

Laurence Gavin. Impact of Copyright Law on the Photographic Reproduction Services of On-line Photographic Images in Academic Research Library Special Collections Research Centers. A Master's Paper for the M.S. in L.S. degree. August, 2006. 75 pages. Advisor: Dr. Helen R. Tibbo

This study details a web based survey of special collections research centers within academic research libraries. The survey was conducted to determine whether or not copyright law has had an impact on the participants' photographic reproduction services policy of on-line photographic images. As new technology provides improved access to special collections, broadening their community of researchers, adhering to copyright law is a major issue for universities. Establishing a consistent photographic reproduction policy among institutions as special collections research centers place easily downloadable, published and unpublished digital photographic images, on-line is necessary in order to protect the rights of copyright holders. The responses on the survey were analyzed using descriptive analysis. Additionally, a review of special collections websites was performed to reveal trends in photographic reproduction policies and various levels of accessibility to on-line digital photographic images.

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IMPACT OF COPYRIGHT LAW ON THE PHOTOGRAPHIC REPRODUCTION  
SERVICES OF ON-LINE PHOTOGRAPHIC IMAGES IN ACADEMIC RESEARCH  
LIBRARY SPECIAL COLLECTIONS RESEARCH CENTERS

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## Introduction

“The alternative to democratically made, forward-looking policy is chaos, domination by individuals and groups, and status quo.”

Herbert McNee Hamlin

Digital technology and the inherent change associated with it are reshaping many aspects of the archival profession. Technologies such as the World Wide Web are redefining the value of records, born and re-born digital, by providing new means of preservation and expanded access. As special collections research centers and university archives create and make available prodigious collections of on-line digital images, the need for archivists to understand the legal issues related to copyright law becomes equally great. As the World Wide Web flourishes, increasing access to information Maher states that “ the broader interest of the public in copying and disseminating information, the highly capable machinery for copying and transmitting information, and the expanded coverage of copyright law have made it absolutely essential that even the most junior of twenty-first century archivists be familiar with copyright issues”(Maher).

What are Special Collections Research Centers doing to protect the rights of copyright holders? Despite a certain amount of trepidation when it comes to issues relating to copyright law and placing photographic images online there is continuing professional discussion in the archival community. Questions asked on list-serves often begin with, “I’m confused.” and answers frequently start with, “I’m no lawyer, but....” Dialogue alone is not enough to apply the law consistently across different institutions with special

collections. Another aspect fueling the lack of confidence on the part of the archivist in the application of copyright law may lie in the difficulty to understand it, Litman states; “copyright rules are complicated and hard to understand [...] the only way to know what the rules say is to commit a two-hundred-some page statute to memory.” (Litman 29). But memorizing the law is only the first step toward the successful application of it; the next is to be able to interpret it correctly in the context of each set of circumstances.

Are the on-line photographic images on special collections websites there legally? The law as written in §108 (b) and §108 (c)(2) of the *United States Code*, respectively speaks about unpublished and published material reproduced in digital format for the purpose of preservation and states it is not to be, “made available to the public in that format outside the premises of the library or archives in lawful possession of such copy”(Office).

Abiding by the letter of the law would indicate that any photographic images put on the World Wide Web by Special Collections Research Centers when that institution does not hold copyright or have permission would constitute infringement. But others parts of the law, from sections such as §107 which address fair-use limitations of those rights, can also be applied and need to be considered when making determinations of what is or is not an infringement of copyright. Once a special collections research center provides access to photographic images via the web or at the premises, §108(a)(3) requires a notice of copyright. Maher observes that “it is important for archivists to understand the differences among the several subsections within Section 108 and the extent to which some are more appropriate for libraries and published material than for archives and unpublished materials”(Maher). Notification of copyright has traditionally been applied by libraries and archives when copying analog material at the physical library; this would

be in accordance with the restriction of digitized material in the wording of sections 108(b) and 108(c)(2). Online notification is another example of how archivists are attempting to comply with copyright law, even when the letter of the law does not specifically address new technology.

Changing technology and confusion due to a lack of understanding of the law illustrate that preservation and access of photographic images by digitization is a complex and challenging process that involves, “ policy questions, institutional roles and relationships, legal issues, and intellectual property rights ...”(Barata 66). In 1962, Herbert Hamlin, acting as a consultant to the North Carolina Department of Instruction at North Carolina State University recognized the necessity of self-analysis as the first step in policy making, stating that, “we look at ourselves... by collecting and codifying existing policy...”(Hamlin). A more current organization concurs, the Association of College and University Policy Administrators (ACUPA), presents the identification of issues in the predevelopment stage of their model: Policy Development Process, With Best Practices, stating, “The more you are able to identify issues that will affect your institution, the less time will be spent in emergency mode”(ACUPA).

As new technology provides improved access to special collections, broadening their community of researchers, adhering to copyright law is a major issue for universities. Establishing a consistent photographic reproduction policy among institutions as special collections research centers place easily downloadable, published and unpublished digital photographic images on-line is necessary in order to protect the rights of copyright holders. This study details a web based survey of special collections research centers within academic research libraries. The survey was conducted to determine whether or

not the participants' are breaking copyright law, and if so, what efforts are being made to notify the public to mitigate copyright infringement through their online photographic reproduction policies.

A review of Title 17 of the *United States Code*, current literature and case law reveal the difficulties involved with balancing the law, technology, preservation and access. Additionally, an analysis of 25 special collections websites was performed to reveal trends in online photographic reproduction policies and various levels of accessibility to on-line digital photographic images. The member libraries of the Association of Research Libraries were chosen as the study population because this organization represents a nation-wide group of libraries posting digital photographic collections on the internet.

## **Operational Definitions**

**Association of Research Libraries, (ARL)** – “is a not-for-profit membership organization comprising the libraries of North American research institutions and operates as a forum for the exchange of ideas and as an agent for collective action. Membership in the Association of Research Libraries necessarily is limited to research institutions sharing common goals, interests, and needs. Single institutions, not systems, form the membership base. Membership in the Association is by invitation upon the recommendation of the Board of Directors and approval of the membership. Candidates for membership must meet the qualifications established by vote of the membership” (ALA).

**Copyright law** is understood to be all of Title 17 of the *United States Code*, including all amendments enacted through the end of the second session of the 107<sup>th</sup> Congress in 2002. It includes the Copyright Act of 1976 and all subsequent amendments to copyright law; the Semiconductor Chip Protection Act of 1984, as amended; and the Vessel Hull Design Protection Act, as amended. (Office). More specifically, this study will examine §107, Limitations on exclusive rights; Fair use, and §108, Limitations on exclusive rights: Reproduction by libraries and archives, and §109, Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord, otherwise known as the “First Sale Doctrine.”

**Copyright owner** – As stated in Title 17 § 101, Definitions - “with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right”(Office). Chapters 2 and 3 of the *United States Code* respectively address the “Copyright ownership and transfer” and “Duration of copyright” listed in Appendixes A and B. For the purpose of this study copyright ownership encompasses all photographic images within the special collections research center that are in public domain, are included in a transfer of copyright by an authorized donor or copyright holder, or have been created by a government institution a state university.

**Photograph** – a picture made with a camera (Dict.)

The term “photograph” also included in Title 17 §101, Definitions - “Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans...”(Office).

**Photographic reproduction policy** - a written policy or statement separate from a photocopying policy; it does not have to be comprehensive, but must specifically relate to the reproduction of analog and digital images held in the collections.

**Reproduce** – 1. produce a copy or representation. 2. recreate in a different medium or context(Dict.).

**Reproduction** as stated in Title 17, § 101, Definitions - “Copies are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.”(Office).

**Special Collections Research Center** - A library, or an administrative unit (such as a department) of a larger library, devoted to collecting, organizing, preserving, and describing special collections materials and making them accessible. Also referred to as “the institution”(ACRL).

## Literature Review

### Copyright Law

Copyright began in America with Article 1, Section 8 of the United States Constitution granting Congress the power to: “Promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” In *Federalist* No 1., Publius, Madison, offers his endorsement by writing; “The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The public good fully coincides [ . . . ] with the claims of individuals” (Madison, Hamilton and Jay 268). The Copyright Act of 1790 codified this power by granting American authors the right to print, re-print, or publish their work for a period of fourteen years and to renew for another fourteen. Establishing a temporary monopoly was a means to motivate authors, artists, and scientists to create original works, stimulating creativity and “the advancement of ‘science and the useful arts’ through wide public access to works in the ‘public domain.” (ARL "Timeline: A History of Copyright in the United States"). Also limited, was the foresight of the Second Congress in writing the legislation to add language or make provisions to accommodate the very science and art it hoped to promote. Litman observes that “Copyright laws become obsolete when technology renders the assumptions on which they were based outmoded” and that this “has happened with increasing frequency since Congress enacted the first copyright law in 1790” (Litman 22).

The 1976 Copyright Act changed the scope of copyrightable material from solely published works to include unpublished works; entitling everything fixed in “tangible form” to the protection of copyright law.

In addition to the change in scope, the language of the 1976 Code also changed to encompass future technology. Section 102(a) of the Code states, “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”(OFFICE).

In §101 of the Copyright Act of 1976 a work is “fixed” when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration and when the work is being made simultaneously with its transmission”(Office). Legislative history supports the notion that digital images on-line constitute a public display. If the images are copyrighted by someone other than the individual or institution producing the online display, then this display constitutes infringement. The Ninth Circuit court of appeals determined in *Kelly v. Arriba*:

allowing subscribers to view copyrighted works on their computer monitors while online was a display. . . The legislative history goes on to state that " `display' would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." This language indicates that showing Kelly's images on a computer-screen would constitute a display.

