

**COPYRIGHT TOWN MEETING: New York, February 22, 2003**

## **Digital Publishing: the Rights Issues**

**Sponsored by:** Cowan, Liebowitz & Latman, P.C.

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### **WELCOME AND INTRODUCTIONS**

#### **Robert Baron, Welcome and General Introduction**

Robert Baron, outgoing chair of the CAA Committee on Intellectual Property, welcomed participants to the program by noting that it represented the sixth copyright town meeting jointly sponsored by NINCH and the College Art Association.

It all began, Baron said, at the February 1997 CAA Conference, when the first joint Town Meeting was convened on a Sunday at Cooper Union College. The topic was the fair use of copyrighted work in education and the hall was filled on only a day's notice. "After all these years, with so much legislation and tribulation," Baron said, "here we are, still tackling fair use, though it seems imperiled, one way or another."

Throughout these years, David Green, as "one of the few people who can connect the dots" has acted "as mentor and sometimes task master" to the Copyright Town Meetings—not just the ones jointly sponsored with CAA but with many other intellectual organizations, including the American Association of Museums, the Art Library Association, the New York Public Library, and many others.

Explaining that he would soon turn over chairmanship of the CAA Committee on Intellectual Property to Patricia Failing, Baron thanked Green for the extraordinary spectrum of views he had presented in the NINCH Town Meetings.

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### **David Green, The Copyright Town Meetings**

David Green began his introduction to the 21st NINCH Copyright Town Meeting by explaining the nature and purpose of the National Initiative for a Networked Cultural Heritage, a coalition of more than 100 organizations and institutions drawn from across the cultural community. As these very different entities produce, describe, collect, and catalogue cultural materials differently, NINCH's goal is to bring the parts of the community together in the collaborative project of producing a more cohesive body of online cultural resources.

Green described NINCH's vision for an online world rich in cultural material in all media, including representations of "prehistoric artifacts, manuscripts, painted, drawn, and photographed images, moving images, 3-D objects you can touch, spaces you can move through, and buildings and cities you can follow as they age and grow through time."

Building such a rich treasury for learning, creation, and discovery and making it available, affordable, and useable for all is an "enormous task," Green admitted, requiring all kinds of people to work together across the globe. But for many, copyright law is "the key that can allow or deny the richness of such a space."

The NINCH Copyright Town Meetings were established to bring together the relevant stakeholders in creating and using intellectual property to begin to develop practical solutions to the questions of copyright law that will make possible the networking of cultural heritage material.

The New York copyright town meeting, Green said, would focus on electronic publishing—what do we mean by publication in a digital age? What are the rights issues? The control and access issues?

The first part of the meeting, he explained, would cover the "landscape" of e-publishing—the activities of artists, scholars, editors, researchers, and others which can be considered e-publication, and the practical issues of getting an established scholarly journal on-line and creating an entirely new on-line journal in art history.

The second part of the meeting would deal with strategies—what recourse you might have if your request to publish is denied or if you are unable to locate a rights holder. Finally, the meeting would deal with the impact of last year's distance education legislation, the TEACH Act, on e-publishing efforts.

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### **Robert Clarida, Fair Use Is Still Alive**

Robert Clarida of the law firm, Cowan, Liebowitz & Latman, PC, sponsor of the Town Meeting, briefly addressed fair use from the point of view of the copyright lawyer. Fair use, Clarida said, is increasingly hospitable to scholarship—especially visual arts scholarship— on the Internet.

Clarida pointed to several recent legal decisions, including one that held that posting thumbnail-sized images in so-called virtual search engines on the Internet is "fair use." Thumbnails posed no "market harm" for rights holders because their use was "functional" and they had "no aesthetic quality" that could be converted into commercial products.

In another case, a Beanie Babies guidebook was allowed to publish Beanie Baby images as fair use, even though they offered only minimal information. They were not a market substitute but an informative publication. The documentary use of clips from old Hollywood films was also declared fair use because it did not hurt the market for selling such clips. In fact, by increasing public visibility of the original films, documentary use would increase, not restrict, the market.

Fair use, Clarida concluded, is always “something of an act of faith.” Still, he maintained, fair use was still a very robust affirmative defense in nonprofit and scholarly use of copyrighted materials. In fact, since the Supreme Court first addressed fair use, virtually every high profile case has come out in favor of the fair use advocate and against the copyright holder.

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## PUBLISHING ONLINE: THE RIGHTS ISSUES

### **Susan Chun, The State of Play of Publishing Art History and Criticism Online or “What is E-publishing?”**

Susan Chun began by pointing out that museums occupy a very interesting place in the discussion of intellectual property rights. Museums are, at the same time, rights holders and administrators, authors, scholars, librarians, and publishers. As General Manager for Electronic Information Planning at the Metropolitan Museum of Art, she plays roles in several of these areas.

Museums thus experience intellectual property issues from several sides and understand, from the inside, the frustrations of authors at the same time as they formulate their own policy for working with authors. Museums, Chun stressed, live in the same confusing, changing, uncertain world of intellectual property concerns as everyone else.

