

Braving the Present: Experience and Copyright Risk Assessment for Digitizing Recent Historical Collections

Katie Fortney

Introduction

The Grateful Dead Archive is not a typical special collection. Some of its unique aspects are enviable, like the fact that the project won a \$600,000 grant from the IMLS for a digitization project that would eventually become www.gdao.org. Others would make a lot of universities not want to touch it with a 10 foot pole, like the fact that it's such a recent collection that almost all of the works targeted for digitization are protected by copyright, and most of the copyright holders are a) still alive and b) not the donor.

The collection is a polarizing one—it's graced both the cover of *College & Research Libraries News*¹ (September 2012) and Senator Tom Coburn's top ten list of most wasteful government expenditures.² Its contents, like the public opinion surrounding it, are highly varied. The original accession by the University of California Santa Cruz in 2008 was over 600 linear feet of photos, posters, t-shirts, concert tickets, stage props, backstage passes, news clippings, periodicals, and fan mail, in addition to realia that defies categorization.

The author joined UCSC in 2010, after the IMLS grant was awarded and the digitization project was underway. As a new librarian who also happened to be the only lawyer in the building, I was immediately tapped to join the project as intellectual property consultant. I subsequently viewed the entire collection through the lens of copyright, which is the lens through which it will be viewed in this article.

1. What's on GDAO

While the collection as a whole is unusual, if it's viewed as a series of smaller collections it's easy to find parallels with types of collections that are common in archives everywhere. Some copyright holders signed licenses, but most of what appears online—approximately 23,000 items, in other words 80% of the site's contents—is there on the basis of fair use. This section describes the four biggest series within the online collection.

Fan Envelopes

The fan envelopes are the single most common item type in the Grateful Dead Archive Online (www.gdao.org). There are about 15,000 of them. Envelopes may not sound that interesting if you're not a Deadhead, but these aren't average envelopes. From the early 1980s to the mid-1990s, fans would request tickets to Grateful Dead concerts by sending a self-addressed stamped envelope and a money order to the band's ticket sales office in San Rafael, CA. Ticket hopefuls would try to catch the eyes of the staff by decorating the envelopes in various creative and lavish ways.

In generic terms, these are correspondence, an extremely common item type in special collections and archives. They were unpublished creative works, created by individuals who had no intent to sell or license them and never expected to see them again. No advance permission was sought for including the

Katie Fortney is Copyright Management Officer at the California Digital Library, e-mail: Katie.Fortney@ucop.edu

envelopes on the website; all were posted on the basis of fair use.

Photographs

Photographs are the next most numerous item type in the online archive, numbering about 10,000. They were taken between 1963 and 2005, by about 300 different photographers ranging from complete amateurs to the respected professionals, and an individual photographer may have just one photo in the archive, or hundreds.

While photographs this recent may be atypical for special collections and archives, subject oriented collections of photographs taken by a variety of photographers are not. Most of the photos in the archive were previously unpublished, and very few were works for hire, so the copyright holder is almost always the photographer. Sometimes photos were sent to the band by photographers hoping to sell negatives or reproduction rights, but often they were taken by a fan just to commemorate an event, with no intent of future profit, and simply sent in as a token of appreciation.

Archive staff attempted to contact the photographers, for reasons discussed in Section 3. Licenses were signed by enough photographers to cover about 3,000 photos, thanks largely to the archive's success in contacting a few photographers with hundreds of photographs each. Approximately 7,000 photographs were included in the website on the basis of fair use.

Tickets and Backstage Passes

The online archive includes around 1,000 tickets and backstage passes, its third most common item type. They range in age from the late 1960s to the mid-1990s. Most of the tickets are computer generated, like an average Ticketmaster printout. The backstage passes (and "laminates," their cousins, all-access passes valid for a whole tour rather than a single show) are more decorative, often featuring full color art.

These are the online archive's largest collection of printed ephemera. They were created for the purpose of conferring a separate benefit on the owner, rather than for their own sake, and after their use their value decreased quickly. Most were mass-produced, and many people may have thrown similar items away. No advance permission was sought for including these items on the website; all were posted on the basis of fair use. In addition, many of the computer generated tickets included trademarks, but little or no copy-rightable expression.

Posters

One of the most unique and anticipated parts of the online archive were its posters, of which there are about 600. The band collected a variety of posters: some advertising their own shows, some advertising other bands' shows of the same era, and others not connected to any performance at all.