(Cv-99-00560-Glt)

Photographs, both digital and analog, are included in sub subsection §102(a)(5), “pictorial, graphic, and sculptured works,” of the list of categories provided in §102(a)(1)-(8). The definitions stated in the law and the legislative history have sparked a debate about whether or not the law will be able to function as a protection of copyright in the digital age. The debate over the effectiveness of copyright is approached from many viewpoints. Laura Gasaway observes that “Many internet proponents have expressed that copyright law simply will fade away in the digital environment because it will be unnecessary or obsolete . . .” Providing insight from the opposing side, she notes that many “copyright owners disagree with this position,” taking “the view that the internet simply provides new ways of reproducing and plagiarizing copyrighted works... “ She further explains that many “users of copyrighted works who rely on fair use also disagree that copyright will disappear in the digital environment”(L. N. Gasaway 1998) Maxwell argues, “ the necessity of copyright has evolved around several issues, including the concept of authors’ natural rights, the balance between author’s rights and the public domain, and the economic impact of copyright on the protection of information industries and the diffusion of knowledge through society”(Maxwell). In order to put these many viewpoints into perspective it is important to note the means by which copyright law has been enacted after 1790. Littman states, “About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of the appropriate legislation”(Litman 23).

The use of the term “industries” in both arguments made by Maxwell and Litman illustrate how the debate about copyright is no longer about its effectiveness to “promote

the progress of science and useful arts”(Office). The measure of success of copyright law has morphed from providing incentive to authors, artists and scientists to how well it provides industries such as publishers, music producers and movie makers a means to protect the rights they have purchased from the creators against infringement. The effect of industries on copyright law is evident throughout Title 17 of the United States Code and subsequent amendments. Maher notes that, “one need only look at the rather unlikely inclusion of protection for boat hull design as Title V of the 1998 Digital Millennium Copyright Act (DMCA) or the inclusion of provisions for small restaurants and bars to play music in the 1998 Sonny Bono Copyright Term Extension Act” (Maher 66). Also evident are the influences other industries such as education and libraries have established within copyright law.

**First Sale Doctrine:**

§ 109 of the United States Code  
 Limitation on exclusive rights  
 Effect of transfer of particular copy or phonorecord

I have often heard the question asked, “How are libraries allowed to lend books?” The law that codifies this entitlement is called the first sale doctrine, “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord” (Office 109(a)). The law encompasses establishments such as record stores, book stores, libraries and video rental stores and is also the reason why it is legal to sell your old books at a yard sale.

Current literature on the first sale doctrine indicates that Congress has been slowly wearing away at portions of the exemption beginning in 1984. Litman asserts, “one trend in the piecemeal repeal of the so-called first sale doctrine [is illustrated] by Congress [yielding] to the entreaties of the recording industry to limit the first sale doctrine as it applied to record, cassette tapes and compact discs in 1984 and enacted an amendment that made commercial record rental (but not loan or resale) illegal”(Litman 82). Both Dames and Litman concur that “if copyright owners can impose conditions on the act of gaining access, and back those conditions up with technological devices or legal prohibitions or both then copyright owners can license access to and use of their works on a continuing basis”(Litman 82). Dames states, “In the end, license agreements can and often do – substantially alter the balance of rights and defenses available under contract (and copyright law)”. He then issues a warning, “information professionals should recognize that the first sale doctrine is often hampered by the terms and conditions found in many license agreements”(Dames "Copyright Clearances: First Sale's Slow Fade" 36). License agreements, although a possible alternative to serve the needs of copyright owners to protect against infringement and ensure proper remuneration for use in the private sector are in conflict with the goals of special collections centers and “the underlying premise of archival work [to]... make accessible the information and evidence of the past for the benefit of as broad a community of users as possible”(Greene 150). Gasaway confirms this responsibility stating, “Copyright law in the United States developed in order to balance the rights of the creators of copyrighted works and the users of those works [ . . . ] Paying even nominal amounts for access to information that

currently is available free in public libraries all over the world is the antithesis of this balance mandated in the U.S. Constitution”(L. N. Gasaway 1003).

### **Libraries and Archives**

#### § 108 – Limitations on exclusive rights Reproductions by libraries and archives

This section is evidence of the influence that libraries and archives have had on the development of copyright law in relation to reproduction of materials for the purpose of preservation and providing access. However, for special collections centers placing digital images online, this section is more aptly approached from the viewpoint of what cannot be done. Dames states that, “as generous as Section 108 is, it is not a ticket to an unlimited buffet of content”(Dames 34). Section 108 was codified in the 1976: Revision of the U.S. Copyright Act, providing libraries and archives with a legal means of photocopying for preservation purposes as long as they meet certain conditions:

Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in the subsections (b) and (c) or to distribute such copy or phonorecord under the conditions specified by this section if -

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (a)
- (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field: and (a)
- (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provision of this section(a)
- (4) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions... (g)

Copyright of 1976 § 108

Subsections (b) and (c) address specific rights for the reproduction of unpublished and published works respectively and states that creating reproductions in digital format for the purpose of preservation (b), or migration due to obsolescence (c)(2), “is permissible,” it also puts the limitation on the exemption that it is “permissible as long as any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy” §108(c)(2).

The language here seems to recognize the changing nature of technology, but while allowing digitization with one hand, it snatches away the potential of technology to provide broad access with the other. Although section 108 allows for the copying of material for the purposes of preservation, scholarship, and research, Oakley contends that “the intention of the section was to limit reproduction to analog copies of the work, rather than any digital or machine-readable form”(Oakley). It becomes clearer what types of materials are excluded from reproduction and distribution in subsection (i), which states:

The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with the news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

Copyright of 1976 § 108

Sections (d) and (e) respectively relate to copying for private use of either a portion of a larger work or of the entire work.

Although special collections centers can and often do hold materials such as rare books and manuscripts which might be well served by the statutes of Section 108, the restriction that pictorial works, which includes photographs, cannot be disseminated in

digital format beyond the physical premises of the institution puts a stranglehold on providing access. Dames asserts that “If the document being transferred from the librarian is any one of the protected class of works outlined above, Section 108 cannot be used and you must figure out if your copying or redistribution can be allowed under another limitation, such as fair-use in Section 107”(Dames 34). Fortunately, Section 108 also provide a means for special collections librarians and archivists to reconcile the dilemma of being “a profession explicitly committed to intellectual freedom and the freedom of access to information”(ALA "Code of Ethics"), and still “respect the limited monopoly rights that the original authors/creators have in the documentary material we hold as we assist researchers in using historical records”(Maher 65). Section 108(f)(4) states:

Nothing in this section- in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

#### § 107 Limitations on exclusive rights: **Fair use**

Section 107 of the *United States Code* was codified in the 1976: Revision of the U.S. Copyright Act and the use of it by special collections librarians and archivists is controversial at best. In his report on *Copyright and Preservation—Limitations on Rights*, Oakley presents the arguments of both publishers and libraries stating that the “publishing community asserts that Section 108 sets out the libraries’ rights, and therefore creates a cap on library copying” and continues by stating that the “library community, relying on Section 108(f), understands that it has been given certain rights under 108, but also believes that Section 107 may be applicable in certain cases”(Oakley). Despite the controversy, the archival community is exploiting the

ambiguities in the law by using precedent as a guide to placing photographic images online. “In determining whether the use made of a work in any particular case is fair use the factors that should be considered shall include:

- 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- 2) The nature of the copyrighted work
- 3) The amount of substantiality of the portion used in relation to the copyrighted work as a whole
- 4) The effect of the use upon the potential market for a value of the copyrighted work”

Copyright of 1976 § 107

Stanton explains that the doctrine of fair use “is not to be applied rigidly (which might “stifle the very creativity which that law is designed to foster”) but case-by-case, applying the four factors together as ‘guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.’”(Stanton).

The enigmatic nature of the above mentioned factors leaves them open to interpretation. A court will weigh all factors but not necessarily find all four in favor of either the plaintiff or defendant. In the case of *Kelly v. Arriba Soft Corporation*, Judge Thomas G. Nelson states in his decision:

Having considered the four fair use factors and found that two weigh in favor of Arriba, one is neutral, and one weighs slightly in favor of Kelly, we conclude that Arriba's use of Kelly's images as thumbnails in its search engine is a fair use.  
(Cv-99-00560-Glt)

Most librarians, archivists, and other information professionals wish copyright law was straight forward but as Schockmel states, “The language within section 107 was crafted in an ambiguous fashion; it does not attempt to define the boundaries of what is legitimate fair use. Determination of fair use is to be made on a case by case basis, with an examination of the particular circumstances of each use”(Schockmel). To add to the

controversy surrounding the ambiguity of the language incorporated into the §107 of the U.S. Copyright Act of 1976 “fair-use guidelines have emerged in different settings to facilitate the application of the law in the context of education and librarianship”(Rivera-Morales). In an effort to apply the law to technology Buttler states, “The Conference on Fair-Use (CONFU) represents one such effort to determine guidelines for digital works [ . . . ] CONFU ultimately proposed three sets of fair-use guidelines, first released in 1997, covering digital images, multimedia, and synchronous distance learning”(Buttler 1308). A strong opponent of these guidelines, Kenneth Frazier, argued that the “CONFU guidelines would impose a peculiarly narrow interpretation of fair-use in copyright law at a time of rapid transition from print media to digital information” and called for “educators and scholars to oppose the formal institutional adoption of the proposed fair use guidelines that have emerged from the Conference on Fair Use” (Frazier 1320). Conversely, Mary Levering, in her capacity as Associate Register for National Copyright program of the U.S. Copyright Office asserted that, “scholars, educators and students who follow the criteria out lined in mutually accepted educational fair-use guidelines...” “can be assured a ‘safe harbor’ in which users are acting within the spirit of copyright principles and are not in violation of the law”(Levering 1313). She went on to say that “guidelines were “not the law” nor were they statutes, but rather, “just practical advise in specific instances”(Levering 1317). In an effort to make the use of guidelines less controversial, these statements undermine the purpose of the guidelines. After all, if the guideline or policy carries no weight or benefit with the intended community of users then there was not much point in establishing them.

