

# Learning to Live with the Legal Risks of Digital Collections

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# My name is Peter

I am not a lawyer

I am an archivist. I study copyright.

And digital collections.



# What I have learned

- Digitizing is powerful
- But there are risks
  - Copyright risks
  - Privacy risks
  - Loss of control
- To understand why, you have to know the law

# Copyright Basics

- Most fixed works with a modicum of creativity are protected by copyright
- Copyrights last for a long time

Cornell University

Cornell University Library  
COPYRIGHT INFORMATION CENTER

Home About Copyright Basics Copyright Clearance Cornell Policies For Authors and Faculty Resources

Copyright Term and the Public Domain in the United States

(See footnote 1)

Never Published, Never Registered Works<sup>2</sup>

Type of Work	Copyright Term	In the public domain in the U.S. as of 1 January 2019 <sup>3</sup>
--------------	----------------	--

<https://copyright.cornell.edu/publicdomain>



# Copyright owner's rights

Exclusive rights to ...	In plain English
Reproduce	Make copies
Distribute	Sell; make available for downloading on your web site
Create derivative works	Make new work from an existing work; screenplay from novel; translation
Display the work publicly	Hang a painting in a gallery; display on the web
Perform the work publicly	Theatrical performance; show a movie; stream on the web



# Privacy tort: publication of private facts

- **True information**
- about a person's private life
- that would be highly offensive to a reasonable person, and
- not of legitimate public concern
  - Sexual activity
  - Health – including mental health, addiction
  - Economic status



# Our problems

- Digitization can infringe on copyright owner rights
  - Reproduction
  - Distribution
  - Possibly public display
- Broad public access may impinge on privacy
  - No more “security through obscurity”



# Locating copyright owners is hard

- Example: Thomas Watson papers
  - 8,434 pieces of correspondence;  
3,304 names; 2,671 still ©
    - \$8,000 to figure this out
  - 450 hours total, over 9 months
  - Result: dependable contact information for 4 authors



Maggie Dickson, *Due Diligence, Futile Effort: Copyright and Digitization of the Thomas E. Watson Papers*, 73 *American Archivist* 626 (2010)

<http://archivists.metapress.com/content/16rh811120280434>



---

# Who owns the copyright?



The Children of (Joseph) Stephen Hirtle, ca. 1920

# International liability: even for public domain

- Copyright rules vary by nation
- Internet distribution may make you liable abroad
- Example: Wikimedia Foundation v. Reiss Engelhorn Museum



Copyright  
by Glyn Moody  
Fri, Jun 16th 2017  
8:35am

## Multiple German Courts Rule Photos Of Public Domain Works Are Not In The Public Domain

from the *and-no,-you-can't-take-your-own,-either* dept

Back in November 2015, we wrote about a bad situation in Germany, where a museum in Mannheim was **suing** the Wikimedia Foundation over photos of public domain works of art, which were uploaded to Wikimedia Commons. Sadly, since then, things have not gone well for the public domain. No less than three German courts -- in **Berlin**, **Stuttgart** and now again in a **higher Stuttgart court** -- have ruled against the use of the photos. The latest court judgment is available



# Conclusion: Digitization = Legal Risk

- But we live with risk all the time:
  - Theft
  - Fire and other physical thefts
  - Accidents to staff and patrons
  - Institutional embarrassment
- Solution: policies and practices that limit the potential for harm



# Elements that minimize risk

- Some material is in the public domain
- Some in-copyright works published between 1924 and 1944 may go online: 17 U.S.C. § 108(h)
- Potential monetary damages for unregistered material are low
  - Registered: up to \$150,000 per work
  - Unregistered: actual economic harm
- Registered damages mostly waived for a “fair use”: 17 U.S.C. § 504(c)(2)
  - Need “reasonable grounds for believing that [the] use... was a fair use”

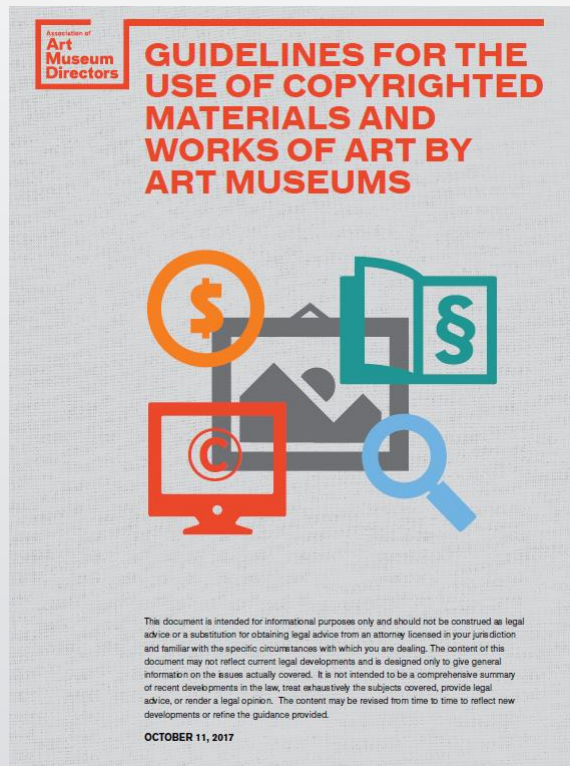
# Is digitizing a collection fair use?