Seven Grateful Dead concert posters were the subject of a lawsuit that went all the way to the Second Circuit Court of Appeals in 2006, when the Bill Graham Archives sued DK Publishing over a Grateful Dead book (Bill Graham was a major concert promoter, and commissioned some of the most iconic rock concert posters ever created). The court found that DK's use of the images in its book was fair use. The case provides a thorough and thoughtful discussion of fair use for the curious; for the purposes of this article, it is enough to know—as we did—that these works have been the subject of considerable commercial and legal interest. This wasn't even the only case: the subject of copyright ownership of these posters has been a source of conflict between the artists and concert promoters for years.³

The archive's posters, dating from the mid-1960s to almost the present day, comprise the largest group of previously published material on the site. Commercial gain was generally at least one of the motives spurring the artists who created them. Posters that advertise concerts are often given away for free at the time of their initial publication. Originals, as collectors' items, will sometimes fetch a high price later, but modern reprints are inexpensive. Digital representations of most of the posters are easy to find on various sites online.

The band owned the copyright in 79 posters, and permission to post them online was included in the deed of gift for the archive. Archive staff attempted to contact the other poster artists and other poster copyright holders, for reasons discussed in Section 3. Licenses were signed by enough copyright holders to cover about 200 more posters. Some 100 others are in the public domain in the United States because they were published without a copyright notice during the years when a copyright notice was required (generally, pre-1978; sometimes, pre-1989). Of the remainder, many are included on the basis of fair use. About 150 others can only be viewed on campus pending further discussions with poster artists, for reasons discussed in Section 3.

2. Responses to GDAO

The Grateful Dead Archive Online went live at the end of June 2012. In the seven months between the site’s launch and the end of January, no one has sued the library. No one sent a cease and desist letter. No one contacted UCSC’s designated DMCA agent requesting takedown under Section 512 of the Copyright Act. However, users of the site—including those holding the copyright in the works that appear there—have been in touch through other means.

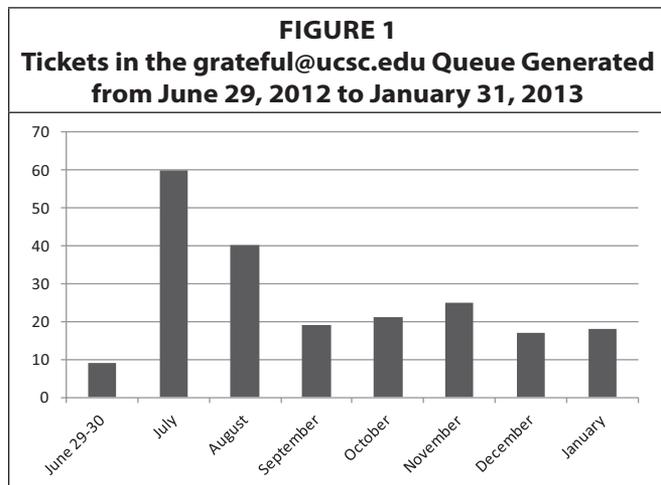
The following statement appears as part of the Copyright Statement field for every object on the site: “If you have additional or conflicting information about ownership of rights in this work, please contact us at grateful@ucsc.edu.” A similar statement is in the “Status of works on our site” section of the Policies page (<http://www.gdao.org/policies>) and the “Our Values” section of the About page (<http://www.gdao.org/about>).

The “grateful” e-mail address is the standard point of contact and appears throughout the website, including in the footer of every page. E-mails sent to this address become requests, or tickets, in a queue in the library’s issue tracking system (the “grateful” queue). The grateful queue contains 252 tickets generated between June 29, 2012 and January 31, 2013. As a point of comparison, UCSC’s regular special collections queue, which handles requests for all the library’s other archives combined, has 238 tickets for the same time period. Ten tickets are duplicates, created when requestors responded to an e-mail from a system, that should have been automatically incorporated into an existing ticket. Thirty-three of the tickets are bulk mail; this is not spam, which gets moved to

a spam queue, but mail generated automatically by a subscription or received as part of an individual’s e-mail blast to their entire address book. Removing the 43 duplicate tickets and bulk e-mail messages leaves 209 attempts, over seven months, by an individual to contact the archive via the “grateful” e-mail address. Figure 1 shows that while the first month was the most active, there is still regular use.