How archivists in academic research libraries are complying with the law in regard to digital images may vary depending on the institution. Reliance on the interpretation of the law in similar circumstances allows special collections librarians and archivists to gauge the steps necessary to comply with the law. One example of this is the use of low resolution thumbnails commonly used by special collections websites, the transformative nature of which, have been determined in *Kelly v. Arriba Corporation* to not be esthetic, but functional and thus considered fair use because; “Anyone who downloaded the thumbnails would not be successful selling the full-sized images because of the low-resolution of the thumbnails. There would be no way to view, create, or sell a clear, full-sized image”(Cv-99-00560-Glt). But however ambiguous the language in certain aspects, it can be just as clear in others. It is important to note that each of these subsections: 108(a)(3), 108(d)(2), 108(e)(2), 108(f)(1), 108(h)(2)(C), states notice of copyright is required for the circumstances of copying and distribution outside the premises of the library they address. However, in addition to the thumbnail images on most special collections websites that provide access to digital images are larger images of better quality that can be downloaded and possibly used for commercial purposes. Gasaway asserts, “It is [ . . . ] difficult to argue fair use for databases of images that incorporate high-resolution digitized images which themselves may be displayed directly from the database, printed and perhaps even reused in subsequent works such as multimedia or printed publications. Some institutions are proceeding with projects to digitize their slide collections, however, and will not restrict the use. They have simply determined that the risk of being sued for copyright infringement is low”(L. Gasaway 1996). As evidence of the low risk of copyright infringement cases being brought against

institutions, an argument has been raised about the possible immunity of state colleges and universities; “The eleventh amendment to the United States Constitution provides that no state may be held liable in legal proceedings in federal court [ . . . ] meanwhile, copyright infringement cases are required to be filed only in federal courts” (Crews and Harper). Citing: *Chavez v. Arte Publico Press 1998*, Crews and Harper explain “ a sequence of legal developments resulted in rulings that the state agencies had constitutional protection”, this decision was upheld on appeal in 2000(93.2881), but also recommended “not celebrating yet” as § 511(a) states:

“Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 – 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.”

(“Copyright Remedy Clarification Act”)

Copyright law in the United States, in spite of its’ subjectivity to the interests and influences of industry in a democratic society far beyond what the framers of the constitution could have envisioned is a viable tool “to achieve an appropriate balance between copyright owners and users”(Besek). The debate over how best to serve the needs of all I am sure will continue. However, the current debates on every level of the law and the subjectivity of its’ interpretation in varying circumstances underscore the importance for archivists to establish a valued policy to comply with copyright law and control the “chaos” that is inherent on the internet.

## **Methodology**

### **Data Collection**

This study involved two primary data collection stages: a web content analysis and a web based survey, in order to explore if the online photographic reproduction policies of special collections websites comply with copyright law. The first stage sought to determine several aspects about the collections as represented on Special Collections websites. The content analysis was then followed up with the second stage, a web based survey. The scope of this research is limited to institutions within the United States.

### **Significance of Population**

The population of the Association of Research Libraries (ARL) was chosen because the member libraries represent research libraries in North America. Its mission; "to shape and influence forces affecting the future of research libraries in the process of scholarly communication"(ARL "Association of Research Libraries Statement on Qualifications") is in juxtaposition with the purpose of this study. Thereby, examining a sample of member libraries within the ARL and how they are complying with copyright law in regard to their online photographic images will prompt further study in determining the necessity to develop a consistent on-line photographic reproduction policy.

### **Stage One – Web Analysis**

#### **Sample Frame of Web Analysis**

The first stage in the research was to perform a content analysis of 25 academic research library websites using the protocol listed in (Appendix D). This study focused on individual member libraries within the United States, eliminating one consortium, and twelve libraries located in Canada for a total population of 110 of the 123 ARL member

libraries. The number of the sample size represents approximately 22% of the population of 110 member libraries of the Association of Research Libraries from which they were randomly selected.

### **Web Analysis Objective**

The intention of the website content analysis was to examine what actions special collections research centers are making online to protect copyrighted digital photographic images in their online collections. The assumption here is that the copyright of many of the digital images in these online collections is not held by the special collections department putting them on the World Wide Web. I began with several questions in mind. The first; Does the special collections research center have an on-line photographic reproduction service? Second; are digitized photographic images being placed on special collections websites when copyright law specifically states that copyrighted material may be reproduced in a digital medium, but may not be displayed outside the premises of the library in possession of them? Third; can the images on the special collections website be downloaded?

### **Web Analysis Protocol**

The content analysis protocol developed as the analysis of the special collections websites progressed. As the different aspects of the special collections websites became more apparent, the list of protocol questions grew to eighteen. Some of these questions lead to specific information and answers but others lead to more questions. Thus, the web content analysis acted as a tool to determine what questions needed to be clarified by repeating them or following them up in the survey. Whenever a new aspect of a website such as an online publication policy or price-list was discovered, it resulted in a new

question and a re-examination of each previously analyzed website to ensure this aspect was not missed.

The first thing I looked at on each Special Collections website was whether or not it stated having an analog or digital photographic collection and the extent of the collections. Knowing the number of analog photographic images held by a special collections department is necessary in order to put into perspective the numbers of digitized photographic images in the collection and then how many of those have been put online. In looking for the existence of analog and digital photographic collections on each site I determined that some Special Collections Research Centers do not administratively include the University Archive. In fact, in one case I learned the Special Collections department did not have a photographic collection at all, but included rare books and manuscripts. In two other cases there was no Special Collections department or University Archive but departments that handled analog and digital photographic images exclusively. Although there are different administrative hierarchies managing photographic collections within an institution, they all still meet the requirements of the operational definition of a Special Collection department. This information established the need for these questions relating to administrative hierarchy to be asked again in the survey to eliminate ambiguities that could not be clarified by looking at the websites.

After determining the administrative aspect of a collection, I sought to determine if the department has an on-line photographic reproduction policy and what parts of the policy are directly related to copyright law. Title 17 §108(f)(2) states that a notice must be placed on photocopying equipment within the department. Therefore, the action of placing a statement on-line bolsters the theory that if the department managing the digital

on-line photographic collection is applying the law meant for physical libraries to the internet then some awareness of the law must exist and the placement of the statement is an attempt to mitigate the possibility of an infringement suit. For instance, if a department has a stated on-line policy that the patron is responsible for determining the copyright of the images on-line, this statement establishes that the department has some knowledge of copyright law. The assumption that statements such as this refer directly to on-line images is determined by where they are placed on the website, such as directly under each on-line image or on the title page of each collection, as opposed to being on the Special Collections homepage. Only those statements that referred directly to the on-line images were recorded for this research. Other steps such as offering an on-line copyright link or tutorial located on the Special Collections website can also be construed as a type of notification to mitigate the institution's culpability.

One limitation of this analysis is that it is difficult to determine certain aspects of many of the collections such as: which departments have analog and digital photographic collections, what percentage of those images have been digitized and put on-line and finally, for how many of the on-line images the institution own copyright. However, despite this, the website analysis proved to be an effective means to determine what efforts are being made to protect copyright such as: notification, photographic reproduction policy, and the level of access to on-line images.

## **Stage Two - Survey**

### **Sample Frame of Survey**

In order to remain consistent with restricting the population to individual institutions within the United States I eliminated one consortium and 12 member libraries of the ARL not located in the United States. I then searched the websites of the remaining population of 110 ARL member libraries for the e-mail addresses of the University Archivist, Special Collections Department Head or other titles responsible for analog or digital photographic collections. Because no list-serve was used, wherever the e-mail address was indeterminable; that institution was eliminated from the population. E-mail addresses were indeterminable when there was no directory of personnel listed on either the Special Collections website or in the Institution website. If I was able to locate a name by some other means on the website, but no e-mail address, I performed a Google search of the name to find an e-mail address; this search was only successful part of the time. The end result of establishing a mailing list in this manner resulted in a survey sample frame of 95 member libraries representing approximately 86% of the remaining individual 110 member libraries of the Association of Research Libraries located in the United States.

### **Survey Objective**

The survey (Appendix F) consisted of 21 questions developed from the varying aspects of collections found on Special Collections websites. Wherever the content analysis left ambiguities the question was asked again on the survey. The questions sought to determine more definitively the administrating department of the on-line photographic images, more accurate numbers of analog, digital and on-line digital

photographic images in collections, and collect information on internal policies relating to reproduction requests, training, and whether or not infringement lawsuits are a prevalent motivation in protecting the rights of copyright holders.

While awaiting Institutional Review Board (IRB) approval of the request for participation cover letter (Appendix C) and the survey (Appendix F) a mailing list of the 95 e-mail addresses in the sample frame was entered in a World Wide Web survey tool called "SurveyMonkey.com". The recipients of the survey request were notified that all survey responses were anonymous, that their participation was completely voluntary, and that they could skip any questions for any reason. Upon receiving IRB approval the request for participation cover letter was sent to the sample frame of 95 ARL member libraries via e-mail, with a link to the survey. After one week, I received 9 responses, these respondents were removed from the mailing list and the request for participation cover letter was sent a second time. After another week, I received another 13 responses, these respondents were then removed from the mailing list and the request for participation cover letter with the link to the survey was sent a third time. After waiting another week I received another 10 responses at which time I closed the survey. During the three week period the survey was open I received a total of 32 responses, representing approximately 33% of the 95 ARL member library sample frame. When each collection stage was completed the resulting data was entered into separate data-set files in SPSS 14.0 for storage and to perform descriptive analysis using frequencies.