- No one knows..
- *Code of Best Practices in Fair Use for Academic and Research Libraries*
  - Principle 4: Creating digital collections of archival and special collections materials
  - Digital collections may serve a different purpose than the originals, making them transformative
  - See the limitations





Also excellent: AAMD guidelines for museums  
(includes archives and other special collections)



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# More components for risk mitigation

- Takedown policy on request
- Example: Digital Commonwealth

- **Copyright Holders**

“Digital Commonwealth and its members welcome feedback from any copyright owners who are not properly identified on this site so that the necessary corrections may be made. If you have any additional information about the images or would like to suggest a correction, please [contact us](#).”



# Clear statements about user responsibility

- Digital Commonwealth:

“It is your obligation to determine and follow all copyright or use restrictions of the material presented here.”
- Library of Congress:

“Responsibility for making an independent legal assessment of an item and securing any necessary permissions ultimately rests with persons desiring to use the item.”



# Limitations on subsequent use

- Digital Commonwealth:

“Digital Commonwealth provides access to copyrighted materials strictly for noncommercial educational and research purposes and places no restrictions on public domain material.”
- Library of Congress:

“The Library of Congress provides access to manuscripts at the Library of Congress for educational and research purposes and makes no warranty with regard to their use for other purposes.”



# Different collections = different risks

- Some content may present more risk
  - Newer versus older
  - Potentially highly commercial
  - Existence of potentially litigious owners
- Institutions will vary on the desired level of risk-avoidance

# One approach: Pacifica Radio Archives

## Risk Factor Assessment for Copyrighted Tapes at PRA

This chart can be used to determine the risk factors for copyright status of tapes at the Pacifica Radio Archives. PRA staff must weigh the various factors together before determining whether it is appropriate to disseminate a tape for broadcast, re-transmission, etc.

Risk factor	Low-risk	Medium-risk	High-risk
Copyright/distribution notice on tape?	No notification or tape belongs to "Pacifica Tape Library" or a variant thereof	Notice on label that says PRA has "limited" or "restricted" distribution rights to the program	Tape label explicitly states that we have no distribution rights to the program
Producer credit?	Credit exists for a producer who has consented for PRA to distribute his or her work	No producer credit or PRA cannot locate producer after good faith search	Credit exists for a producer who does not want PRA distributing their work
Music used in program?	No music used in program or recording falls in public domain	Contains small amount (less than half) of music not in public domain (fair use)	Contains large amount (more than half) of music not in public domain (not fair usage)
Literature in program?	No literature recited or performed or excerpt used falls in public domain	Contains small amount (less than half) of a total work not in public domain (fair use)	Contains large amount (more than half) of a total work (e.g. novel, book of poems) not in public domain (not fair usage)
Excerpts from other broadcasts/radio programs/TV shows?	No such excerpts in program, or it can be demonstrated that producer was granted usage of that excerpt by licensee	Contains small amount (less than half) of an older broadcast in the new recording (fair use)	Contains large amount (more than half) of an excerpt in the new recording (not fair usage)
Station ID announced on recording?	Pacifica ID (i.e. KPFA, KPFK, WBAI, KPFT, WPFW, Pacifica National Broadcast)	No ID announced	Non-Pacifica ID announced
Known litigious entities associated with tape?	None	Risk factor of personalities unknown	Yes

[http://www.pacificaradioarchives.org/sites/default/files/fileattachments/pacifica\\_rights\\_assessment\\_.pdf](http://www.pacificaradioarchives.org/sites/default/files/fileattachments/pacifica_rights_assessment_.pdf)



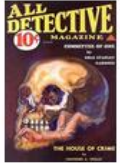


# Examples of risk minimization strategies

- One extreme: the Internet Archive
  - Regularly posts copyright content
  - Follows the Oakland Archive Policy (2002) for takedowns:  
<http://groups.ischool.berkeley.edu/archive/aps/removal-policy>
  - Redefining what is considered fair use



# Example 1: The Pulp Magazine “Archive”



## The Pulp Magazine Archive

Pulp magazines (often referred to as "the pulps"), also collectively known as pulp fiction, refers to inexpensive fiction magazines published from 1896 through the 1950s. The typical pulp magazine was seven inches wide by ten inches high, half an inch thick, and 128 pages.

