

COPYRIGHT TOWN MEETING: Cleveland, April 12, 2003

Copyright for Artists and their Public: Artists' Rights and Art's Rights

Cleveland Museum of Art

**in association with the
Case Western Center for Law, Technology and the Arts**

Sponsored by:

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Americans for the Arts

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WELCOME AND INTRODUCTIONS

Craig Nard and Leonard Steinbach

Craig Nard welcomed participants, noting the interplay between technological innovation and artistic creation and expressing great interest in hearing discussion of the role of copyright in this interplay. As NINCH Boardmember and Chief Information Officer for the Cleveland Museum of Art, Leonard Steinbach was delighted to be able to host the town meeting in part because the Cleveland Museum prides itself on being a leader in the use of technology to disseminate information and is keen to further this in an articulation of the role of copyright. Thus he noted how valuable the conference will be in the furtherance of the museum's further technological goals.

David Green, The Copyright Town Meetings

David Green, Executive Director of NINCH, thanked Craig Nard for sponsoring and Leonard Steinbach for hosting the 22nd NINCH Copyright Town Meeting. He thanked Americans for the Arts and the Cleveland Intellectual Property Bar Association for co-sponsoring the event.

Green described NINCH as a coalition of more than 100 organizations and institutions from across the cultural community working on the issues that need to be resolved for the successful mounting of an online, networked cultural heritage. Building an accessible and affordable online world, rich in material of all media, from medieval manuscripts to touchable three dimensional objects is an enormous task, requiring thousands of people and institutions working together across the globe.

Copyright law had emerged over the last decade as “the key that can allow or deny the richness of such a space.” Without an international intellectual property regime that would allow the global cultural community to accomplish the task legally and economically, the goal would simply be unattainable.

As part of this effort, NINCH has been holding Copyright Town Meetings to bring the different sections of the cultural community together to share basic information about copyright in the digital age, to hear different opinions and to begin developing practical solutions to current problems.

After reviewing the territory covered in recent Town meetings, Green declared that the Cleveland meeting would focus squarely on the arts and explore the impact of copyright law on individual artists and their public in the digital world. He then introduced the three major panel topics:

1. Issues of Art and Work. When an artist goes to work for a particular company or organization what are the rights and issues to keep in mind? Who owns what? What can be negotiated? What should the artist be sure not to sign away?
2. Recent Legislation. What has recent legislation done to our ability to access and reuse copyrighted material on the Internet? What are the hurdles? What can you do legally with online material?
3. The Artist's Perspective. The floor goes to two artists: a photographer and musician who will discuss their own experiences with the legalities of copyright

KEYNOTE

June Besek, Copyright and the Digital Landscape

June Besek opened with a masterful overview of copyright law and the impact of networked technology. She explained that the power to create copyright and patent law comes from Article 1 § 8 of the Constitution which provides that Congress shall have the power “[t]o promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” In the eighteenth century, “Science” essentially meant learning, and the creation of knowledge, and thus copyright had clearly been designed for the public good.

Besek explained that the first U.S. copyright law was passed in 1790, soon after the Constitution was ratified. It has evolved a great deal over the years, as the first law only applied to maps, charts and books. It has gone through several major revisions, most recently the Copyright Act of 1976, which itself has been amended several times.

The Basics

Turning to the basics of copyright law, Besek explained that a work of authorship was either protected by copyright or was in the public domain. If in the public domain it is free for anybody to use. If it is protected

by copyright, then free public use is limited. What does it take for a work to be copyright-protected? There are two requirements: it has to be an original work of authorship; and it must be fixed in some tangible, physical medium.

Besek noted that originality under U.S. law is a very liberal standard. It simply means that the work cannot be copied from someone else's work, and it has to have a modicum of creativity - whether the work is good art or bad art is of no consequence.

The tangible medium can be almost anything from paper, to film, to compact discs. The basic categories have expanded from maps, charts and books to include literary and musical works, dramatic and choreographic works, pictorial, graphic and sculptural works, motion pictures, sound recordings and architectural works. However, she said that even copyrighted works are not completely protected. There are certain aspects of every work that are excluded from protection. Specifically, copyright does not protect ideas or facts. One may freely use ideas or facts as long as the expression of these ideas and facts is not being used. Besek further noted the extreme difficulty that sometimes occurs when trying to determine exactly what constitutes expression and what constitutes fact.

Ownership

Turning to the topic of ownership, Besek emphasized that copyright is a property right, although intellectual property is different from other forms of property because it is intangible. The distinction between the intangible rights and the material object in which the copyright is embodied is a crucial one. One may own the object and not the rights or the rights and not the object.

Besek illustrated this idea by showing a favorite etching of hers that she purchased in England of Wells Cathedral. Although she owns the etching, she does not own the underlying copyright and thus does not have the right to reproduce it or sell copies of it. Similarly, when someone donates a piece of art to a museum, they do not necessarily donate the rights that go with that work.