Reason	Count	Percentage
Want to talk to a subject expert	71	33.97%
Creator of a work on the site, and/or follow up to license request	37	17.70%
Site suggestion or metadata correction	32	15.31%
Interested in donating materials to the archive	31	14.83%
Seeking information about visiting the physical archive	14	6.70%
Looking for a job or volunteer opportunity	9	4.31%
Requesting permission to use images	7	3.35%
Working on a similar project	5	2.39%
No other category applies; just want to compliment site	3	1.44%

As shown in Table 1, over a third of the e-mails were from people trying to contact a subject expert, for example with a reference question specific to the Grateful Dead or a related subject area, or because they wanted to communicate with the Grateful Dead Archivist personally. Many of the e-mails has positive things to say about the site; three e-mails had no question or other reason for contacting the archive *except* to pay a compliment. Other common reasons for e-mailing were a desire to donate additional materials to the archive, make a suggestion about the metadata or site functionality, or ask about visiting the physical collection. Seven e-mails, just over 3%, were in search of permission to reproduce or otherwise use images in the archive. Sometimes contact information for the copyright holder was available, as discussed in Section 3. If not, the requestor was generally referred to the metadata or the item image, and left to make their own assessment.



Thirty-seven of the 209 tickets, or about 18%, were sent by or on behalf of creators of the works pictured on the website (or, in one case of mistaken identity, an individual explaining he was not the creator). “Creator” is used intentionally here, because none of the tickets from copyright holders were from business entities, heirs, or employers, just the creators or someone assisting them. Many reactions were positive, with 18 e-mails expressing appreciation of the site, 17 indicating they were glad to see their work on the site, and 3 offering to contribute additional items.

Envelope artists were by far the most common (24 tickets), but photographers (11) and graphic artists were also represented (2). Fifteen e-mails, all from envelope artists, resulted in de-publishing an item from GDAO. Seven of the 15 creators stated that they only wished for their identifying information to be removed, but due to the time involved in such a practice, the archive’s response was to treat these as a request to depublish. Eleven of the fifteen removal requests cited privacy, reputation, or related concerns; the other four did not state a reason. None of the requests cited copyright as a reason for removal, and one actually stated “This isn’t a copyright issue.”

Eight of the 37 tickets were from individuals following up in response to licenses we sent in our attempts to contact photographers, described in Section 3. These requests included things like getting a new copy of a lost license, or asking for more details about which of their photos were in the archive. Five of the tickets were from creators who had no request, but were just writing to share their happiness at finding their work on the site. Table 2 lists the other reasons behind the 37 tickets from creators.

Remove envelope or personal info	15
License follow up	8
Fix attribution metadata	5
No request, just writing to say they found their item(s)	5
General site suggestions	1
Fix broken image link	1
Arrange onsite visit	1
Seeking high resolution copies; willing to pay	1

To summarize, the site included approximately 23,000 items on the basis of fair use. In its first seven months, it received eight requests to remove items (fan envelopes) and seven requests to remove identifying information that resulted in the removal of items (again, fan envelopes). None of the removal requests were based on copyright. All 200+ tickets in the queue, including those requesting removal, were polite, and none threatened legal action.

3. What Was Done Before GDAO Launched

Librarians and archivists as a group are very conscious of and respectful towards copyright law, and this project was no exception. At a minimum, for every series that was considered for the website, an assessment of likely risks and an evaluation of the strength of a fair use argument was conducted and documented. For many series, like the fan envelopes and the tickets, this led to the entire series being posted without seeking permission. For others, this led to a decision to post only what was licensed. A prime example of this is the item type that appears in GDAO as “Fanzines.” That description implies a more amateur effort than is generally represented in the collection. *Relix*, for instance, was launched in 1974 as a handmade newsletter for Deadheads, but it is still being published over 30 years later, and is now a magazine with over 100,000 subscribers.

Two of the series are more complex. For the photographs and the posters, the archives decided to contact all identifiable copyright holders and ask them to sign a license. From a strictly legal perspective, including the posters and the photographs on the site as fair use may have been reasonable. From a practical perspective it was not. Factors that influenced this conclusion included: how recent the collection is, how active many of the creators still are (both artistically and in interacting with the Grateful Dead community), and the existence of prior disputes and bad feelings regarding use of some of the works. Another possible approach would have been to seek out only the most prominent copyright holders, or those creators with numerous items in the collection. The project decided to pursue a more comprehensive approach instead, both because of the potential to build goodwill in the broader community, and because of the potential to gather and share the data resulting from such a search with the larger library community. The results of this search will be detailed in a future article, along with fair use analyses for each of the series.

The project hired a rights management coordinator who attempted to find accurate names and contact information for all copyright holders for the photographs and posters in the collection. Most copyright holders—about two thirds—were not locatable. The search was not without its rewards, however. The effort built some buzz about the project long before its launch; some creators who were contacted decided to donate additional materials for the archive in addition to signing a license; and any party who signed a license is listed on GDAO's Copyright Owners page (<http://www.gdao.org/copyright-owners>). Metadata for the relevant items includes links to this page, where users seeking copyright permission can find contact information provided by the copyright owner on their license agreement with the archive.