## Results

### Web Analysis

In determining the varying aspects of Special Collections Research Center websites, the first that becomes apparent is the organizational structure of the Institution such as, a Special Collections department that administratively includes the University Archive. One problem created by combining these departments is the different collecting goals of these two entities. Although photographic images are one area where the genre collected may overlap, the goals of the collecting policies differ in that Special Collections seeks to collect material that will support the research of the Institution while the University Archive seeks to collect records of evidentiary value to the Institution. This distinction is important to recognize because it can directly effect how much is known about the copyright status of the photographic images in the collections. For example, a major course of study at an institution could be veterinary medicine; the Special Collections department might seek a collection of material including photographs of animal experiments in research, a broad topic that would support the study of veterinary medicine. The University Archive would collect material, including photographs, that have been created by and provide a history of the Institution, thereby having an increased possibility of knowing the copyright status of the material in the collection. Determining how an Institution collects and manages it's analog, digital and on-line photographic images offers incite to the different types of research libraries within the ARL and is the first step in illustrating the difficulty of creating a consistent policy to protect against copyright infringement.

The results illustrated in (Table 1) answer the first three questions of the web analysis and show the varying types of administrative units that include in Special Collections departments within the member libraries of the ARL that “share a commitment to providing the materials needed for serious study and research”(ALA). Within the sample frame, 15 (60%) of the Special Collections departments administratively encompass the University Archive. The two institutions with alternate names had neither a Special Collections department nor a University Archive. These two institutions were public libraries with large collections of on-line photographic images, further complicating the issue of creating a consistent policy relating to copyright law and on-line photographic images. Of the 25 websites analyzed, 24 (96%) have on-line photographic images, demonstrating not only the popularity of digitization for improved access but the necessity to protect against copyright infringement.

Table 1

N = 25	Special Collections Includes University Archive	Alternate name For Photographic Print Department	Website Has On-line Photographic Images
Yes	15	2	24
No	10	23	1
Total	25	25	25

The next step in the web content analysis was to determine if the Special Collections websites contained a formal on-line photographic reproduction policy. This is a linked page to the Special Collections website containing a written policy or statement separate from a photocopying policy; it does not have to be comprehensive, but must specifically relate to the reproduction of analog and digital images held in the collections.

Table 2 outlines the varying levels of photographic reproduction policy of the Special Collections websites. Question (A) shows that 10 (40%) have formal on-line photographic reproduction policies. Questions B – F show the most common statements on the websites whether there was a formal policy or not. The online publication policy in Question C of Table 2 refers to a statement of notification that the reproduction of photographic images on the website for publication is prohibited and that permission from the department must be received. In order to understand these results and make observations it is necessary to break them down further.

Table 2

Does the Special Collections Research Center have a(n) --

N = 25	Yes	No
A. Formal on-line photographic reproduction policy?	10	15
B. On-line statement that patron is responsible for determining copyright?	13	12
C. On-line copyright notification statement?	14	11
D. On-line notification of the library's right to refuse a photographic reproduction request?	12	13
E. On-line photographic reproduction price list?	12	13
F. Price list includes separate charges for commercial use	13	12

Table 3 below, shows that of the 10 websites with formal on-line photographic reproduction policy, only 2 include all the most commonly used statements and 3 include none. The 3 sites in (Table 3) that had a formal policy but did not include any of the most commonly used statements provided a link to a contact person in the Special Collections department. Two of these three sites were also in the group of 5 websites that restricted access to their on-line photographic images shown in (Table 4).

Table 3

	Websites with Formal On-line Photographic Reproduction Policy  <b>N = 10</b>	Websites with No Formal On-line Photographic Reproduction Policy  <b>N = 15</b>
Website Includes all statements (B-F) in Table 2	2	4
Website Excludes all statements (B-F) in Table 2	3	1
Website contained Some statements	5	10
Total	10	15

(Table 4) illustrates that 17 (68%) percent of the sample frame provide a link to a copyright website or a tutorial created by the institution. The 5 (20%) websites that provided some type of security against downloading varied from providing only thumbnail size images, to having a watermark on every digital image that could be

enlarged from a thumbnail, to complete restriction by means of password protection. However, only 2 of the websites that restricted access provided a link to a copyright website or tutorial.

Table 4

N = 25	Provides link to Copyright Website or Tutorial	Restricts Access To On-line Images
Yes	17	5
No	8	20
Total	25	25

### Survey

The first two questions of the survey sought to clarify how many Special Collections departments include the University Archive and whether or not the department has an analog or digital photographic collection. It cannot be assumed that because a special collections research center website does not have digital photographic images on-line, that it does not have a digital photographic collection. The lack of an online collection of digital photographic images could indicate that institution is adhering to either Section 108(b) or (c) by restricting access to the physical premises.

Table 5

N = 32	Special Collections Jointly operated With Special Collections	Percent
Yes	22	68.75
No	9	28.125
N/A	1	3.125
Total	32	100

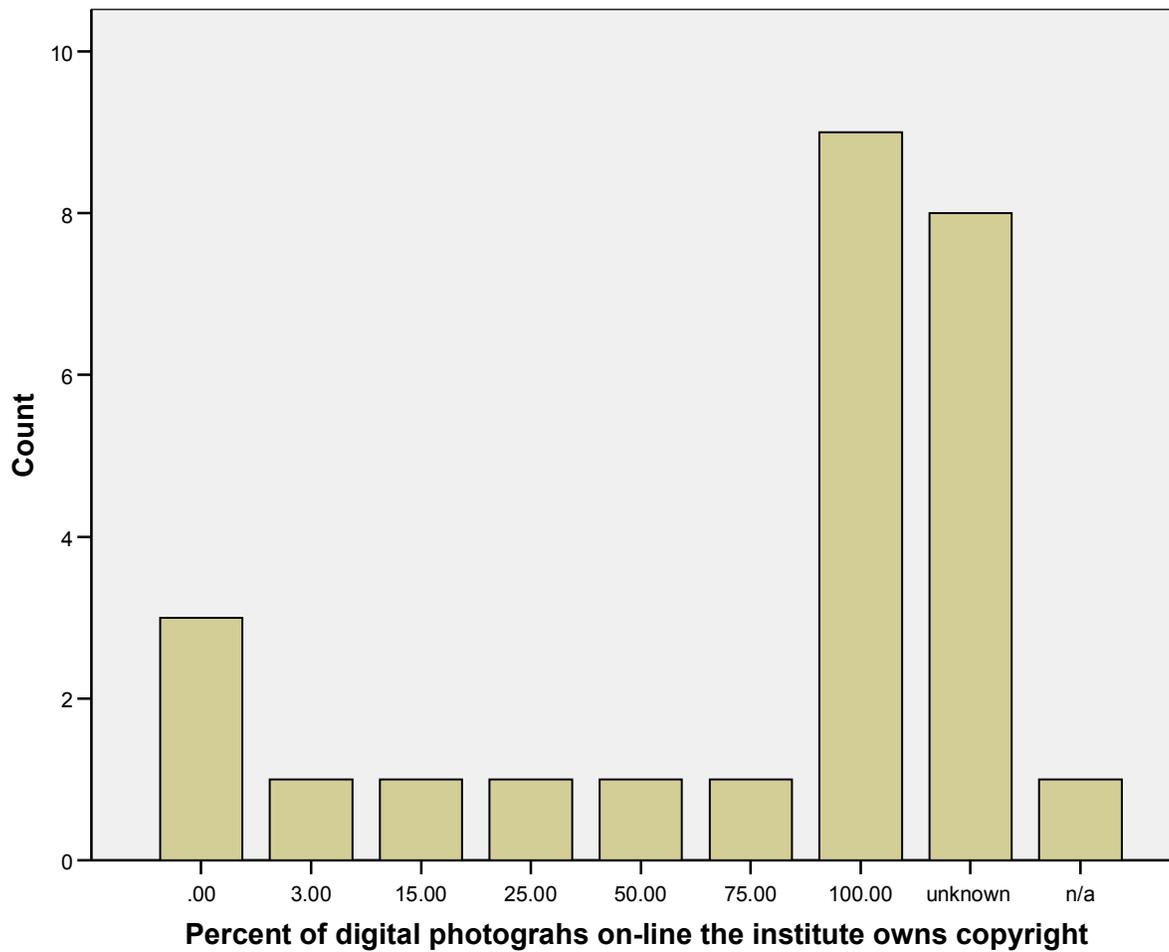
(Tables 5) confirms the findings of the web analysis, although there is a 8.75% difference between the results of the web analysis at 60% and the survey responses of 68.75%.

The results illustrated in (Table 6) determine that digital photographs represent 1.83% of analog photographic images held in collections. Institutions hold copyright to seventy-six percent of digital images found on-line. This is a clear indication that archivists are respecting copyright and that most of the images on-line are there legally. This is also supported by the number of institutions that own 100% of the photographic images they have placed on-line as illustrated in the chart below (Fig. 1). However, the number of institutions that do not know how many on-line images to which they hold copyright illustrates the need to establish a policy of placing photographic images on-line that can be easily downloaded.