Who does own the copyright in a work? Under the law, it is usually the human creator. If there is more than one author, then it is a joint work and both own the copyright. Besek explained that there is one very important exception to this rule called the "work made for hire" doctrine. When a work is made for hire, the hiring party is considered the author. A work may be made for hire two ways: it can be created by an employee in the course of employment; or it can be specially ordered or commissioned where the parties have agreed in writing that it will be a work made for hire. Only certain categories of works are eligible to be commissioned works made for hire.

Transfer/Assignment of Rights

Whoever is the initial owner of a copyright is free to transfer it to someone else. Besek reiterated that the copyright does not automatically transfer with the transfer of the physical object. Under the law, all transfers of copyrights must be by a signed document. Further, one does not have to transfer all of the rights that go with a copyright together. For example, an author can transfer just the right to publish his or her work in the English language or may license the right to create a movie from their work. She further noted that nonexclusive licenses of copyright rights need not be in writing, but often are.

Copyright Notice

Until 1989, copyright notice, in the form of the copyright symbol, ©, was required on all copyrighted works published in the U.S. Under the 1909 Copyright Act, if a work was published without notice, it went into the public domain, meaning it was free for unencumbered public use. The 1976 Act was a bit more forgiving, but one could still lose rights to the work if it was published without notice. Today, notice is not required, but many still use it for its practical function in 'staking out' territory and letting the public know that someone owns the rights to a particular work. Besek noted the significance of this practicality due to the fact that there is much public confusion concerning the copyright symbol. Many think that if a work lacks the symbol, it is free for the taking.

Registration

The other formality Besek addressed was copyright registration. She noted that although many believe that copyright protection only comes into being upon registration at the Copyright Office, in fact it exists when an original work is created and fixed in a tangible medium. It is not necessary to go to the Copyright Office. Second, registration, although not necessary, does offer some advantages. First, it is required for a work of U.S. origin, should you need to file a lawsuit concerning the copyright. Further, registration allows one to recover greater damages and the possibility of having attorney's fees awarded. Frequently, the cost of attorneys' fees is greater than the damages that would be awarded. This serves as a huge deterrent from filing lawsuits. Registration helps to alleviate this concern and can also serve as a huge settlement tool in that the opposing party may wish to dispose of the suit out of court in order to avoid the risk of paying attorneys' fees.

Term

The next topic addressed was the length of copyright protection. The term of copyright is the life of the author plus seventy years. The term for work made for hire is ninety-five years from publication or 120 years from creation, whichever happens first. This is only effective for works made since the 1976 Copyright Act. Works created prior to this act had a different term of protection: 28 years, renewable. The renewal term for such works was extended in 1976 and again in 1998; thus, addressing the term of protection for works created pre-1976 is a complex matter. [See Lolly Gasaway, "When Works Pass Into the Public Domain.

Rights Protected

Besek then turned to the rights protected under copyright law. The most obvious and fundamental right in the bundle is the reproduction right. Second, is the right to create a derivative work or adaptation, such as a translation, a musical arrangement, or a movie from a novel. Third, is the right to distribute copies of the work to the public. One exemption to this is the "first sale" doctrine, which allows an authorized copy of a work that has been sold to be transferred to someone else. The Performance Right allows for a public performance and lastly, there is the right of public display.

Besek noted that "public" is a broad concept under the Copyright Act. Something is public if it is performed or displayed in an area open to the public or anywhere that a substantial number of persons besides a normal circle of a family and its social acquaintances is gathered, or if it's transmitted to such a place.

Besek further noted that the Berne Convention, which is the principal international copyright treaty, requires that authors have additional, non-economic rights called moral rights. The two basic moral rights are the right of attribution, (the right of an artist to have his name accompany his work), and the right of integrity, (the right to prevent mutilation or distortion of the work that would prejudice the author's honor or reputation). In the U.S. these rights are made explicit in the statute only for works of visual arts and only apply if the works exist in a single copy, or, if a print or lithograph, if there are no more than two hundred copies, each numbered and signed by the artist.

Exemptions

Besek next addressed non-infringing uses of a copyrighted work. There are numerous exceptions in the U.S. Copyright Act that do not require permission or payment. Besek noted that fair use is the broadest and most ambiguous section of U.S. copyright law. Uses favored by the law include criticism, news reporting, research, parody and satire. However, even if a use falls into these categories, that does not mean it is automatically fair. The use has to be analyzed under four factors in the copyright act:

1. **Purpose and character of the use.** Is the use transformative? Did you add something in some way? If so, the court will more likely find fair use because the law wants to encourage people to build creative works.
2. **Nature of the work.** Use of fact-based works is more likely to be considered fair than use of creative, fanciful works.

