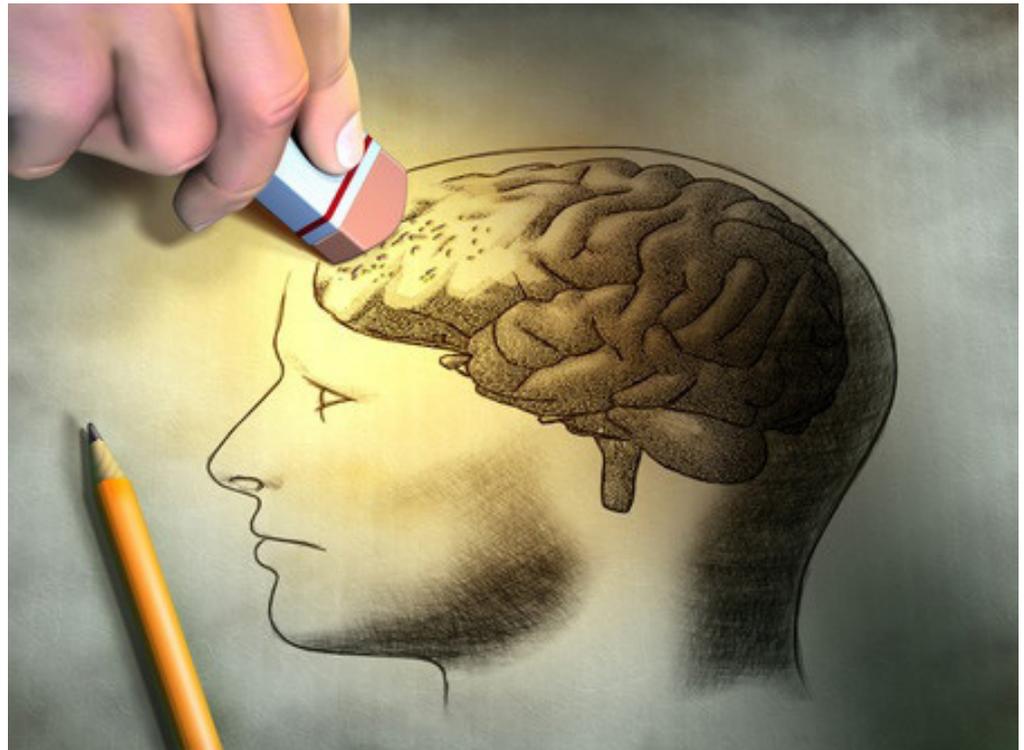


# Copyright & New Media Law

Making sense of complex legal issues

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*Our very way of knowing about ourselves as a society will be shaped by the ... access we will have to ... [born-] digital records. But without a plan for making sure these materials are available in the future, ... even five to ten years from now, it could all disappear.*



## How Copyright Law is Promoting Cultural Amnesia

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We understand our history through what was left behind. We know about ancient Egypt from studying the pyramids and hieroglyphs that survived the ages. We know about our Civil War from the writings of the time, speeches given, letters written, and constitutional amendments passed. This knowledge survived because it was etched in stone, pressed into clay, or written on paper—materials that are durable over time. The fact that most human knowledge and culture created today is encoded in digital formats—a fragile means

<sup>1</sup> I must give credit for the term “cultural amnesia” to the author Abby Smith Rumsey in her wonderful book, *When We Are No More: How Digital Memory Is Shaping Our Future*.

for preserving and transmitting knowledge over time—means that we are facing a serious risk of cultural amnesia if we do not find ways to begin preserving our fragile heritage in a systematic way.

### The Problem of Cultural Amnesia

Millions of blog posts are written every day. Billions of photos are uploaded to platforms like Instagram, Facebook, Snapchat, and Flickr every day. Hundreds of hours of video are uploaded to YouTube each minute. Moreover, new technologies have already allowed us to develop whole new systems of communication that have no non-digital equivalent: hashtags, emoji, reaction gifs, LoLcats, just to name a few.

But what records will be passed down to tell future generations what it was like to be alive at the dawn of the Internet? Digital objects are notoriously ephemeral. For example, although difficult to measure, we know that the average lifespan of a webpage is short—some estimates put it at about one hundred days.<sup>2</sup> “Ephemerality is built into the very architecture of the web, which was intended to be a messaging system, not a library.”<sup>3</sup>

<sup>2</sup> Nicholas Taylor, “The Average Lifespan of a Webpage,” *The Signal: Digital Preservation* (Nov. 8, 2011).