Generally, posters and photographs for which no copyright holder was identified, was located, or responded were included in the site along with those for which a license was signed. Thus far, the archive has restricted to campus-only access the works of the creators and other copyright holders who have said no to the archive's request to sign a license. Some copyright holders who initially failed to respond or were opposed to the project later decided to sign a license after seeing the completed website. For those who never change their mind, fair use remains an option in the long term.

Beyond these series-specific tactics, the project implemented a number of archive-wide projects intended to improve relationships with copyright holders and reduce copyright related risk:

- Images that are easily downloadable are kept to a size and resolution that make them undesirable for printing. Users can see fine detail of the scans, but only for one part of the image at a time.
- Many efforts were made to try to get the word out early to the fan, user, and creator communities likely to be interested in the project. These included, but were not limited to, the license mailings, blog posts, and press coverage.
- From the early stages of the project, the library communicated with campus counsel and the campus DMCA agent. Campus counsel was provided with documentation of copyright strategies and risk analyses as well as supporting information about copyright

and fair use in libraries and archives.

- As described in Section 2, the website provides contact information for potential copyright holders in every location it seemed likely they would look for it. Any questions or requests received were answered as promptly as possible.

4. Developments Since GDAO Was Planned

GDAO.org launched in the summer of 2012, and building it was no small task. Strategies for handling the intellectual property issues were formulated and developed throughout 2010 and 2011. Certain existing documents were quite helpful,⁴ and the project was confident that it was acting within the scope of the law. However, two newer resources published in 2012 would have made the work easier, and these are briefly described below. They should provide valuable resources for future projects at other institutions, both internally and for educating campus counsel who are unfamiliar with copyright and fair use in libraries.

The Code of Best Practices

The Code of Best Practices in Fair Use for Academic and Research Libraries⁵ was released in January 2012. In addition to providing some general background on fair use, the Code includes as one of its eight scenarios a library's decision "to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts." Beyond the document itself, the Code's homepage at <http://www.arl.org/fairuse> provides FAQs for librarians, links to relevant articles in the legal literature, and other resources.

RLI 279

ARL's *Research Library Issues* no. 279 includes "Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections."⁶ In it Kevin Smith outlines four strategies for evaluating risk that GDAO would wholeheartedly endorse; in fact, reading it made some of those involved in the project wonder if he'd been sitting in on its meetings. It promotes a realistic and reasonable assessment and management of copyright risk. Such approaches can enable more libraries and special collections to create the digital collections they most want to share with their users, rather than focusing on materials with the least complicated copyright issues.⁷

Notes

1. Free, David, ed. *College & Research Libraries News* 73, no. 8 (2012). Accessed February 1, 2013 at <http://crln.acrl.org/content/73/8.toc>.
2. Coburn, Tom, *Wastebook 2010: A Guide to Some of the Most Wasteful Government Spending of 2010*, accessed February 1, 2013 at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=774a6cca-18fa-4619-987b-a15eb44e7f18.
3. Cahill, Greg, "Poster Kids: Kelley and Mouse Psychedelic Art Takes Center Stage at Petaluma Event," *Sonoma County Independent*, February 3-9, 2000, accessed February 1, 2013 at <http://www.metroactive.com/papers/sonoma/02.03.00/poster-0005.html>.
4. Dickson, Maggie, "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers," *American Archivist*, 73:2 (2010): 626-636; OCLC, *Well-intentioned Practice for Putting Digitized Collections of Unpublished Materials Online*, May 28, 2010, accessed February 1, 2013 at <https://www.oclc.org/resources/research/activities/rights/practice.pdf>; Adler, Prudence, Brandon Butler, Patricia Aufderheide, and Peter Jaszi, "Fair Use Challenges in Academic and Research Libraries," December 20, 2010, accessed February 1, 2013 at http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf.
5. Association of Research Libraries, Code of Best Practices in Fair Use for Academic and Research Libraries, January 2012, accessed February 1, 2013 at <http://www.arl.org/pp/ppcopyright/codefairuse/index.shtml>.
6. Smith, Kevin, "Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects I Special Collections," *Research Library Issues*, 279 (2012): 17-23, accessed February 1, 2013 at <http://publications.arl.org/rli279/17>.
7. Dryden, Jean, "Failing Our Users: The Role of Copyright in Selection for Digitization," (submitted for publication, 2012). Dryden's survey data shows that many archivists are prioritizing materials that are in the public domain or that have institutionally-owned copyright.