3. **Amount and substantiality of the use.** This refers to how much of the work was taken and how important to the whole was the portion used.
4. **Effect of the use on the potential market for, or value of, the copyrighted work.** If the copying will displace the original in the market, then the court is less likely to find fair use.

Besek noted that the factors of the fair use doctrine are elastic: there is no exact formula. This elasticity allows the court to respond to new situations as they occur.

She illustrated the fair use doctrine through two cases in New York. The first case, *Rogers v. Koons*, 960 F.2d 301, (2d Cir. 1992), cert. denied, 506 U.S. 934 (1992), involved a photographer, Art Rogers, who licensed his photographs for sale on note cards. One of the note cards, showing a Mr. and Mrs. Scanlon holding eight German Shepherd puppies was purchased by the sculptor Jeff Koons while working on a "Banality Show" for the Sonnabend Gallery in New York City. Koons tore off the copyright notice from the note card that he sent to his woodcarving studio in Italy, instructing the carvers to create a three-dimensional copy of the photograph as close to the original as possible. He then painted the sculpture and exhibited it in his show. Koons sold three copies of the sculpture, *String of Puppies* [see image], for over \$100,000 each. Rogers subsequently sued for copyright infringement. Koons claimed the sculpture was a social criticism, a commentary on the deterioration of society. The court was not convinced. In ruling against Koons, the court emphasized the commercial nature of his copying: the sculptures made money. The court further noted Koons' bad faith in removing the copyright notice from the note card before sending it to his woodcarvers. Importantly, the court noted that while the law is generally lenient toward parody, a satire on society does not require specifically parodying Rogers' photograph *per se*.

The second example was *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) in which Annie Leibovitz sued Paramount Pictures for copyright infringement in its re-creation, in an ad campaign for the movie, *Naked Gun 33 1/3*, of her famous photograph of a nude and pregnant Demi Moore for *Vanity Fair*.

In the ad, Paramount placed Leslie Nielson's head on a pregnant woman's body. The court determined this was use was fair because the copied picture was an obvious parody on the solemn Demi Moore image. The court also noted that Annie Leibovitz had admitted that the parody would not affect the potential market for her photograph.

Besek explained another reason for the different result: in the interim between the Rogers and Leibovitz cases, the Supreme Court had decided a very important case involving a parody of Roy Orbison's song, "Pretty Woman," by the rap group 2 Live Crew. The Supreme Court noted that while the commercial aspect of a parody is important, the transformative aspect is just as important. This case changed the relative emphasis given to the four fair use factors. Besek noted, however, that whether something is fair use can be difficult to predict in practice, especially in cases involving new technology or a new use of a copyrighted work.

The Digital Challenge

Turning to how copyright law has responded to the challenge of digital technology, Besek listed the pros and cons of digital technology for authors and artists: The Internet makes it easier to share work with colleagues and friends; it makes different kinds of collaboration easier, and modifications, especially on photographs, easier to create. However, digital technology also makes copying much easier, especially with the help of file-sharing programs that permit users to send millions of copies at an instant.

For many creators, whose work is only meaningful in its original form, the Internet probably does not pose too much of a threat. Academics, for whom renown is more important than royalties, may welcome the distribution of their work over the Internet. However, some academics may be concerned about attribution. If their work is disseminated on the Internet, the concern is that they will not get credit for their work, or that the copying party will attempt to "pass off" the work as their own. Others are concerned that their work will be changed in a significant way, so integrity is an important issue.

Besek explained that the law has responded to digital technology in two ways: through Congressional statutes and case law. New issues arise every day, to which the courts must apply statutes often created in a time when the particular issue was non-existent.

In 1998, Congress passed The Digital Millennium Copyright Act (DMCA) [see [Copyright Office Summary of the Act](#)]. This was designed, among other things, to make copyright owners feel more secure in posting their works online. Besek noted two provisions relevant to the Town Meeting:

- the Anti-Circumvention Provisions (Section 1201) and
- the Integrity of Copyright Management Information (the identifying information attached to copyrighted works in digital form) (Section 1202).

Technological Protection

Besek explained that Congress felt copyright owners would want to rely on various forms of technological protection (e.g., password protection, copy protection, encryption, and digital watermarking). The DMCA gives legal protection to these technological protection measures, prohibiting their circumvention. It deals separately with 'access controls' (passwords and encryption that limit access to authorized users) and rights controls that limit a user's ability to copy a work or play it in a particular environment (e.g., streaming media that does not allow downloading).

The DMCA does three things:

- it prohibits the actual act of circumventing a technological access control
- it prohibits manufacturing or distributing devices or offering services to circumvent access control, and
- it prohibits manufacturing or distributing devices or offering services to circumvent rights controls.