Table 6

N = 32	# of respondents	Mean	Median
Number of Analog Photographs	31	583187.19	80000
Number of digital photographs	31	10684.89	1500
Percent of digital photographs on-line	29	36.77	20
Percent of analog photographs the Institution owns copyright	28	57.1429	55
Percent of on-line photographs the Institution owns copyright	26	76.0769	100

Figure 1



(Table 7) establishes that 81.3% of special collections research centers have some type of formal photographic reproduction service. Although a few institutions elaborated that as the number of images on-line increased so did the number of scan requests; one has to wonder about how many times an image is downloaded by people who make the same assessment that Gasaway asserts the libraries make about the low risk of being sued for infringement.

Table 7

Provide photographic reproduction service on-line

N = 32	Frequency	Percent
Yes	26	81.3
No	5	15.6
Missing	1	3.1
Total	32	100

Once a patron decides to follow the procedure set in the photographic reproduction services policy to make a request to reproduce an on-line photographic image, 75% of the time that request must be approved by the department head (Table 8). Table 9 illustrates that approval of requests at this level have been established for more than three years and the implementation of it is ongoing.

Table 8

Policy states Department Head approval of photographic reproduction requests is necessary

N = 32	Frequency	Percent
Yes	24	75
No	8	25
Total	32	100

Table 9  
When was the policy instituted?

N = 32	Frequency	Percent
Within past 12 months	2	6.3
More than 36 months ago	19	59.4
Missing	11	34.4
Total	32	100

The necessity of this type of approval process seems obvious when looking at the number of institutions that don't provide staff training for Title 17 of the *United States Code* §107 and §108 in table 10.

Table 10  
Does institution provide training to staff in copyright law  
Sections 107 and 108?

N = 32	Frequency	Percent
Yes	5	15.6
No	23	71.9
Don't know	1	3.1
Missing	3	9.4
Total	32	100

The next step in the approval policy for reproduction requests is sending the request to the legal or other reviewing department for approval. As seen in Figure 2, most institutions have not had to go to this level; one reason might be the number of digital photographic images in the collections on-line to which the institution holds copyright.

Figure 2

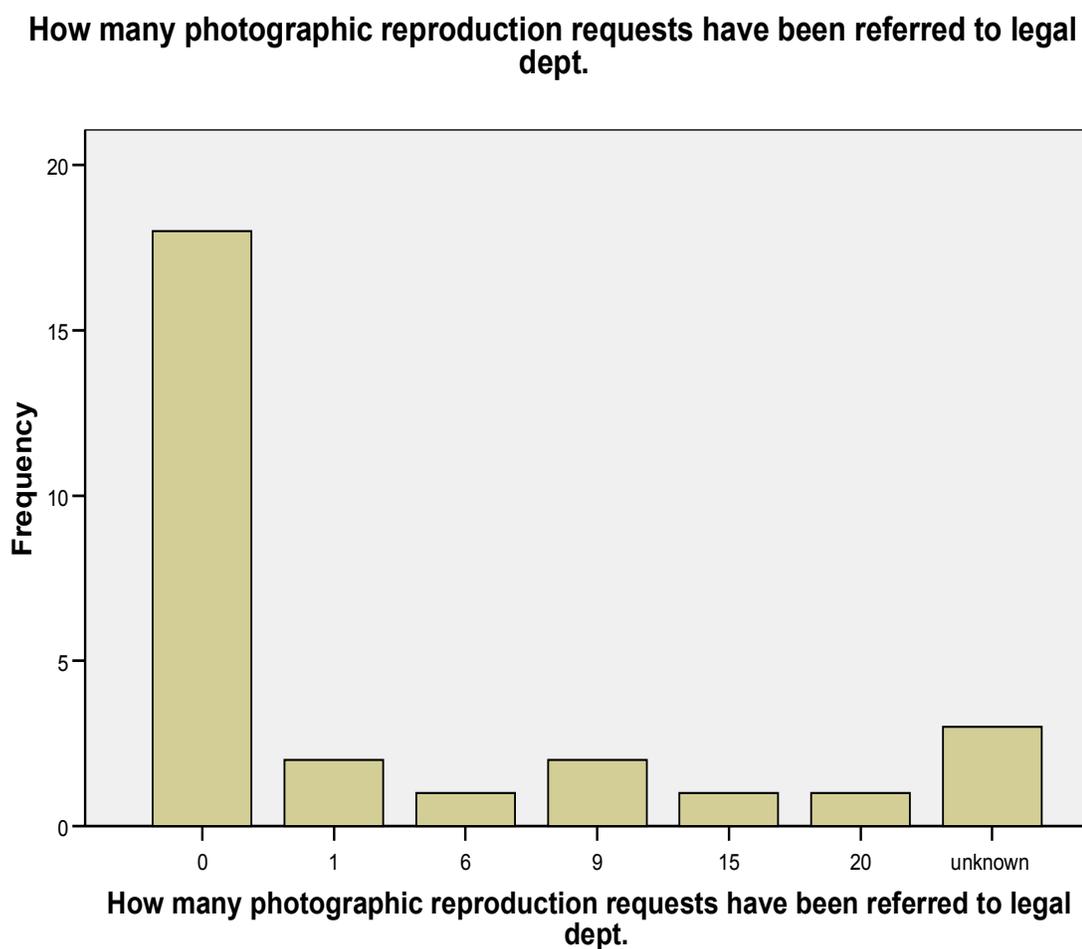


Figure 3 shows that once a photographic reproduction request is sent to the legal department to be reviewed it is highly unlikely that the request would be denied. Comments made in the elaboration section of the survey have stated that permission to reproduce is often granted with the stipulation that the patron sign a statement that although the institution is granting the reproduction it does not guarantee the status of the copyright and therefore the risk of infringement is up to the patron to determine.

Figure 3

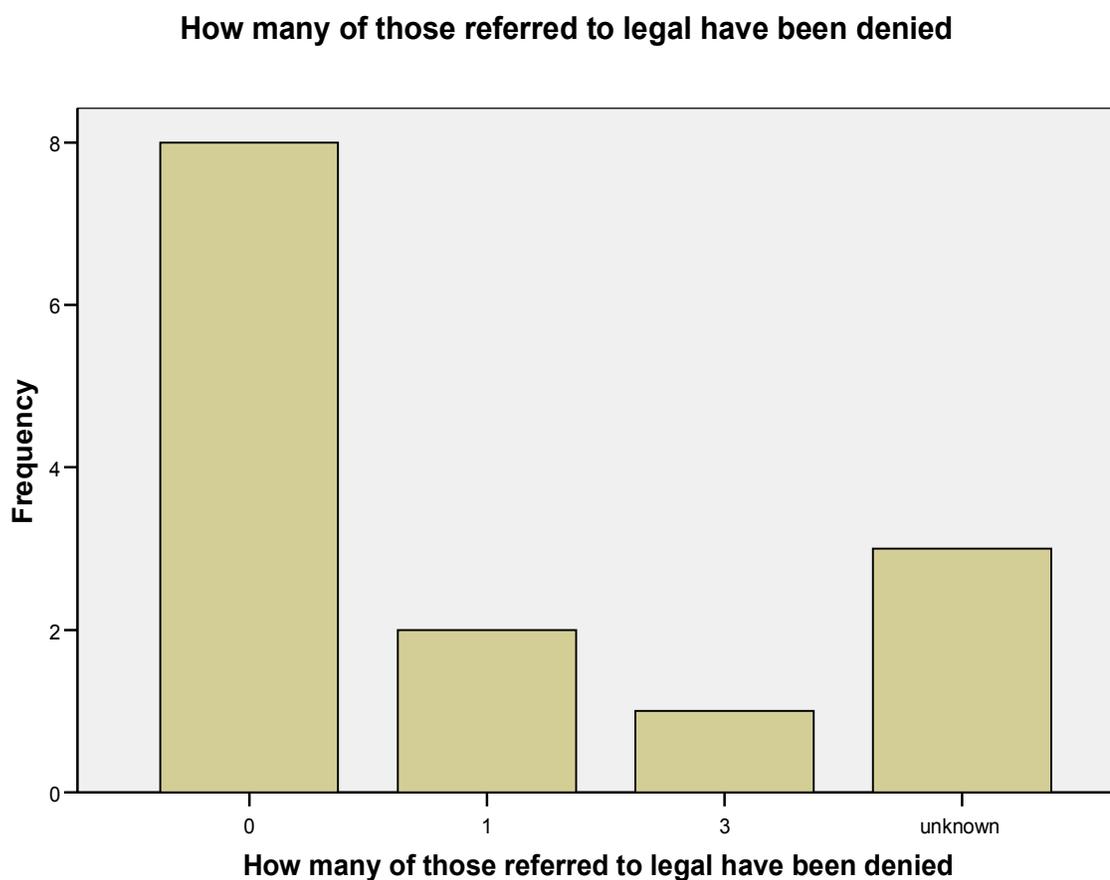
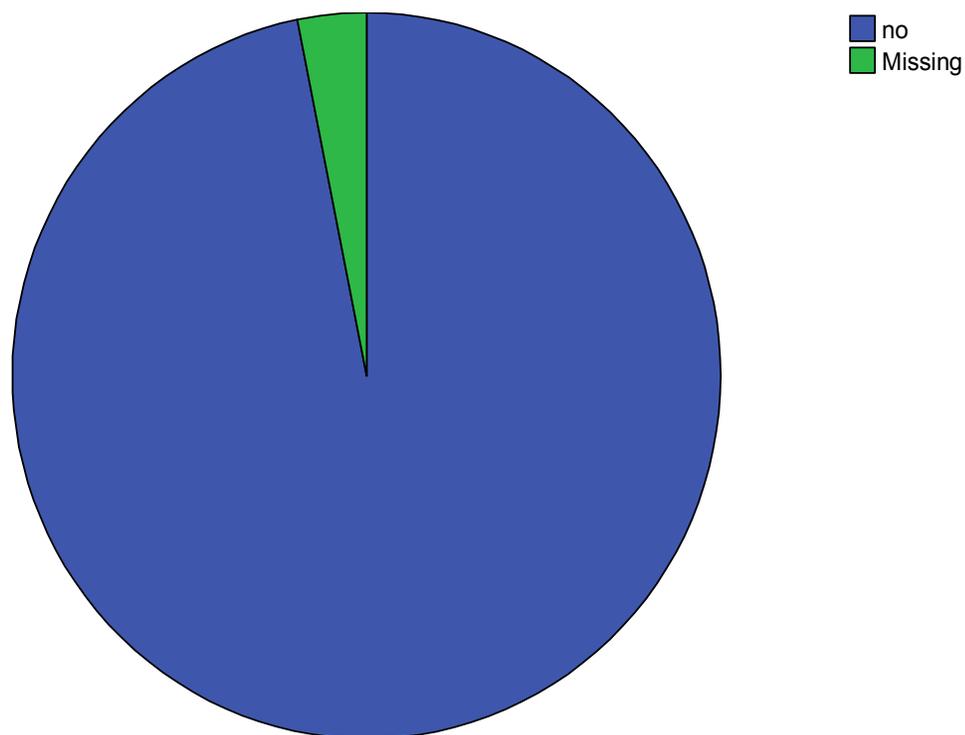


