label for the standardized rights statement. However, if a CMS does not allow batch importing of metadata, the alternative may be tedious metadata editing for each individual digital object.

The issue of inconsistent language was often attributed to practices no longer in use, while the absence of any rights statement was often attributed to having incomplete archival intake paperwork that didn't address rights and licensing. Many participants described their frustrations with these situations, and two declared that the ability to go back in time to adjust these practices and paperwork would be especially helpful to their current practice. While the authors are not able to provide any insight on time travel, these desires do point to the benefit of using standardized rights statements for the sake of future metadata practitioners and collection developers. By using consistent, standardized language, batch editing metadata is an attainable goal.

As previously mentioned, buy-in was described as a key component for moving forward, both at the administrative level and amongst collection owners. One respondent said that they didn't feel that they had the clout on campus to engage with the administration to consider methods that would facilitate better practices for rights management and standardization implementation. Another respondent said that their legal department were a substantial barrier to local buy-in.

Structural and Institutional Challenges

When speaking to interview participants, 47% stated that the biggest challenge is copyright determination for materials intended to be made available online, 26% said that getting permissions from copyright holders is a significant issue, and only a small number (16%) of participants said that time is a major barrier to implementation. Others cited local buy-in—both from administrators and collection owners—as a major obstacle, as well as staffing, while one respondent stated that they had no challenges in implementing standardized rights statements.

Staffing and Time

Seven interview participants mentioned that their biggest challenge with implementing rights statements is having the necessary staff and/or the time to do a thorough investigation into the copyright status of digitized works, especially with legacy collections where the deed of gift may not be clear. More specifically, one participant wished there were a single person tasked with curating the online digital projects to make the statements more uniform, as opposed to projects completed by individuals who are only focused on a given collection.

A lack of time and staffing may also result in the use of boilerplate language. One participant said that all of the items in their digital collections used to include a statement that declared, “Images are provided for personal and educational use only...and any use beyond that is up to the discretion of the user.” But they went on to further say that this type of statement was not helpful to the users as it essentially said “here's some stuff and we don't know anything about it or what you can do with it.” This library would then get calls from users who wanted to know how they could use an image, ultimately still involving staff time to research the copyright status and uses associated with a digital object. After implementing standardized rights statements, the library saw a drop in these calls as users had clear information about both the copyright status and use permissions.

One interviewee described their lack of implementation as being a user experience concern, and that the added value of utilizing standardized rights statements did not outweigh the time it would take to change their current rights statement. They further explained that the current rights statement declared that the copyright

holder was unknown, which the librarian said was not always true. After analyzing the standardized rights statements the organization determined that the length of the statements was prohibitive to their using them because “it just would look bad on the screen to users.”

Legal Staffing

While only two interviewed institutions had access to a full time copyright professional on staff, one institution had a very interesting approach to copyright questions. They had resources to an hourly fund for an ask-a-lawyer service to consult with about complicated questions that arose in the library. The responses by the attorney were then filed for future use in an FAQ queue so that the library need not pay the attorney an additional fee if a similar question came up in the future. This seemed to be working fairly well for that particular institution and may serve as a model to institutions with funding available to put towards the management of legal issues (this library had allocated \$4,500 for this service and was intending to add more in the upcoming fiscal year), but not enough to hire a copyright librarian, for instance.

A Roadmap for Success

Workflows

The authors gathered many examples for successful copyright determination and standardized rights statements application workflows. The most efficient and successful workflows involved archival intake paperwork that addressed copyright and licensing, which relieved much of the problems that other institutions grappled with, particularly a lack of information to make accurate copyright determinations. One participant said that as part of the agreement that donors sign, language about digitization is included in order to remove the need to contact donors at a later date to secure permissions to digitize. Another participant said that they wished that they could go back in time to make clearer gift agreements, which would make their current work much easier. A third participant said that in their first two years in their position, their institution did not have any donor agreements, but they have since added donor agreements, which have evolved over time, and now include a section about rights and permissions. They went on to say that they are in the process of untangling the previous iterations, but that having the rights and permissions clearly outlined in the donor agreement has helped immensely.