The one thing the DMCA does not do is prohibit the actual act of circumventing rights controls. Besek explained that the legislators did this because they thought that if one made a copy after circumventing a rights control and it was a fair use copy, he should not be liable for circumventing a rights control. On the other hand, if he did circumvent a rights control and the copy was not fair use, then the copyright holder would have a claim under the Copyright Act

Copyright Management Information

Copyright Management Information (or Digital Rights Management) comprises metadata attached to a work containing the copyright owner's name, the title of the work and the terms by which one can use it. Section 1202 of the DMCA states that it is illegal to knowingly distribute false copyright management information with the intent to enable or conceal infringement or distribute works knowing that the accompanying information has been removed or altered.

These provisions provide tools to individual owners as well as big businesses. If individual authors can have reasonable protection under copyright law they will more freely self-publish. Besek noted that this may liberate artists and authors from traditional distribution mechanisms, and the often one-sided agreements they get from large publishers. Besek further stated that her particular research has shown that even those who are less concerned about royalties do see digital rights management as a useful tool to protect the integrity of their work.

Case Law

Besek discussed two cases to illustrate how courts have been dealing with digital technology and copyright. The first is *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2001) <http://pub.bna.com/ptci/99-560.htm>. Arriba Soft owns an image database with a webcrawler that discovers and copies images into its database. A query to the search engine will produce several thumbnail images. When the thumbnails were clicked on, a large version of the photograph would appear through an in-line link. Because of the in-line link, the image could not be classified as a copy; rather the use invoked the right of public display.

Photographer Leslie Kelly had images posted on a website that were picked up by Arriba Soft's webcrawler. Arriba Soft failed to remove the photographs from their database when Kelly requested that they do so and then sued Arriba Soft for copyright infringement.

The court looked at the thumbnail images differently than the larger images. The court was convinced that the thumbnail images were fair use because of their transformative nature. Even though the copies were exact, the smaller images provided less clarity, prompting the court to conclude that they would not impinge on the market for the larger photographs. Moreover, the thumbnail pictures served a totally different function. The court felt the thumbnails were a useful and valuable tool, meant to provide and locate the photographs on the web, unlike the purpose of the original photographs which were meant for aesthetic enjoyment. However, Besek noted that the court had a very different view of Arriba Soft's use of an in-line link to the full-size images. These did impinge the market for the original photographs because it made it unnecessary to ever go back to the original. One could essentially get the photograph without going to the original website.

However, Besek noted that the court had a very different view as Arriba Soft's use of an on-line link to the full-size images. These did impinge on the market for the original photographs because it made it unnecessary to ever go back to the original. One could essentially get the photograph without going to the original website.

The second case was *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) <http://www.law.cornell.edu/copyright/cases/239_F3d_1004.htm> that Besek wanted to discuss because of the vast quantity of misinformation circulating in regard to it. She noted that MP3 technology has made it possible to transfer music files over the Internet very quickly. Napster sought to take advantage of the MP3 software standard and peer-to-peer networking technology to create a database that would enable users to locate and exchange music files with other users currently logged on to Napster. This became an extremely popular source of free music and record companies subsequently filed suit against Napster. Besek explained that though Napster itself did no copying, one can be liable for copyright infringement through secondary liability. There are two forms of secondary liability under copyright law (1) contributory infringement, where one is liable if he has knowledge of the infringing activity and assisted in some way, and (2) vicarious infringement, where one has the right and ability to supervise the activity and derives a financial benefit from the activity.

The record companies owned the copyrights in most of the material that was being copied through Napster. They claimed that Napster was aware of the infringement and that the copies were being made without the permission of the copyright holders. Ultimately, the court agreed. The court held that Napster was both contributorily and vicariously liable and issued an injunction.

Besek noted that while many people feel this is a decision about peer-to-peer file sharing technology, this case is really about a mass, centralized database of information about the location of copyrighted works available for (often unauthorized) copying, used in conjunction with peer to peer technology. Besek further noted that there are many justifiable and legal uses of peer to peer technology that do not infringe copyrights.

Final Thoughts

Besek concluded with some thoughts on what is ahead on the legal front concerning digital technology. She noted that enforcement of the DMCA is beginning to target individuals. Corporations whose files are the subject of file sharing are now beginning to go after individual copyright infringers rather than intermediary companies like Napster. However, Besek noted that there is currently legislation pending in Congress that will attempt to weaken aspects of the protection offered by The Digital Millennium Copyright Act. (See, for example, the Digital Media Consumers Rights Act.

In closing, Besek noted that the most interesting developments regarding digital copyright are on the business side of the issue. Because many feel that the use of peer-to-peer file sharing would diminish if

customers had a better service, the music industry is trying to respond. However, see the impact of the May 2003 release by Apple Computer of a system allowing 99¢ downloads, some limited copying for personal use and no subscription requirement. (See also a May 28, 2003 report that Apple withdrew file-sharing ability because of abuse by some: Ian Fried, CNET News.com: "Apple unplugs iTunes Internet file-sharing,"

Besek noted that an important role remained for legal enforcement because "it is hard to compete with free." In the end Besek concluded that the solution to the copyright problem in the digital era is multifaceted and will be a combination of enforcement of the law and the development of new business models.