[Share](#)  
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ABOUT

COLLECTION

2,074 RESULTS

science fiction

☒ Metadata  
☐ Text contents

PART OF

Additional Collections

Media Type



☐ collections 4  
☐ texts 2,070


Year

☐ 2018 52  
☐ 2013 1





SORT BY


VIEWS • TITLE • DATE PUBLISHED • CREATOR









future science fiction 51.11

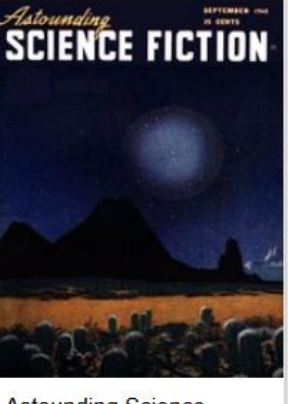
  1,808  3  0



Astounding Science Fiction v39n3





by Street and Smith Publications

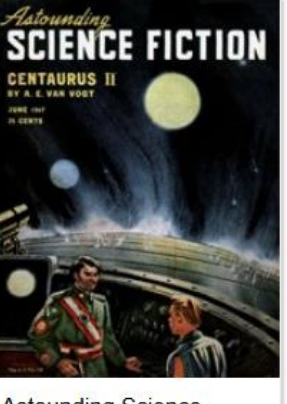
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Astounding Science Fiction v42n1





by Street and Smith Publications

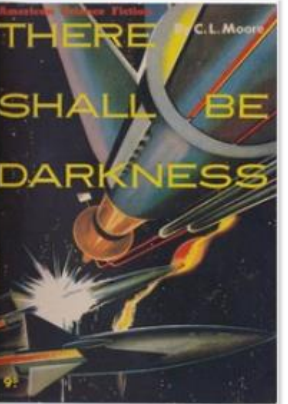
  1,108  2  0







Astounding Science Fiction v39n4

by Street and Smith Publications

  849  0  0



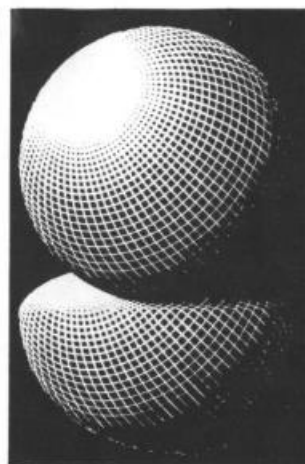
American Science Fiction #24 (1954)

  491  0  0

IF Magazine, October 1969







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# WORLD'S OF **IF** SCIENCE FICTION

OCTOBER, 1969  
Vol. 19, No. 8  
Issue 141

**ALL NEW  
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*Lester del Rey, Feature Editor*  
*Franc L. Roggeri, Art Director*  
*Jack Gaughan, Associate Art Director*

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most writers: Leiber, Anderson, Herbert Vance, Simak, Dickson, Blish, Silverberg, Ellison, Knight, Harrison, Aldiss, Niven, Clement. Popular monthly columns: *For Your Information*—Willy Ley, *Galaxy Bookshelf*—Algis Budrys.

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## Example 2: The Great 78 Project

### THE GREAT 78 PROJECT

About Collections Preservation Research Discovery Join Us Listen



<https://great78.archive.org/>





- 1 Kissa Me Baby - 03:11
- 2 78 kissa-me-baby ray-charles gbia0060584b 01 2.0 CT EQ - 03:11
- 3 78 kissa-me-baby ray-charles gbia0060584b 01 2.0 CT flat - 03:11
- 4 78 kissa-me-baby ray-charles gbia0060584b 02 2.3 CT EQ - 03:11
- 5 78 kissa-me-baby ray-charles gbia0060584b 02 2.3 CT flat - 03:11
- 6 78 kissa-me-baby ray-charles gbia0060584b 03 2.8 CT EQ - 03:11
- 7 78 kissa-me-baby ray-charles gbia0060584b 03 2.8 CT flat - 03:11
- 8 78 kissa-me-baby ray-charles gbia0060584b 04 3.3 CT EQ - 03:11
- 9 78 kissa-me-baby ray-charles gbia0060584b 04 3.3 CT flat - 03:11



## Kissa Me Baby

by Ray Charles

Publication date 1952-02

Topics 78rpm, Popular Music

Publisher Swing Time

Digitizing sponsor Kahle/Austin Foundation

Contributor Internet Archive

Language English


Performer Ray Charles




508 Views

1 Review


DOWNLOAD OPTIONS






1 Kissa Me Baby  
2 78 kissa-me  
CT EQ - 03:11  
3 78 kissa-me  
CT flat - 03:11  
4 78 kissa-me  
CT EQ - 03:11  
5 78 kissa-me  
CT flat - 03:11