Figure 4

**Has the institution been sued for copyright infringement between 1/1/2000 and 3/23/2006**



There could be any number of reasons why one special collections research center didn't respond to the question illustrated in Figure 5, speculating would only create an interminable debate. The last and most pertinent issue the web survey addresses is the fact that 100% of special collections research centers that responded to this question state that they have not been sued for copyright infringement from 1/1/2000 through the present.

## Conclusion

The Copyright Act of 1976 clearly states that using technology to digitize photographic images for preservation and improved access is not an infringement of copyright, but access must not be made available to the public in that format outside the premises of the library or archives in lawful possession of such copy. Therefore, the act of placing these images on the World Wide Web has put the archivists within Special Collections Research Centers in the position of acting as publishers of possibly copyrightable material. In these instances, it becomes increasingly important for archivists to understand the complexities of copyright law to protect the institutions they represent from infringement lawsuits. Effectuating policy is a means to that end.

What this study has revealed is that archivists are generally making a concerted effort to protect the copyright of analog and digital on-line photographic images. The number of digital photographic images on-line is minuscule at fewer than two percent of the total photographic images held by special collections research centers. The web analysis and survey determined that institutions own 76% of the photographic images they place on websites; clearly demonstrating an effort to protect copyrighted images. In addition, 75% of the respondents have as part of their photographic reproduction policy the requirement that requests for reproduction must be approved by a department head. This tendency to have one person make the decision of whether an image can be reproduced or not is advisable based on the number of respondents (71%) who do not offer any training to staff in the parts of copyright law pertinent to libraries and archives. Department head approval also seems to make sense when only 36% of websites have a formally stated on-line reproduction policy and approximately 54% of websites provide only some type of

tutorial or statement about copyright. This research illustrates that although there is little training, little security from downloading images at 20% of respondents, and no consistent policy on special collections websites, no institution has been involved in an infringement lawsuit in the past five years. Concluding that, even without a policy developed by a recognized authoritative organization such as the Association of Research Libraries, there is enough awareness of the issues relating to copyright through literature and practice within the special collections research centers to mitigate the possibility of infringement. On the face of it, Maher's observation that all archivists should be familiar with copyright issues seems obvious, but to what extent has yet to be determined or even why? Raising the question; what is the motivation to pursue the process of establishing a policy of best practices if indeed, Gasaway's argument and this research has shown, the risk of infringement is low.

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**Appendix A**  
**1976 Copyright Act Title 17**  
**Chapter 2**  
**Copyright Ownership and Transfer**

201 *Ownership of copyright*  
 202 *Ownership of copyright as distinct from ownership of material object*  
 203 *Termination of transfers and licenses granted by the author*  
 204 *Execution of transfers of copyright ownership*  
 205 *Recordation of transfers and other documents*  
*Copyright Ownership and Transfer*  
 104 *Copyright Law of the United States*

**§ 201 · Ownership of copyright**

(a) Initial Ownership.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowner of copyright in the work.

(b) Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.2

**§ 202 · Ownership of copyright as distinct from ownership**

**of material object**

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does

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transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

**§ 203 · Termination of transfers and licenses granted by the author<sup>3</sup>**

(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period

of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication  
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of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination.—Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination

under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any

person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

**§ 204 • Execution of transfers of copyright ownership**

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if—

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

**§ 205 • Recordation of transfers and other documents** □

(a) Conditions for Recordation.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

(b) Certificate of Recordation.—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

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(c) Recordation as Constructive Notice.—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) Priority between Conflicting Transfers.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(e) Priority between Conflicting Transfer of Ownership and Nonexclusive

License.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if

- (1) the license was taken before execution of the transfer; or
- (2) the license was taken in good faith before recordation of the transfer and without notice of it.

### **Chapter 2 • Endnotes**

1. In 1978, section 201(e) was amended by deleting the period at the end and adding “, except as provided under title 11.”
2. Title 11 of the *United States Code* is entitled “Bankruptcy.”
3. In 1998, the Sonny Bono Copyright Term Extension Act amended section 203 by deleting “by his widow or her widower and his or her grandchildren” from the first sentence in paragraph (2) of subsection (a) and by adding subparagraph (D) to paragraph (2). Pub. L. No. 105-298, 112 Stat. 2827, 2829.
4. The Berne Convention Implementation Act of 1988 amended section 205 by deleting subsection (d) and redesignating subsections (e) and (f) as subsections (d) and (e), respectively. Pub. L. No. 100-568, 102 Stat. 2853, 2857.

## **Appendix B**

### **1976 Copyright Act Title 17**

#### **Chapter 3**

#### **Duration of Copyright**

301 *Preemption with respect to other laws*

302 *Duration of copyright: works created on or after*

*January 1, 1978*

303 *Duration of copyright: Works created but not published or copyrighted before January 1, 1978*

304 *Duration of copyright: Subsisting copyrights*

305 *Duration of copyright: Terminal date*

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#### **§ 301 · Preemption with respect to other laws<sup>2</sup>**

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection

(a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067.

Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the

adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.<sup>3</sup>

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(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

**§ 302 · Duration of copyright:**

**Works created on or after January 1, 1978** □

(a) In General.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content

with requirements that the Register of Copyrights shall prescribe by regulation.

(d) Records Relating to Death of Authors.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall

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identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) Presumption as to Author's Death.—After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

**§ 303 · Duration of copyright: Works created but not published or copyrighted before January 1, 1978** □

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

**§ 304 · Duration of copyright: Subsisting copyrights** □

(a) Copyrights in Their First Term on January 1, 1978.—

(1)(A) Any copyright, in the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

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the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

- (i) the author of such work, if the author is still living,
- (ii) the widow, widower, or children of the author, if the author is not living,
- (iii) the author's executors, if such author, widow, widower, or children are not living, or
- (iv) the author's next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

- (i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or
- (ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

- (i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or
- (ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

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(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act —Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the

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authors of the work, termination of the grant may be effected, to the extent

of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

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(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons

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provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been

served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) Termination Rights Provided in Subsection (c) Which Have Expired on or before the Effective Date of the Sonny Bono Copyright Term Extension Act.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act□ for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.

### **§ 305 · Duration of copyright: Terminal date**

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

### **Chapter 3 · Endnotes**

1. Private Law 92-60, 85 Stat. 857, effective December 15, 1971, states that:

[A]ny provision of law to the contrary notwithstanding, copyright is hereby granted to the trustees under the will of Mary Baker Eddy, their successors, and assigns, in the work “Science and Health with Key to the Scriptures” (entitled also in some editions “Science Endnotes

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and Health” or “Science and Health; with a Key to the Scriptures”), by Mary Baker Eddy, including all editions thereof in English and translation heretofore published, or hereafter published by or on behalf of said trustees, their successors or assigns, for a term of seventy-

five years from the effective date of this Act or from the date of first publication, whichever is later.

But *cf.* *United Christian Scientists v. Christian Science Board of Directors, First Church of*

*Christ, Scientist*, 829 F.2d 1152, 4 USPQ2d 1177 (D.C. Cir. 1987) (holding Priv. L. 92-60, 85 Stat.

857, to be unconstitutional because it violates the Establishment Clause).

2. The Berne Convention Implementation Act of 1988 amended section 301 by adding at the end thereof subsection (e). Pub. L. No. 100-568, 102 Stat. 2853, 2857. In 1990, the Architectural

Works Copyright Protection Act amended section 301(b) by adding at the end thereof paragraph (4). Pub. L. No. 101-650, 104 Stat. 5133, 5134. The Visual Artists Rights Act of 1990

amended section 301 by adding at the end thereof subsection (f). Pub. L. No. 101-650, 104

Stat. 5089, 5131. In 1998, the Sonny Bono Copyright Term Extension Act amended section

301 by changing “February 15, 2047” to “February 15, 2067” each place it appeared in subsection

(c). Pub. L. No. 105-298, 112 Stat. 2827.

3. The Visual Artists Rights Act of 1990, which added subsection (f), states, “Subject to subsection (b) and except as provided in subsection (c), this title and the amendments made by

this title take effect 6 months after the date of the enactment of this Act,” that is, 6 months after

December 1, 1990. Pub. L. No. 101-650, 104 Stat. 5089, 5132. See also endnote 37, chapter 1.