ART & WORK: COPYRIGHT, CONTRACTS AND WORK-FOR-HIRE

Alberta Arthurs, Introduction

Alberta Arthurs began the panel discussion with some informative thoughts on the challenges creators face in the new digital millennium. She noted that the meaning of 'copy' has changed significantly with the advent of new technology, making it possible to procure endless perfect copies of any product that appears in digital form. Further, the Internet allows for these copies to circulate globally and freely, and creates challenges to those seeking protection of their creative works. She expressed her great interest in hearing the response of artists and legal minds alike to these challenges. She also directed participants to the important project conducted in 2002 by the American Assembly on Art, Technology and Intellectual Property on many of these issues.

Maureen A. O'Rourke, Creators' Rights and the Aftermath of the Tasini Case

Maureen O'Rourke gave a powerful talk on the plight of freelance writers in the digital age, and on the intersection of contract and copyright law in the protection of creators' rights. She noted that the problems faced by freelance writers extend to all creators in their struggle to protect their work from uncompensated dissemination on the Internet.

She began by outlining the specific issue faced by freelance authors today. Although the Internet offers them the opportunity to produce and broadly disseminate their work, the question is: who gets what compensation when the work is published on the Internet? The author? The publisher? The technologist who created the database on which the work is published?

Prior to electronic publishing technology, an author might typically be paid by a publisher for one-time publication of a work within the United States. With the advent of the Internet, publishers may now make entire publications available on websites. A common example is newspaper publication. The problem arises when these publications are made without the permission of the individual freelance authors who contributed to the overall publication.

O'Rourke noted that copyright law offers little to protect freelancers in bargaining with publishers over electronic rights. Although the Tasini case [*N.Y. Times v. Tasini*, 533 U.S. 483 (2001)]; see <http://www.nwu.org/tvt/tvthome.htm>], seemed to offer a glimmer of hope to freelance authors, it has produced some unwelcome results. In this case, the Supreme Court confirmed that when a freelance author contributes an article to a collective work such as a newspaper or magazine, the author has a distinct and protectable copyright. Further, the court noted that although section 201 of the Copyright Act allows owners of collective works (publishers) the right to reproduce and distribute contributed work in a

"revision," the term "revision" does not encompass distributing the work in electronic format." O'Rourke noted that while one may think this ruling might encourage publishers to increase payment to freelance writers in exchange for electronic rights, in practice the outcome has been much different.

Ironically, the case has led to a change in contracting practices between authors and publishers. Publishers now routinely seek all publication rights to a creative work for the same price they offered for the more limited one-time publication rights. Because of unequal bargaining power, authors have little recourse when confronted by unbalanced contracts, and publishers are typically easily able to convince authors to give up all rights in order to be published.

O'Rourke further noted that the U.S. court system has been unresponsive to claims brought by authors under contract law. She explained that contract law is simply not well suited to adjust for disparities in bargaining power. Moreover, while courts may be willing to police contracts on some level, the courts are less willing to protect freelance authors who know what the terms are when they sign, but sue later.

She offered valuable insights into possible solutions to these complex problems. While changing copyright law will be a long and arduous process, she noted that collective activity by artists and authors could do much in the way of equalizing bargaining power. She suggested that a form of unionizing could strengthen the creators' position in negotiating contracts and noted that while such groups have succeeded in the music industry, attempts by artists and authors have been, so far, largely unsuccessful. She suggested that this could be due to the scale of the operation: artists and authors have been unable to attract the large numbers necessary to demonstrate strong bargaining power in contract negotiations.

One solution might be self-publication through author/artist groups that can use digital technology to their own advantage, perhaps attracting advertising money and becoming a competitive force to be reckoned with.

However, O'Rourke concluded by suggesting that perhaps the most important key is educating creators about their rights and the kind of contractual terms they should avoid. She stated poignantly that an artist cannot just be an artist anymore, but must be a lawyer, too

Richard Kelly, An Artist's Perspective

Richard Kelly, a Pittsburgh based photographer, picked up the conversation nicely with an explanation of how copyright law affects him as an artist on a day to day basis. He noted how relevant this discussion was to his own situation because, as O'Rourke had demonstrated, he is no longer just a photographer, but a bit of a lawyer as well. As a professional photographer, he typically spends two days a week shooting photographs and five days a week negotiating contracts.