84b 03 2.8  
84b 03 2.8  
84b 04 3.3  
84b 04 3.3





# Kissa Me Baby

by Ray Charles

Publication date [1952-02](#)  
Topics [78rpm](#), [Popular Music](#)  
Publisher [Swing Time](#)  
Digitizing sponsor [Kahle/Austin Foundation](#)  
Contributor [Internet Archive](#)  
Language [English](#)

Performer Ray Charles





# Boston Public Library 78rpm Collection

The [Boston Public Library](#) (BPL) sound collection includes hundreds of thousands of audio recordings in a variety of historical formats, including wax cylinders, 78 rpms, and LPs. The recordings span many genres, including classical, pop, MORE

- Share
- Favorite
- Play All

ABOUT

COLLECTION

116 RESULTS

ray charles

- ☒ Metadata
- ☐ Text contents (no results)

PART OF

[78 RPMs and Cylinder Recordings](#)  
[Music, Arts & Culture](#)

Media Type

☐ audio 116

Year

- ☐ 1957 5
- ☐ 1956 11
- ☐ 1955 3
- ☐ 1954 11
- ☐ 1953 14
- ☐ 1952 9

SORT BY VIEWS · TITLE · DATE ARCHIVED · CREATOR



Kissa Me Baby

by Ray Charles

508 0 1



Mexico

by Charles Wolcott And His Orchestra; Ray Gilbert; Charles

19 0 1



Come Back

by Ray Charles and his Band; Ray Charles

210 1 1



Land of Long Ago

by Charles Harrison; Lillian Ray

6 0 0



You Belong to My Heart (Solamente Una Vez);

by Charles Wolcott and his Orchestra; Ray Gilbert; Augustin

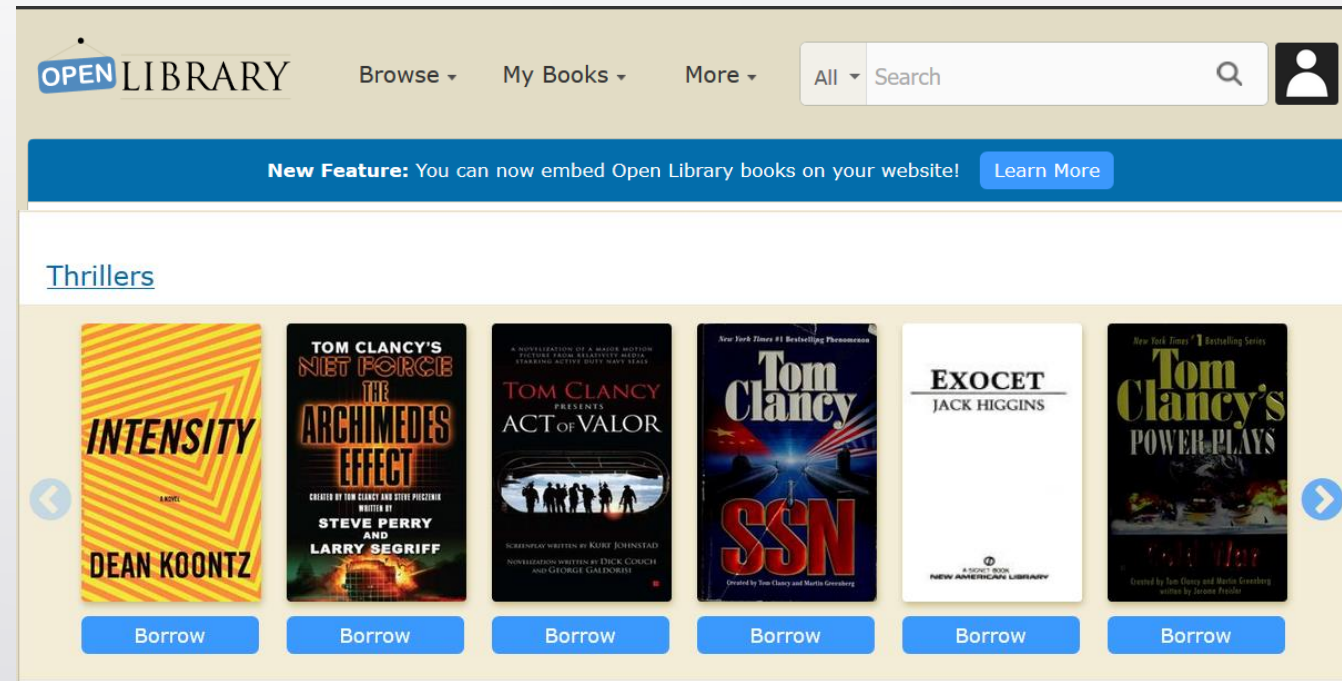
125 1 1



[https://archive.org/details/78rpm\\_bostonpubliclibrary](https://archive.org/details/78rpm_bostonpubliclibrary)