<sup>3</sup> Adrienne Lafrance, “Raiders of the Lost Web,” *The Atlantic* (2015).

Ensuring that digital content remains accessible over time is not a passive activity. The decision to continuously maintain and upgrade the software and hardware involved in keeping such material alive must be an active decision. Without a systematic means for digital preservation in place, countless born-digital works are lost every day as they are deleted, replaced, superseded, or left, forgotten, in obsolete formats and media.

The means for creating extremely rich records of our daily lives are everywhere. People are voluntarily and enthusiastically documenting big events and small moments. “Virtually everything related to our daily lives that our civilization produces as a record of our existence is now stored in digital form.”<sup>4</sup> Our very way of knowing about ourselves as a society will be shaped by the sorts of access we will have to these digital records.

But without a plan for making sure these materials are available in the future—not in one hundred or one thousand years, but even five to ten years from now—it could all disappear.

## Copyright Law is a Major Barrier to Digital Preservation

Perhaps ironically, the law that is tasked with “promot[ing] the progress of science and the useful arts”<sup>5</sup> is set in opposition to the preservation of works for future use. When initially drafted, copyright law applied to a small number of physical objects and their creators and lasted for a relatively short period of time. Today, copyright law touches upon almost every form of communication and means of cultural production we have. Moreover, the term of copyright has been expanded again and again, while the formalities required for claiming copyright protection have been relaxed.

The law gives a copyright owner and her descendants a degree of veto power over how, or even whether, a work is available to future generations. Copyright law is more forgiving of the preservation of physical objects than of digital. If I buy a copy of a book, I can keep it on my bookshelf indefinitely and transport it from house to house if I move. I can also lend it to a friend or donate it to my local library, thanks to the first sale doctrine.<sup>6</sup> Similarly, specific exceptions are built into the law for libraries to manage older physical copies of works as the works deteriorate or become obsolete.<sup>7</sup> But the preservation of a digital object, such as a photo from a politician’s Instagram account or the Twitter stream associated with #BlackLivesMatter, could require making many copies over time to shift into formats accessible via the hardware and software of the day. As such, the mechanisms available to us for the long-term preservation of digital objects are in tension with copyright law.

One seemingly simple solution might be to get permission

from the various authors and creators of the works we wish to preserve. If we wished to steward towards the future only a handful of identified digital objects, this might be a viable solution. But it is very difficult to assess now precisely what materials might be valuable to future generations. Further, it is likely that taking a select few objects out of their broader social context may make them less valuable as sources of information about our culture, social behavior, political activities, public health trends, and more. Accordingly, we should err on the side of collecting and preserving as much as we can, to allow future generations to determine for themselves what is valuable.<sup>8</sup>

Getting permission and clearing rights for a large volume of works is a substantial barrier to the process of digital preservation, even in cases where the author is known.<sup>9</sup> In today’s digital world, the problem becomes even more significant. Most of the content posted online is created by amateurs. Much of it is also created anonymously or pseudonymously, with no real name attached to the account. And the vast majority of users of these platforms are under thirty-five. All of this means that these works are going to be protected by copyright for many years to come and are highly likely to be (or to become) “orphan works” (*i.e.*, copyright-protected works whose owners are impossible to identify or locate). In such cases, permission is simply impossible to get, because the copyright owners cannot even be contacted.

If digital preservation requires permission, we as a society are in danger of suffering from wholesale cultural amnesia.

## Legal/Policy Solutions

Legal and policy solutions to the problem of digital preservation are likely to come piecemeal. For example, several proposals have been made to deal with the orphan works problem. The [Shawn Bentley Orphan Works Act](#)<sup>10</sup> offered a compromise that had wide support among stakeholders, but it died in the Senate in 2008. The Act, and other proposals based on it, has failed to gain traction since then. More recently, the U.S. Copyright Office published a report proposing an extended collective licensing approach to orphan works and mass digitization.<sup>11</sup> Unfortunately, this proposal was widely viewed as unhelpful by the libraries, archives, and other cultural institutions that would be the most likely candidates to steward our digital heritage.