4. In 1998, the Sonny Bono Copyright Term Extension Act amended section 302 by substituting

“70” for “fifty,” “95” for “seventy-five” and “120” for “one hundred” each place they appeared. Pub. L. No. 105-298, 112 Stat. 2827. This change was effective October 27, 1998. *Id.*

5. In 1997, section 303 was amended by adding subsection (b). Pub. L. No. 105-80, 111 Stat.

1529, 1534. In 1998, the Sonny Bono Copyright Term Extension Act amended section 303 by

substituting “December 31, 2047” for “December 31, 2027.” Pub. L. No. 105-298, 112 Stat. 2827.

6. The Copyright Renewal Act of 1992 amended section 304 by substituting a new subsection

(a) and by making a conforming amendment in the matter preceding paragraph (1) of subsection (c). Pub. L. No. 102-307, 106 Stat. 264. The Act, as amended by the Sonny Bono

Copyright Term Extension Act, states that the renewal and extension of a copyright for a further

term of 67 years “shall have the same effect with respect to any grant, before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998], of a transfer or license of the further term as did the renewal of a copyright before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998] under the law in effect at

the time of such grant.” The Act also states that the 1992 amendments “shall apply only to

those copyrights secured between January 1, 1964, and December 31, 1977. Copyrights secured before January 1, 1964, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before ... [enactment on June 26, 1992], except each reference to forty-seven years in such provisions shall be deemed to be 67 years.” Pub. L. No. 102-307, 106 Stat. 264, 266, as amended by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2828.

In 1998, the Sonny Bono Copyright Term Extension Act amended section 304 by substituting “67” for “47” wherever it appeared in subsection (a), by substituting a new subsection (b) and by adding subsection (d) at the end thereof. Pub. L. No. 105-298, 112 Stat. 2827.

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Act also amended subsection 304(c) by deleting “by his widow or her widower and his or her

children or grandchildren” from the first sentence of paragraph (2), by adding subparagraph

(D) at the end of paragraph (2) and by inserting “or, in the case of a termination under subsection

(d), within the five-year period specified by subsection (d)(2),” into the first sentence of subparagraph (4)(A). *Id.*

7. In 1998, the Sonny Bono Copyright Term Extension Act amendment to subsection 304(b) completely deleted the previous language that was originally part of the 1976 Copyright

Act. Pub. L. No. 105-298, 112 Stat. 2827. That earlier statutory language continues to be relevant for calculating the term of protection for copyrights commencing between September

19, 1906, and December 31, 1949. The 1976 Copyright Act extended the terms for those copyrights by 20 years, provided they were in their renewal term between December 31, 1976,

and December 31, 1977. The deleted language states:

The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

The effective date of this provision was October 19, 1976. That effective date provision is contained in Appendix I, herein, as section 102 of the Transitional and Supplementary Provisions of the Copyright Act of 1976. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2598.

In addition, prior to the 1976 Copyright Act, Congress enacted a series of nine interim extensions for works whose copyright protection began between September 19, 1906, and December 31, 1918, if they were in their renewal terms. Without these interim extensions,

copyrights commencing during that time period would have otherwise expired after 56 years,

at the end of their renewal terms, between September 19, 1962, and December 31, 1976.

The

nine Acts authorizing the interim extensions are as follows, in chronological order:

Pub. L. No. 87-668, 76 Stat. 555 (extending copyrights from September 19, 1962, to December 31, 1965)

Pub. L. No. 89-142, 79 Stat. 581 (extending copyrights to December 31, 1967)

Pub. L. No. 90-141, 81 Stat. 464 (extending copyrights to December 31, 1968)

Pub. L. No. 90-416, 82 Stat. 397 (extending copyrights to December 31, 1969)

Pub. L. No. 91-147, 83 Stat. 360 (extending copyrights to December 31, 1970)

Pub. L. No. 91-555, 84 Stat. 1441 (extending copyrights to December 31, 1971)

Pub. L. No. 92-170, 85 Stat. 490 (extending copyrights to December 31, 1972)

Pub. L. No. 92-566, 86 Stat. 1181 (extending copyrights to December 31, 1974)

Pub. L. No. 93-573, 88 Stat. 1873 (extending copyrights to December 31, 1976)

8. The effective date of the Sonny Bono Copyright Term Extension Act is October 27, 1998.

9. See endnote 8, *supra*.

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## Appendix C – Survey Cover letter

My name is Laurence Gavin, and I'm a graduate student in the School of Information and Library Science. As part of the requirement for completing a Master of Library Science degree at the University of North Carolina at Chapel Hill I am preparing a research paper on issues related to copyright law and photographic reproduction services in academic research libraries special collections research centers. As you know, there is much discussion about the issues of archives and copyright in the digital age, this study examines these issues.

I am writing to request your participation by completing the attached survey at the bottom of this message. I understand your time is valuable and have kept the survey as short as possible, requiring **approximately fifteen minutes**. This is a confidential study. Your name and other identifying information will not be associated with any specific reply or data collected. Your participation in this study is completely voluntary. You may stop participating at any time. You may skip any question you choose not to answer for any reason. This survey is being distributed to the 123 Association of Research Libraries (ARL) member libraries via contact people listed on the institutions websites. Permission to use data supplied in the survey for the purpose of completing the above mentioned research paper is implied with the submission of the completed survey.

All research on human volunteers is reviewed by a committee that works to protect your rights and welfare. If you have questions or concerns about your rights as a research subject you may contact, anonymously if you wish, the Institutional Review Board at 919-966-3113 or by email to [IRB\\_subjects@unc.edu](mailto:IRB_subjects@unc.edu).

I welcome you to contact me with any questions, comments, concerns, or to request results of this study by phone (919) 356-7152 or e-mail: [lgavin@email.unc.edu](mailto:lgavin@email.unc.edu).

Information about the faculty advisor can be found at the School of Information and Library Science at the University of North Carolina at Chapel Hill, website <http://sils.unc.edu/people/faculty.html#tibbo>.

Approval IRB: Behavioral Institution Review Board  
Date of Approval: 3/02/06  
IRB Number: LIBS 05-104

Thank you in advance for your consideration of my project.

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## Appendix D – Web Analysis Protocol

1. Does the Special Collections department administratively include the University Archive? Yes No
2. Does the University Archive have a photographic collection?  
Yes No
3. Is the University Archive photographic collection on-line?  
Yes No
4. Does the Special Collections department have a photographic collection?  
Yes No
5. How many photographic images does the Special Collections department have?
6. Approximately how many photographic images are posted on-line?
7. Is there an alternate name for the photographic collection department?
8. Does the institution have a digital library?  
Yes No
9. Does the institution have a pathfinder to other photographic collections?  
Yes No
10. Can the on-line photographic images be downloaded?  
Yes No N/A Other
11. Is there an on-line photographic reproduction policy?  
Yes No Other
12. Does the on-line photographic reproduction policy state the patron is responsible for Investigating the copyright of images?  
Yes No
13. Is there an on-line publication policy?  
Yes No
14. Is there an on-line notification of the right to refuse a reproduction request?  
Yes No

15. Is there an on-line photographic reproduction price list?  
Yes No Other
16. Is there an online statement of different reproduction charges for commercial use?  
Yes No
17. Is there a link to Copyright law website or tutorial?  
Yes No Describe
18. Does the institution restrict access to on-line photographic images in any way?  
Yes No Describe

## Appendix E – Frequency tables of Web Analysis

Special Collections administratively includes University Archive

N = 25	Frequency	Percent
Yes	15	60
No	8	32
Cannot be determined	2	8
Total	25	100

Does University Archive have a photographic collection

N = 25	Frequency	Percent
Yes	18	72
No	3	12
Cannot be determined	4	16
Total	25	100

Is University Archive collection on-line

N = 25	Frequency	Percent
Yes	8	32
No	12	48
Cannot be determined	5	20
Total	25	100

Does the Special Collection Dept. have a photographic collection

N = 25	Frequency	Percent
Yes	20	80
No	5	20
Total	25	100

Number of photos in Special Collections

N = 25	Frequency	Percent
Cannot be determined	13	52
11000.00	1	4
15000.00	1	4
20000.00	1	4
32700.00	1	4
35000.00	1	4
36500.00	1	4
65000.00	1	4
100000.00	1	4
300000.00	1	4
650000.00	1	4
750000.00	1	4
1000000.00	1	4
Total	25	100

## Number of Special Collections images on-line

N = 25	Frequency	Percent
Cannot be determined	14	56
0	2	8
1	1	4
5	1	4
15	1	4
200	1	4
300	1	4
500	1	4
1000	1	4
1500	1	4
5000	1	4
Total	25	100