## Example 3: Controlled Digital Lending (CDL)


- CDL: limited loan of digitized books to patrons
  - See <https://controldigitalending.org/>
- Implemented in IA's Open Library



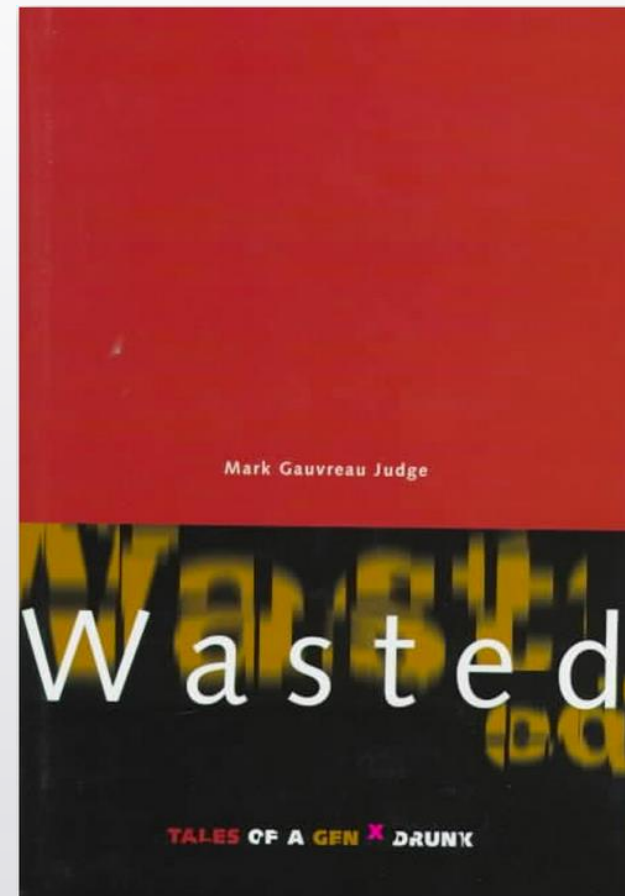
# Boston Public and CDL

This book is currently on loan with 442 patrons on the waitlist.

Join waitlist

 Print disability? [Get access now.](#)

Limited Book Preview





## Authors Guild and Society of Authors Allege Copyright Infringement by the Internet Archive



In News by Porter Anderson / January 18, 2019 / 3 Comments

Should the Internet Archive not comply by February 1, the Society of Authors says in its letter, “we will have to consider legal action on behalf of our members to prevent this practice. If that becomes necessary we shall be seeking damages for copyright infringement and payment of all legal costs.”





# Why the Internet Archive matters

- IA goes farther than most of us
- To date, it has not been challenged
- Takedown policy is effective
- No commercial exploitation is likely key

# Example 2: Fair Use at the Library of Congress

**LIBRARY**  
LIBRARY  
OF CONGRESS

Everything ▼ rosa parks 🔍 ☰

Library of Congress > Search Subscribe Share/Save

Results: 1-25 of 15,087 | Refined by:

**Refine your results**

☒ Available Online15,087

☐ All Items15,368

**Original Format**


Legislation6,111

Periodical3,341

Photo, Print, Drawing2,079

Book/Printed Material1,719

Newspaper853



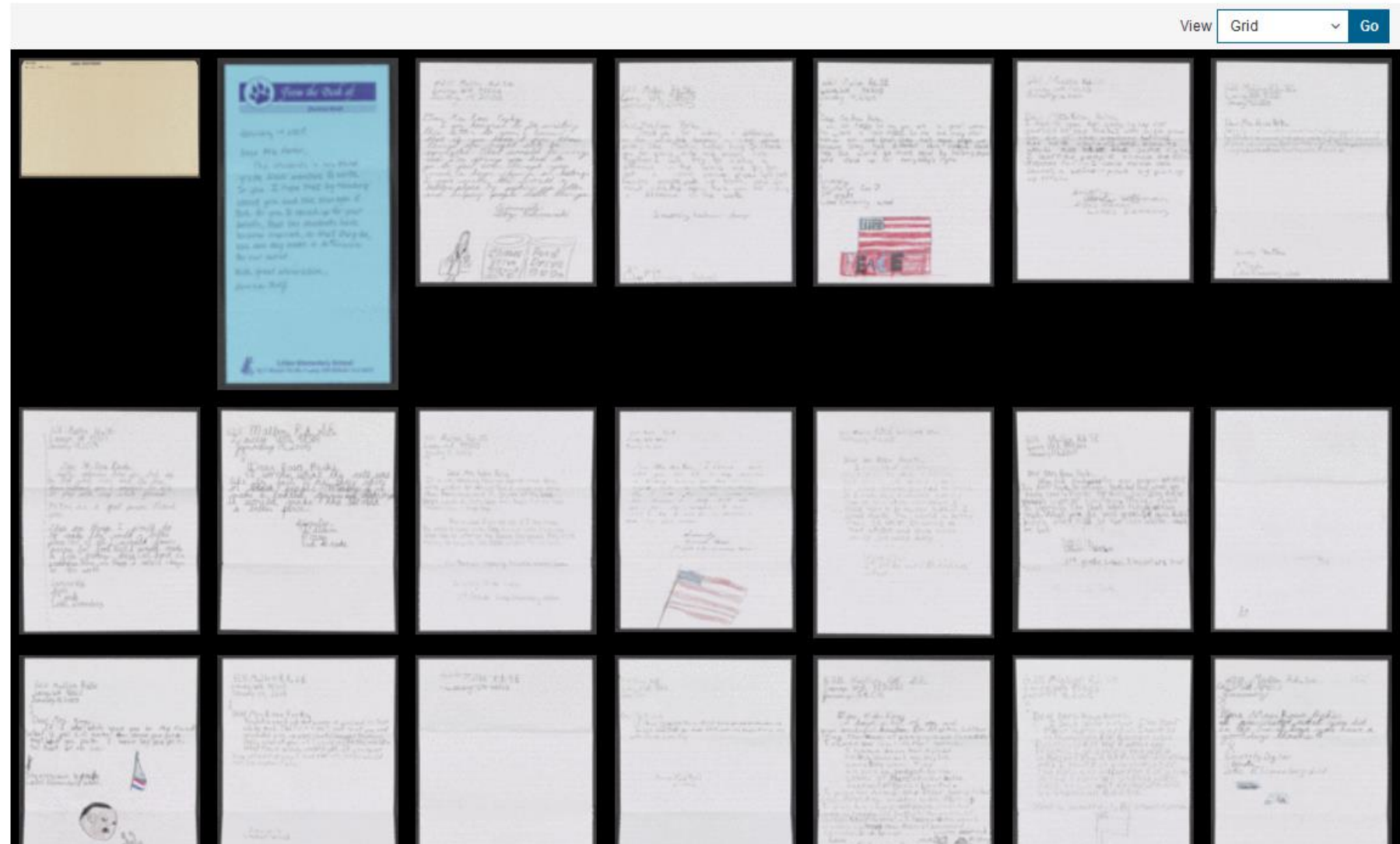
**COLLECTION**  
**Rosa Parks Papers**  
The papers of Rosa Parks (1913-2005) span the years 1866-2006, with the bulk of the material dating from 1955 to 2000. The collection, which contains approximately 7,500 items in the Manuscript Division, as well as 2,500 photographs in the Prints and Photographs Division, documents many aspects of Parks's private life and public activism on behalf of civil rights for African Americans. The collection is a...  
**Contributor:** Parks, Rosa - Williams, Aubrey Willis  
**Collection Items:** [View 2,455 Items](#)