Kelly expressed his dismay that the legal hurdles facing artists are not discussed in art schools, and noted the need for artists to become educated about their rights. He explained how he did not learn the ramifications of licensing until working for a professional photographer and seeing the importance, and value, of licensing agreements in action. He declared that his legal education is an ongoing process and that the changes in digital technology have altered the playing field significantly since he began working as a professional photographer in the 1980's.

Kelly explained that, as O'Rourke noted above, prior to the advent of the Internet, most of his contract negotiations involved one-time only publication rights within the United States. He stated that most of his contracts were negotiated freely and easily, many times by telephone, without the need of signing. However, with the dawn of the digital age, contract agreements became more complicated, involving exclusivity and Internet publication. Though more money was not offered, publishers were now seeking all publication rights, including the right to multiple web publications. Rather than improving artists'

bargaining power, Kelly noted that the Tasini case had the unfortunate effect of causing publishers to demand all rights up front, leaving little room for negotiation.

He registered the frustration artists face because of their frequent inability to speak to anyone at a particular publication office who has the ability or the power to negotiate. Because artists frequently deal with middlemen, they are effectively barred from contracting around unfair terms. Kelly noted that negotiation is critical. In his personal experience, he has been able to get larger fees in exchange for digital publication rights in situations where he was able to confront those with the bargaining power and make specific contractual demands.

Publishers, he granted, often receive and use thousands of photographs a day and most don't have the resources to negotiate individual contracts. Standardized contracts are the only way to manage the volume. However, this concern could be alleviated if the standardized contracts included just compensation for digital publication rights.

Kelly concluded by explaining that he, like many artists, is excited and amazed by the marketing and promotional opportunities for photographers that the Internet presents. However, he noted the difficult choice an artist must make when putting his works in this uncontrollable domain. "It is getting harder and harder to remain in the business when you cannot reap the benefits of your own work."

Deborah A. Coleman, The Museum's Concerns

Deborah A. Coleman followed with an expression of an institution's concerns. Specifically she offered an informed discussion of a museum's perspectives on these issues from the viewpoints of: (1) The Museum as Curator, (2) The Museum as Collector, and (3) The Museum as Author.

The Museum as Curator

Coleman eloquently noted that until the digital age the museum operated as an effective container for cultural heritage. Digital technology now offers the opportunity to dramatically enhance the museum's educational mission by dispersing more broadly the actual experience of cultural content through the museum's website. A curator and certainly the educational staff now have the opportunity to be entrepreneurial as the museum faces very real economic concerns and needs to balance educational mission against economic interests.

She declared that the museum faces copyright questions each time it places an image of a piece of artwork on a coffee cup or poster sold at the gift shop. She emphasized that the fact that the museum owned a work did not necessarily mean it owned the copyright or had the right to reproduce it. Though there are a few implied permissible uses, such as the need to make a copy of the work for the museum's archives, copies made for promotional and marketing purposes are often problematic because they produce financial benefits.

Because of so many copyright uncertainties, museum staff will rely on contracts. Unless art is acquired for the contemporary galleries, museums rarely deal directly with artists. Often, work is gifted and the donor does not own the rights to reproduce the work. In cases like these, standardized contracts can alleviate the burden of complex legal issues.

The Museum as Owner

As owners of artwork, museums are frequently concerned with the quality of images displayed on their websites. Coleman noted that the digital world has no bounds, and the museum must carefully address the terms on which they enter this new space to protect themselves from unauthorized copying. She reported that some museums allow only low-resolution images or long-view gallery shots that seldom show an entire piece of artwork and noted that many museums place copyright protection notices on the websites or create pages that do not allow downloading or printing.

The Museum as Author

As author, the museum will have many rights accruing from its publication of catalogues, commentaries, and scholarly writings as well as from material it develops for the web. A museum will usually own the rights of works created by its employees in the course of their employment. However, when employing independent contractors, museums often have to negotiate specific ownership rights.

Comments and Discussion

The comments and questions session raised some interesting points concerning artists' views on the value of the Internet on one hand, and the dangers of uncontrolled dissemination on the other. One particularly interesting question involved O'Rourke's comments on the need for mobilization and collective activity on the part of authors and artists to protect their rights in the freelance market. An audience member asked O'Rourke to expand her comments: How exactly will writers' unions or collective rights organizations assist individual artists and writers? O'Rourke explained that creators could come together and license their publications to large collective rights organizations such as the Publication Rights Clearinghouse of the National Writers Union <<http://www.nwu.org/prc/prchome.htm>>, which in turn, could license the works to interested publishers for a standardized fee.

However, O'Rourke noted the difficulties encountered when creators have already signed away all of their publication rights in the original publication. She further noted that success depends, in part, on attracting a critical number of creators. So far, the broad range of opinions among artists on the pros and cons of the Internet have prevented a large collaborative effort to materialize.