## Is there an alternate name for photographic collection department

N = 25	Frequency	Percent
Yes	3	12
No	22	88
Total	25	100

## Does the institution have a digital library

N = 25	Frequency	Percent
Yes	12	48
No	13	52
Total	25	100

## Does the institution have an on-line photographic reproduction policy

N = 25	Frequency	Percent
Yes	9	36
No	16	64
Total	25	100

## Does the institution provide a pathfinder to other image collections

N = 25	Frequency	Percent
Yes	23	92
No	2	8
Total	25	100

## On-line statement that patron is responsible for determining copyright

N = 25	Frequency	Percent
Yes	14	56
No	11	44
Total	25	100

## On-line Publication Policy

N = 25	Frequency	Percent
Yes	14	56
No	11	44
Total	25	100

## On-line notification of library's right to refuse reproduction

N = 25	Frequency	Percent
Yes	12	48
No	13	52
Total	25	100

## On-line photographic reproduction price-list

N = 25	Frequency	Percent
Yes	13	52
No	12	48
Total	25	100

## Price list includes separate charges for commercial use

N = 25	Frequency	Percent
Yes	12	48
No	13	52
Total	25	100

## Institution provides link to copyright tutorial or website

N = 25	Frequency	Percent
Yes	17	68
No	8	32
Total	25	100

## Institution restricts access to on-line images

N = 25	Frequency	Percent
Yes	5	20
No	20	80
Total	25	100

## Can the images provided by the pathfinder be downloaded

N = 25	Frequency	Percent
Yes	19	76
No	6	24
Total	25	100

## Appendix F – Web Survey Questions

1. Is your Special Collections department jointly operated with University Archive?
2. Are the photographic collections managed by University Archives considered to be part of Special Collections?
3. How many professional are currently employed in your Special Collections department?
4. How many students, interns, or support staff, are employed in your Special Collections department?
5. How many analog photographs does your Special Collections department have in its collection?
6. How many digital photographs does your special collections department have in its collections?
7. What percentage of the department's digital photographs are on-line?
8. What percentage of photographs in the department's physical collection does the institution currently own copyright?
9. What percentage of photographs in the department's on-line collections does the institution currently own copyright?
10. Does your Special Collections department provide a photographic reproduction service?
11. How many photographic reproduction requests have been made within the past 12 months?
12. How many photographic reproduction requests have been made within the past 12 to 24 months?
13. How many photographic reproduction requests have been made within the past 24 to 36 months?
14. How many photographic reproduction requests have been denied due to copyright infringement issues in the past 12 months?
15. How many photographic reproduction requests have been denied due to copyright infringement issues in the past 12 to 24 months?

16. How many photographic reproduction requests have been denied due to copyright infringement issues in the past 24 -36 months?
17. Does your current department policy require that requests for photographic reproduction be approved by the department head or other designated professionals within the department?
18. If the answer to 17 is yes, when was this policy instituted?
19. Does your institution currently provide employee training (formal, in class) in the area of copyright law relating to sections 107(fair-use), and section 108, (libraries and archives) of Title 17 of the United States Code?
20. How many requests for photographic reproductions has your department referred to the institution's legal office or other in-house office for the purpose of determining the legality of reproduction relating to copyright law?
21. Of the photographic reproduction requests that have been referred to the institution's legal office or other in-house office, how many have been denied?
22. Has your department been involved in a copyright infringement lawsuit between January 1, 2000 and the present?

## Appendix G – Web Survey Frequency Tables

University Archive photos are managed by Special Collections

N = 32	Frequency	Percent
Yes	20	62.5
No	10	31.3
n/a	1	3.1
Missing	1	3.1
Total	32	100.0

Number of Professional Staff

N = 32	Frequency	Percent
1	1	3.1
2	5	15.6
3	5	15.6
4	2	6.3
5	5	15.6
6	6	18.8
7	1	3.1
10	1	3.1
11	1	3.1
12	2	6.3
15	2	6.3
20	1	3.1
Total	32	100.0

## Number of Support Staff

N = 32	Frequency	Percent
0	2	6.3
2	1	3.1
3	3	9.4
4	4	12.5
5	2	6.3
6	2	6.3
7	4	12.5
8	1	3.1
9	2	6.3
11	1	3.1
12	1	3.1
14	2	6.3
15	1	3.1
16	1	3.1
18	1	3.1
23	1	3.1
25	1	3.1
30	1	3.1
33	1	3.1
Total	32	100.0

## Number of analog photographs

N = 32	Frequency	Percent
Unknown	3	9.4
1000.00	1	3.1
5000.00	2	6.3
20000.00	1	3.2
25000.00	1	3.1
50000.00	1	3.1
52500.00	1	3.1
60000.00	3	9.4
80000.00	3	9.4
200000.00	1	3.1
300000.00	2	6.3
500000.00	1	3.1
600000.00	2	6.3
1000000.00	4	12.5
1100000.00	1	3.1
2000000.00	2	6.3
2400000.00	1	3.1
3500000.00	1	3.1
Missing	1	3.1
Total	32	100.0

## Number of digital photographs

N = 32	Frequency	Percent
0	5	15.6
Unknown	4	12.5
400	2	6.3
500	1	3.1
1000	3	9.4
1500	1	3.1
2000	1	3.1
3566	1	3.1
4637	1	3.1
5000	1	3.1
6000	1	3.1
10000	1	3.1
12000	1	3.1
15000	3	9.4
25000	1	3.1
41806	1	3.1
50000	1	3.1
60000	2	6.3
Missing	1	3.1
Total	32	100.0

## Percent of digital photographs on-line

N = 32	Frequency	Percent
0	7	21.9
.0001	1	3.1
.0300	1	3.1
1.000	3	9.4
6.000	1	3.1
8.300	1	3.1
20.0000	1	3.1
25.0000	1	3.1
30.0000	1	3.1
40.0000	1	3.1
50.0000	2	6.4
66.0000	1	3.1
75.0000	1	3.1
90.0000	1	3.1
100.0000	3	9.4
Unknown	3	9.4
Missing	3	9.4
Total	32	100.0

## Percent of analog photographs institution owns copyright

N = 32	Frequency	Percent
0	2	6.3
5.00	2	6.3
9.00	1	3.1
10.00	3	9.4
30.00	1	3.1
50.00	5	15.6
75.00	3	9.4
80.00	1	3.1
99.00	1	3.1
100.00	1	3.1
Unknown	7	21.9
Missing	4	12.5
Total	32	100.0

## Percent of digital photographs on-line does the institute own copyright

N = 32	Frequency	Percent
0	3	9.4
3.00	1	3.1
15.00	1	3.1
25.00	1	3.1
50.00	1	3.1
75.00	1	3.1
100.00	9	28.1
Unknown	8	25.0
n/a	1	3.1
Missing	6	18.8
Total	32	100.0

## Provide photographic reproduction service

N = 32	Frequency	Percent
Yes	26	81.3
No	5	15.6
Missing	1	3.1
Total	32	100.0

## Photographic reproduction requests in the last 12 months

N = 32	Frequency	Percent
0	1	3.1
2	1	3.1
7	1	3.1
36	1	3.1
40	1	3.1
60	1	3.1
96	1	3.1
100	2	6.3
129	1	3.1
200	1	3.1
260	1	3.1
288	1	3.1
307	1	3.1
487	1	3.1
500	1	3.1
643	1	3.1
1000	1	3.1
1268	1	3.1
1845	1	3.1
2000	1	3.1
2500	1	3.1
Unknown	1	3.1
Missing	8	25.0
Total	32	100.0

## Photographic reproduction requests in the last 12 – 24 months

N = 32	Frequency	Percent
0	1	3.1
3	1	3.1
12	1	3.1
40	1	3.1
49	1	3.1
88	1	3.1
150	2	6.3
184	1	3.1
352	1	3.1
658	1	3.1
760	1	3.1
1000	1	3.1
1568	1	3.1
2000	1	3.1
4000	1	3.1
5000	1	3.1
Missing	15	46.9
Total	32	100.0

## Photographic reproduction requests in last 24 – 36 months

N = 32	Frequency	Percent
0	1	3.1
13	1	3.1
19	1	3.1
45	1	3.1
76	1	3.1
100	1	3.1
135	1	6.3
150	1	3.1
190	1	3.1
257	1	3.1
1308	1	3.1
1500	1	3.1
2000	1	3.1
3000	1	3.1
8000	1	3.1
5000	1	3.1
Unknown	1	3.1
Missing	16	50.0
Total	32	100.0

## Number of photographic requests denied in last 12 months

N = 32	Frequency	Percent
0	14	43.8
1	2	6.3
3	1	3.1
5	1	3.1
8	1	3.1
15	1	3.1
25	1	3.1
40	1	3.1
Unknown	1	3.1
Missing	9	28.1
Total	32	100.0

## Number of reproduction requests denied in last 12 – 24 months

N = 32	Frequency	Percent
0	12	37.5
1	1	3.1
5	1	3.1
15	1	3.1
50	1	3.1
Unknown	2	6.3
Missing	14	43.8

Number of reproduction requests denied in last 24 – 36 months

Total	32	100.0
N = 32	Frequency	Percent
0	14	43.8
5	1	3.1
15	1	3.1
100	1	3.1
Unknown	2	6.3
Missing	13	40.6
Total	32	100.0

Policy states Department Head approval of photographic reproduction requests

N = 32	Frequency	Percent
Yes	24	75.0
No	8	25.0
Total	32	100.0

When was this policy instituted

N = 32	Frequency	Percent
Within the last 12 months	2	6.3
More than 36 months ago	19	59.4
Missing	11	34.4
Total	32	100.0

Does institution provide training in copyright law sections 107 and 108

N = 32	Frequency	Percent
Yes	5	15.6
No	23	71.9
Don't know	1	3.1
Missing	3	9.4
Total	32	100.0

How many photographic reproduction requests have been referred to legal dept.

N = 32	Frequency	Percent
0	18	56.3
1	2	6.3
6	1	3.1
9	2	6.3
15	1	3.1
20	1	3.1
Unknown	3	9.4
Missing	4	12.5
Total	32	100.0

How many of those referred to legal have been denied

N = 32	Frequency	Percent
0	8	25.0
1	2	6.3
3	1	3.1
Unknown	2	6.3
Missing	18	56.3
Total	32	100.0

Has the institution been sued for copyright infringement between 1/1/2000 and 3/23/2006

N = 32	Frequency	Percent
Yes	0	0.00
No	31	96.9
Missing	1	3.1
Total	32	100.0