<https://www.loc.gov/collections/rosa-parks-papers/>



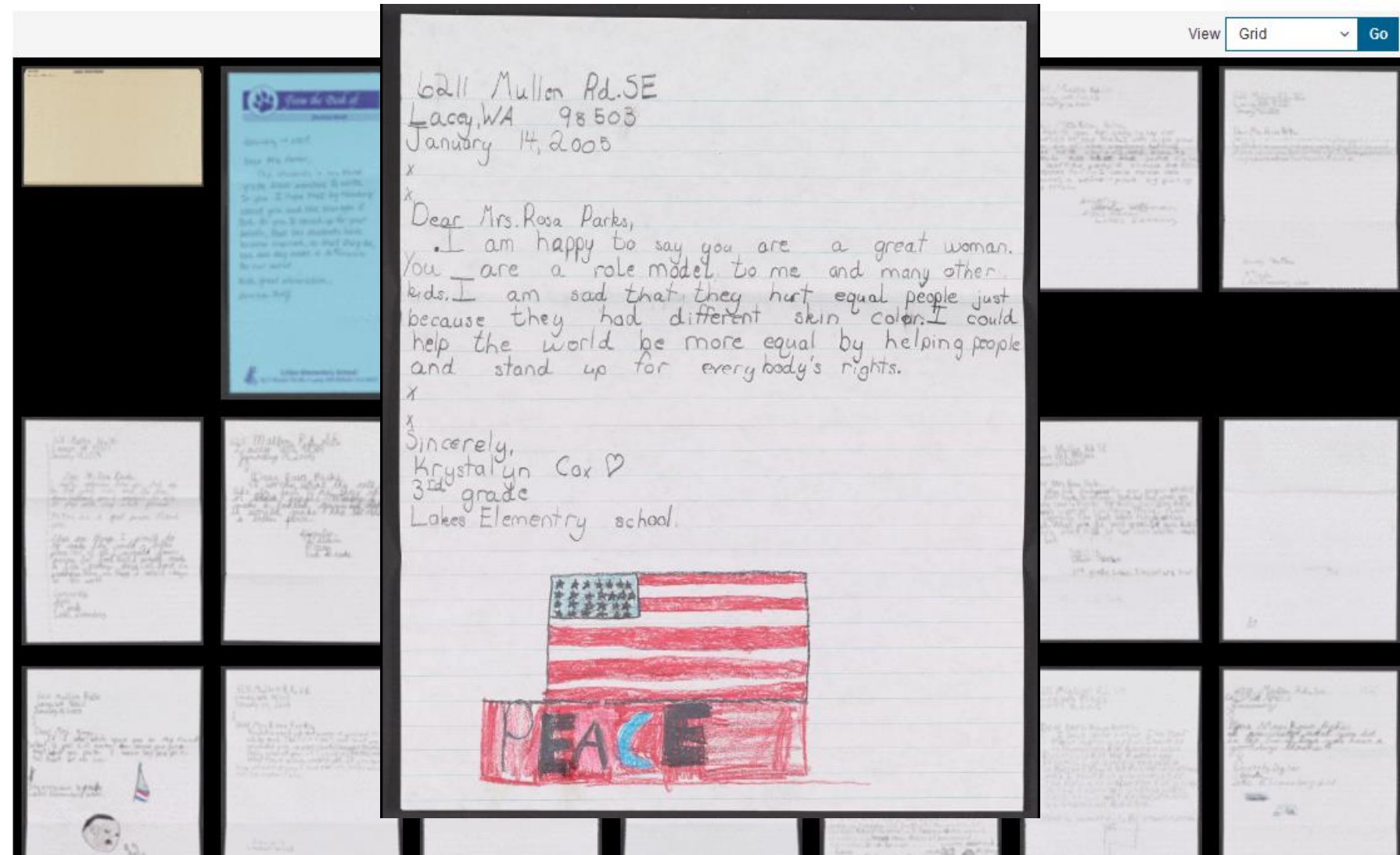
# Rosa Parks Papers: General Correspondence, 1928-2006; Letters and drawings from children; 2005

« About this Item



# Rosa Parks Papers: General Correspondence, 1928-2006; Letters and drawings from children; 2005

« About this Item



# Example 3: “Virtual Reading Room”

## American Archive of Public Broadcasting

<http://americanarchive.org>



OF PUBLIC BROADCASTING

*a collaboration between the Library of Congress and WGBH*

[FIX IT](#) [A TRANSCRIPT GAME](#)

[Advanced Search](#)

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Search Results

### Filter Results

- Media Type ▾
- Genre ▾
- Topic ▾
- Asset Type ▾
- Contributing Organizations ▾
- Producing Organizations ▾
- Year ▾

Available Online (12) ☒ ?

All Digitized (55) ☐ ?

All Records (68) ☐ ?

You searched for: NICK BUNKER ACCESS > ONLINE [CLEAR SEARCH](#)

« Previous | 1 - 10 of 12 | Next »

[SORT BY RELEVANCE](#) [10 PER PAGE](#)   



VIDEO

### Harvard Book Store; WGBH Forum Network; Nick Bunker: The Mayflower Pilgrims and Their World

Date: 2010-05-26

Journalist and historian Nick Bunker steps into a long-past world with his book, *Making Haste from Babylon: The Mayflower Pilgrims and Their World; A New History*. At the end of 1618, a blazing green star soared across the night sky over the northern hemisphere. From the Philippines to the Arctic, the comet became a sensation and a symbol, a



Record

Ha

## Online Reading Room Rules of Use

Welcome to the American Archive of Public Broadcasting Online Reading Room (ORR). To access media in the ORR, please review and agree to the ORR Rules of Use.