Other workflows that were particularly successful relied heavily on the use of tools as a means of copyright determination. There were several publicly accessible tools that were mentioned multiple times—and will be outlined below—while others were homegrown tools that were developed for local needs and practices. One of the benefits of utilizing the tools, is that it leads to more informed decision-making, regardless of the institution’s access to a copyright professional.

Tools

When asked about workflows, the interview participants universally cited tools and educational training that assisted them with making rights determinations for digital collections. Although these tools are each helpful, they are not a panacea. Many participants mentioned the need for face-to-face training, as well as the desire for a document detailing case examples of how to best apply the rights statements in both common and more complex scenarios.

By far, the most mentioned tool (mentioned by nine participants) was Peter Hirtle’s Copyright Term and the Public Domain chart. It is unsurprising that this chart was mentioned so frequently, as it is a useful, highly accurate, visually clear chart for determining the legal rules applicable to a given time period in the US.

The Society of American Archivists Guide to Implementing Rights Statements from RightsStatements.org and the PA Digital Rights Statement Selection Tool designed by Gabriel Galson were mentioned by three participants each as being helpful when applying rights metadata. One organization involved in the arts mentioned the Code of Best Practices and Fair Use for the Visual Arts by the College Art Association. Finally, one organization has developed its own tool in the form of a spreadsheet for making rights determinations.

None of the participants mentioned the new flowchart released by the Minnesota Digital Library, but it is likely due to the fact that it was brand new at the time the interviews took place. Yet, individuals looking to incorporate tools into their workflow for digital rights statements should also review “Rights Review: An Approach to Applying Rights Statements from RightsStatements.org.”

One tool that could be particularly useful to individuals struggling with the application of rights statements, as noted by an interview participant, is a case study document describing a particular challenging rights statement case as well as proposed solutions to the challenge.

Conclusion

This research demonstrates that while there are some best practices for implementing rights statements, there is not a one-size-fits-all approach. With each institution comes a myriad of possible workflows and tools that fit that institutions needs and staffing situations. It is important, for instance, to be current with appropriate rights statements by flagging collections and works that may enter the public domain in the near future, and to update the rights statements at that time. And, while many individuals are working hard to update rights statements, legacy issues remain a challenge. Adding to this challenge is individuals that are struggling to understand complex copyright issues when applying standardized rights statements, most of whom could benefit from greater access to copyright professionals.

However, for institutions that have implemented standardized rights statements successfully, some key areas of success include intake workflows that incorporate more specific information about the right to digitize the material, as well as the manner in which the material can be distributed. Similarly, the use of tools to aid in decision making regarding complex copyright determinations can be helpful to those implementing standardized rights statements.

Currently, many helpful tools are available to aid in the success of those wishing to begin implementing standardized rights statements. As more institutions aim for implementation, a greater variety of tools and checklists will likely be developed and shared among the metadata community. And, the challenge of providing accurate rights information to users of digital collections will be met by thoughtful curators with the support of communities of practice.

Appendix A

1. Can you tell us about the institution that you work for and what your role is there? (R1? We will remove specifics, how large is it?)
2. What kind of digital collections do you work with? (e.g., size, type of collection [IR vs. CHO—cultural heritage objects], how many)
 - a. Do you currently use standardized rights statements or Creative Commons licenses in your digital collections?
 - b. If no, is there anything preventing you from implementing Standardized Rights Statements or Creative Commons Licenses? If so, what?
 - c. What would you need to begin implementation?
3. Who makes copyright decisions for the digital collections?
4. How do you make rights determinations at your institution?
5. Can you describe the workflow for this process?
6. Do you have access to a copyright professional in this process?
7. What do you think are ideal components to a rights statement? What is important to include in a rights statement?
8. How much of a priority is accuracy in the rights field? What would assist in making it a more significant priority?
9. What do you understand risk assessment to mean regarding digital collections?
10. What kind of risk assessment, if any, do you engage in when determining whether to put collections online?
11. In your understanding of copyright, do physical and digital objects have the same copyright status?
12. What is the biggest copyright challenge you face when developing digital collections?
13. What is the biggest copyright challenge you face when adding rights information to digital collections?

Endnotes

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