Alberta Arthurs expanded the argument by noting that, while publishers are vigorously pursuing their interest in the issue and lobbying for protective legislation, artists have such a broad range of opinions on the matter that it is hard to get everyone together on the issue.

Richard Kelly added that he, himself, is a prime example of the vast spectrum of opinions concerning the worth and danger of the Internet. He stated that he was torn between using the web as a promotional tool and the fear of that tool permitting people to steal his work.

Arthurs concluded the discussion with a poignant statement: underneath all of the controversy, the sad irony is that the very goals of copyright law, to get creative works out for the benefit of the general public, and to provide incentives to creative minds through protection and compensation, are being displaced.

ACCESS AND USE: COPYRIGHT AND THE PUBLIC DOMAIN

Mark Avsec, Misappropriation: Criteria for Establishing Copyright Infringement

Mark Avsec, a lawyer and a Grammy Award winning musician, brought a self-proclaimed cynical voice to the panel in his discussion of the criteria used for establishing copyright infringement in the musical realm. His disclaimer was that as a musician he had been on the receiving end of an infringement lawsuit and felt "raped" by the legal system. Though he had won the case, the experience prompted him to become an intellectual property attorney himself, and in this capacity he frequently defends against infringement claims. Here he described the elements necessary to prove infringement as proclaimed by the landmark case, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

He explained that, though Ira Arnstein was a musician, he was also a career litigant with a penchant for the absurd. He brought a copyright infringement suit against Cole Porter claiming that Porter had sent

'thugs' to his apartment to steal his works of musical genius and then copied his music in subsequent recordings. Avsec explained the three-part test for proving copyright infringement as laid out in this case:

Access: the Plaintiff must show that there was a reasonable possibility of access to the copied work.

Substantial Similarity: the Plaintiff must prove that there is substantial similarity between his own work and the allegedly copied work. Here, experts are frequently brought in to prove the similarity of specific notes, chords, and rhythms.

The Intrinsic, or "Lay Listener" Test: again, substantial similarity must be proven, this time from the perspective of the lay listener (the jury). Do the songs sound enough alike to prove infringement?

Avsec noted that very rarely is one able to get first-hand evidence of infringement, such as an eyewitness who could testify that he saw the actual act of copying or stealing. Thus, the elements are frequently satisfied with circumstantial evidence. Avsec warned of the dangers inherent in the use of such circumstantial evidence. For instance, a budding musician may be able to prove access simply because he sent a demo-tape to a recording company. For this reason, Avsec frequently counsels clients not to accept demo-tapes from anyone not completely held in trust.

Avsec emphasized that access is often the key to infringement suits, because once access is proven, particularly in frivolous or baseless suits, experts may be able to confuse a jury sufficiently to convince them that, though the music does not sound similar, the notes, rhythms, or chords used were similar enough to prove copying.

In conclusion Avsec asked a thought provoking question. Do we really need copyright law? If the ultimate goal of copyright law is to provide incentives to authors and artists to continue to create works for the enjoyment of the public, do we really need a copyright to accomplish this? Was Beethoven motivated by copyright concerns to write the Moonlight Sonata? Avsec made it clear that he himself was a "copyright optimist" and firmly supported copyright's monopoly. Yet, even if we agree that copyright is needed to protect the work once it is written, how long should this protection last? How long is too long?

Mark Gunderson, A Musician's Experience Working Online

Mark Gunderson, musician and new media artist, provided a fascinating, if controversial view on the role of copyright law in the work of a media artist. Gunderson is founder and member of [The Evolution Control Committee](#), an audio art group and band known for its copyright-challenging stance. Gunderson explained that the ECC sees itself as a musical pioneer, creating 'collage' music made of spliced sounds, most taken without the permission of the creator, and recombining the spliced material to create new music. For example, the ECC has taken a *cappella* recordings of well-known artists and placed them atop instrumental recordings (of, for example Herb Alpert), creating an all together new musical experience. The ECC has released numerous full length albums and singles, most notably the "Whipped Cream Mixes," said to have spawned the "bastard pop" or "bootlegger tracks" musical genre that became extremely popular in the UK.

Gunderson played various examples of his music for the audience, including the controversial ["Rocked by Rape"](#) single that was the subject of a threatened lawsuit by CBS and Dan Rather against the ECC. The single contained spliced audio of violent words used by Rather on the CBS Evening News put to the music of the rock and roll band, AC/DC. Upon releasing the single and having a [review](#) published in *Spin Magazine* (see reviews in [Resources](#)), CBS became aware of the recording and sent a cease and desist notice to the ECC claiming copyright infringement. Knowing the ECC could not afford the legal costs of

defending suit against CBS, they decided to launch a media war instead. In numerous subsequent news articles Gunderson claimed that the song was simply a parody and that the ECC had not broken any laws. CBS's reaction was to do nothing. As of yet, there has been no suit. Gunderson notes, however, that he is now in 'legal limbo.' Having just re-released the single on his new record, *Plagiarhythm Nation*, he awaits further word from CBS.