The American Archive of Public Broadcasting (the "AAPB") is a project managed collaboratively by the WGBH Educational Foundation and the Library of Congress ("we" or "us"). The AAPB seeks to preserve and make accessible significant historical content created by public media, and the AAPB's Online Reading Room (the "ORR") plays a central role in our mission. In the ORR, you can view and listen to thousands of hours of digitized archival materials free of charge. We make the ORR and all

I AGREE

**FIX IT**

A TRANSCRIPT GAME

ating Organizations ▾

**Donate**

ne Mayflower Pilgrims and  
Their World

**Collection**

Harvard Book Store

▼ **Description**

**Series**

WGBH Forum Network

Journalist and historian Nick Bunker steps into a long-past world

# UC Irvine: slightly more restrictive

**UCI LIBRARIES**  
UNIVERSITY of CALIFORNIA • IRVINE

**SPECIAL COLLECTIONS & ARCHIVES**

SEARCH  in **Special Collections (ANTPAC)**  [?](#)

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- Reference & research assistance
- Information for out-of-town researchers
- Duplication services
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- Langson Library
- Ayala Science Library
- Grunigen Medical Library
- Libraries Gateway Study Center
- Law Library
- Supporters & Friends

## Application for the Virtual Reading Room in UCIspace @ the Libraries

**PRIVACY NOTIFICATION**

The State of California Information Practices Act of 1977 (effective July 1, 1978) requires the University to provide the following information to individuals who are asked to supply information:

The principal purpose for requesting the information on this form is for administration of the use of Special Collections and University Archives. University policy authorizes maintenance of this information.

Furnishing all information requested on this form is mandatory. Failure to provide such information will delay or may even prevent use of Special Collections and University Archives. Information furnished on this form may be used by various University departments for identification purposes and will be transmitted to the State and Federal governments if required by law.

The person responsible for maintaining the information contained on this form is the Head, Department of Special Collections and University Archives.

\* Indicates required field

* Requesting access to:	<input type="text" value="Select a collection"/>
* First name:	<input type="text"/> Middle initial: <input type="text"/>
* Last name:	<input type="text"/>
* Email address:	<input type="text"/> (e.g., jsmith@uci.edu)
* Phone number:	<input type="text"/>
* Street address:	<input type="text"/> <input type="text"/> <input type="text"/>



# Most restrictive: No online access Salman Rushdie papers at Emory

- Locked down computers with emulated environment
- Pre-screened content
- No access outside of reading room

The screenshot shows the Emory FindingAids interface. At the top is a dark blue header with the Emory Libraries logo and the text "EmoryFindingAids". Below the header is a navigation bar with links: HOME, ADVANCED SEARCH, REQUEST MATERIALS, CONTRIBUTORS, and SEARCH TIPS. The main content area has a title "RUSHDIE, SALMAN." and "SALMAN RUSHDIE PAPERS, 1947-2008". It provides contact information for the Manuscript, Archives, and Rare Book Library at Emory University, including the address, phone number, and email. A permanent link is also provided. Below this, there are two columns: "TABLE OF CONTENTS" and "DESCRIPTION OF SERIES". The "TABLE OF CONTENTS" column lists links for Descriptive Summary, Administrative Information, Collection Description, and Selected Search Terms. The "DESCRIPTION OF SERIES" column lists 11 series, each with a brief description and a link to its finding aid.

EMORY LIBRARIES | EmoryFindingAids

HOME | ADVANCED SEARCH | REQUEST MATERIALS | CONTRIBUTORS | SEARCH TIPS

RUSHDIE, SALMAN.  
SALMAN RUSHDIE PAPERS, 1947-2008

Emory University  
Manuscript, Archives, and Rare Book Library  
Atlanta, GA 30322  
404-727-6887  
marbl@emory.edu  
Permanent link: <http://pid.emory.edu/ark:/25593/8zv36>

Print

TABLE OF CONTENTS

- > [Descriptive Summary](#)
- > [Administrative Information](#)
- > [Collection Description](#)
- > [Selected Search Terms](#)

DESCRIPTION OF SERIES

- > [Series 1: Journals, appointment books, and notebooks, 1974-2003](#)
- > [Series 2: Writings by Rushdie, 1964-2006](#)
- > [Series 3: Writing by others, 1983-2005](#)
- > [Series 4: Correspondence, 1974-2006](#)
- > [Series 5: Personal papers, 1964-2005](#)
- > [Series 6: Subject files, 1976-2006](#)
- > [Series 7: Photographs, circa 1947-2006](#)
- > [Series 8: Printed material, 1980-2008](#)
- > [Series 9: Memorabilia, 1982-1999](#)
- > [Series 10: Audiovisual, 1981-2008](#)
- > [Series 11: Computers and related devices](#)



# Summary: Don't worry, act responsibly

- Remember your mission!
- Understand – and manage – the risks
- Commercial use increases the risk you face
- Chose the level of access appropriate for the content and your institution
- Act professionally and thoughtfully
- If in doubt, consult with your legal advisors