A host of other proposals have been made for managing the orphan works problem, from eliminating the availability of remedies for reappearing rights-holders to reinvigorating formalities such as registration.<sup>12</sup> However, these proposals

4 Jason Perlow, “Your Social Data is Doomed, and Don’t Count on Facebook to Save You,” *ZDNet* (Jan. 26, 2016).

5 U.S. Const. art. I, sec. 8, cl. 8.

6 17 U.S.C. §109.

7 17 U.S.C. §108.

8 Abby Smith Rumsey, *When We Are No More: How Digital Memory Is Shaping Our Future*. New York: Bloomsbury Press, 2016, 148 (“We simply cannot know now what will have value in the future. We need to keep as much as we can as cheaply as possible.”).

9 See, e.g., Maggie Dickenson, “Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers,” *American Archivist* 73 (2010): 626. This study documents the efforts of one archive to gain permission to post a series of letters online. Of 6,706 letters, the researchers were only able to get permission for four letters, at a total cost of \$8000—a very poor return on the investment indeed.

10 S. 2913, 110th Congress (2008-2009).

11 United States Copyright Office, *Orphan Works and Mass Digitization*, (2015).

12 David R. Hansen, et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1 (2013).

have primarily been backward-looking and focused on the problem of converting analog materials, such as books, to digital files. Moreover, any legislative change will be slow in coming and will probably require more public awareness and demand for digital preservation.

For now, the most promising approach to managing copyright issues related to digital preservation lies in the fair use doctrine. Cultural institutions in the United States have been relying increasingly on fair use to begin the process of digitally preserving works. To this end, the Association of Research Libraries developed a [Code of Best Practices in Fair Use](#) that includes recommendations for preserving both analog and born-digital content.<sup>13</sup>

Two recent court cases also lend hope to the idea that digital preservation may be accomplished, at least in part, through fair use. Taken together, *Authors Guild v. HathiTrust*<sup>14</sup> and *Authors Guild v. Google*<sup>15</sup> stand for the proposition that making copies of works in order to create a searchable database that can be used for new forms of research and for data mining is a transformative use of the underlying materials. Although the *HathiTrust* court remanded the specific question of preservation to the lower court and the parties settled before the lower court could rule on the issue, the practical upshot of this decision is that a library could make digital copies of all the analog works in its collection and store those copies as text and image files, if the library provided full-text-search capability and full-text access to the disabled.<sup>16</sup>

Neither case directly involved born-digital materials, but the same basic fair use principles could be applied to the collection and preservation of born-digital content. Of course, relying on fair use has its drawbacks—the primary one being that litigation remains a risk, and for many organizations, that is enough to keep projects from getting off the ground. Moreover, under current legal precedent, it is unclear to what extent providing access to a complete copy of a work is permissible to those who do not have reading disabilities.

<sup>13</sup> Association of Research Libraries, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries* (Jan. 2016).

<sup>14</sup> 755 F.3d 87 (2d Cir. 2014).

<sup>15</sup> 804 F.3d 202 (2d Cir. 2015).

<sup>16</sup> Jonathan Band, *What Does The HathiTrust Decision Mean For Libraries?* (Jul. 2014).

## Practical Suggestions

One of the biggest contributors to the digital preservation problem is the creation of vast amounts of digital content with no long-term vision for how to determine what materials should be kept for posterity or a plan for making that happen. Here are a few things you and your institution can do right now to mitigate some of the problems involved:

**Update your institution's copyright policies with digital preservation in mind.** It is entirely possible that your cloud storage provider could go out of business. Make sure your policy includes a literal backup plan, including criteria for decision-making and provisions for storage and maintenance.

**Consider the use of Creative Commons licenses.** Even if your institution has no current ability to curate, archive, and maintain your own digital materials, you can reduce legal barriers by explicitly granting permission to make copies of your works. Attaching a [Creative Commons license](#) to some or all materials created by your institution will ensure that they may be preserved by a third party in the future and not locked down in legal uncertainty.

**Leverage the infrastructure of the Internet Archive.** For the past twenty years, the [Internet Archive](#) has been quietly collecting and preserving the World Wide Web. While the archive it has collected is immense, it is not comprehensive. Libraries, government entities, and other institutions can partner with the Internet Archive to identify important materials and ensure that they are preserved.<sup>17</sup> ■

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<sup>17</sup> See [Archive-It!](http://Archive-It!).