"Rocked by Rape" was Gunderson's first foray into the ease and convenience of digital editing. He notes that the Internet has played a crucial role in many of his projects. Notably, Gunderson is currently using MP3 files downloaded in the days of Napster to create a new medium he calls "Voyart." Gunderson explained that some Napster patrons allowed access to all of their MP3 files to other users, sometimes unwittingly including files containing "karaoke practice" or private recordings of heartfelt letters to loved ones. Prior to Napster's demise, Gunderson was able to amass an archive of such recordings and is now splicing the recordings together, creating what he calls "forced duets."

Though Gunderson poked fun at the legal fragility of his creations, his explanation of the ideology behind his work spoke to the very purpose of copyright law. He explained that his work takes off from where the previous artist left off. By splicing and reordering the music, he was, in fact, creating something entirely new. Is this not the incentive that copyright law seeks to encourage? Moreover, Gunderson noted that each of his released recordings is accompanied by a full list of credited sources naming the original creator. The ECC, he explained, is in no way attempting to take credit for the work in the original source material.

Commenting on the legal implications of the ECC's work, Mark Avsec said that copyright infringement was clearly an issue. However, the songs were arguably derivative works, allowable under copyright law. Avsec thought Gunderson may find himself facing rights of privacy and publicity claims, as well as infringement claims for the MP3 files, which, though not published, are certainly protected under copyright law because they are fixed in a tangible medium. In conclusion, Avsec said that if the re-released "Rocked by Rape" was a success, Gunderson should probably expect to be hearing from CBS in the near future.

Walt Seng, A Photographer's Experience in the World of Copyright Law

Walt Seng, a successful Cleveland-based photographer, gave a revealing talk about unauthorized use of photographs in licensing agreements. Seng related a personal story of a lawsuit he brought against a client for using his photographs in unauthorized form. Seng was hired by a salon to take photographs for a hair color book to be used within the salon. He explained that he had a long-standing and good working relationship with the salon and thus no contract was signed for the work. But, in addition to the color book, the salon used the photographs to create posters and calendars without Seng's permission.

Seng was forced to bring suit and later won in a settlement agreement. He explained that he was saved by an invoice he had sent to the salon on which he had written the intended use of the photographs. While the salon had paid \$5,000 for the photographs to be used in the book, he calculated that it had derived some \$750,000 from reusing the photos to sell posters and calendars.

Seng stressed the need for more education of artists and publishers alike in copyright law, to curtail millions of needless lawsuits. He explained that the salon was very confused: if they hire an out-of-state photographer, the photographer owns the rights; if they hire a local photographer, the salon owns the rights. Seng suggested that if the salon had just asked about their rights to the work prior to publishing the calendars and posters, neither party would have had to invest the time and expense of a lawsuit

OPEN FORUM

International Law

Among the interesting issues raised in the open forum discussion was the question of how international law is responding to the newly digitized world that Internet technology had brought with it. June Besek noted that prior to the Internet, intellectual property rights were handled geographically. Wherever a breach took place would generally be the location for recourse.

The Internet complicates this, as geography becomes relatively meaningless. How can one determine exactly where an infringement takes place? Which country or countries can claim jurisdiction over the parties in suits involving various foreign entities? Which country's law will apply? Besek explained that the place of suit and which country's law will be applied are very important when laws differ significantly from country to country. There are currently efforts under way to standardize intellectual property rights country by country through various international treaties. However, she noted that laws change rather slowly, so rules will differ in various countries for quite some time to come.

Copyright Notice

Another interesting question raised in the discussion was whether it might be necessary to reinstitute the formal notice requirement under copyright law with the advent of Internet technology. Prior to 1989, every copyrighted work in the United States was required to have a copyright symbol to put the public on notice that the work was protected. When the lack of formal notice intersects with the effortless ability to copy works off of the Internet, are we not just asking people to gamble with their rights?

Mark Avsec noted that, though formal notice is no longer required, every copyright owner is still free to affix a legend to their work, warning the public that the work is protected under copyright law. Thus, the artist still has ample opportunity to take advantage of the practical benefits of notice.

Creative Commons

David Green pointed out the value of the innovative "Creative Commons," an organization providing authors and artists with a variety of licenses to choose from, each stating the appropriate uses that may be made of their works. For example, if one decides to let the work into the public domain, thereby allowing free reproduction rights to the general public, they may select or design a license to that effect. Besek expressed a concern, however, that artists and authors may not fully realize the implications of what they are giving away when they choose an appropriate license. This is especially a concern for budding artists who may not realize the economic worth of their creations until much later in their careers. Clearly, the importance of educating creators about the rights they possess under copyright law cannot be overstated.