Chun explained that she would limit her remarks on e-publishing to three questions:

1. What exactly is e-publishing in a museum?
2. What are the specific effects of these new publishing models on authors and their rights?
3. What are the latest developments in museum intellectual property policy that might affect the work of scholars and art historians?

#### *What is museum e-publishing?*

Chun said that just as traditional print publishing at the museum encompasses anything produced for the public, including wall labels and brochures as well as journals and books, so e-publishing has a broad definition. The earliest e-publications in art history were those converted from print or were types of publication—like bibliographies and abstracts—where e-publishing was more economical or efficient than analog publishing.

Early examples of art history e-publishing include book reviews, such as the CAA on-line reviews, the [Getty Vocabularies](#), the on-line edition of the Grove Dictionary of Art, dissertations and theses, electronic library projects, e-journals, CD-ROMS, and DVDs. In most cases, these e-publications went beyond the book model to add special features, including the ability to conduct searches, to continually update material, and to link and integrate resources with other e-publications.

Later developments included increasingly rich and complex museum websites, electronic lesson plans, museum databases that made available large sections of museum collections, and image databases published under new kinds of licensing arrangements, including encyclopedic databases like [AMICO](#) and the Index of Christian Art.

#### *Effects on Authors*

What impact has this e-publication environment had on authors? It has meant, in most cases, a second round of permissions in order to secure rights to images licensed for an earlier print publication. Rights holders are often difficult to track down. Licensing term lengths have become variable and terms are often different from rights holder to rights holder, little standardization. There are many new players in rights

licensing, including consortia like AMICO, and many different models, all making it more difficult to sort through who holds which rights.

#### *Developments in Museum IP Policy*

Chun concluded by touching on recent developments in intellectual property policy at museums. She explained that, at museums, images and other material were originally created as by-products of museum exhibitions, publications, and other programs. These activities rarely operated at a profit. The advent of electronic publishing had changed that environment, creating new demands—including commercial demands—and new outlets for museum intellectual property.

Museums thus had begun to formulate specific plans and policies for managing and developing intellectual property. That process, Chun said, is still very much underway, and there was “a great deal of space at the table” for scholars and art historians in helping to formulate new approaches and standards. She urged scholars “to join with us in formulating a new strategy for making our content available to you.”

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#### **Jeffrey Cunard, Getting an Art Journal Online: JSTOR and *The Art Bulletin***

See Presentation Slides: as [Powerpoint](#); as [PDF](#)

Jeffrey Cunard spoke about CAA's efforts to publish its journal, *The Art Bulletin*, in electronic form as part of the [JSTOR](#) project.

Cunard described some of the reasons why CAA decided to use JSTOR to archive *The Art Bulletin* in electronic form: eliminating the need for CAA and libraries to store printed issues; facilitating electronic access to the entire journal contents from the desktop; and ease of searching across many issues. With JSTOR, CAA's journals would be joining more than 100 other scholarly journals and would be available in quite a different way from other existing databases.

Although the negotiations with JSTOR seemed relatively straightforward—CAA would grant a copyright license to J-STOR to convert issues of *The Art Bulletin* and make them available online to scholars—there was a problem in that over the history of *The Art Bulletin*, CAA had never obtained e-publishing rights from contributors or image owners.

Copyright law specifically permits the publisher of a collective work to publish the individual contributions to that work as part of the collective work without getting separate permissions. E-publishing raised the question of whether the contribution was published as part of the work or not. Freelance contributors challenged the right to rely on the copyright law to e-publish in the Tasini case.

In *Tasini v the New York Times*, decided in 2001, the Supreme Court essentially held that a publisher must obtain permission from each contributor to republish a work electronically, if the user could access and perceive each contribution as distinct and separate from the rest of the publication. Thus, unlike earlier storage media such as microform, classic database access to previously printed material is infringing in the absence of contractual permission from contributors for e-publication. A further class-action case was filed, and is now in mediation.

For the CAA, it would have been impossible, Cunard said, to clear permissions from the hundreds of past contributors to *The Art Bulletin*. But the nature of JSTOR— which reproduces and makes available to end users articles in the context of the original publication— was closer to microform and *Tasini* can be read to suggest that obtaining permission from prior contributors is not required.

Looking ahead, e-publishers are now working to obtain e-publication rights from contributors for future issues of their publications.

Contributors to CAA publications are now not able to publish without granting electronic publishing rights to their material, and to clearing e-publishing rights in third-party material, such as images, that accompany the contributions. At the same time, however, CAA is discovering that the rights holders to images are much more reluctant to grant electronic rights than print rights. They typically may want to charge higher fees and limit licenses to only a period of years.

Cunard concluded by suggesting that licensors of images and other third-party material should recognize JSTOR's academic, nonprofit nature, and its intended user base. He warned that the more assertive positions being taken by licensors with respect to electronic rights are having a potentially chilling effect on the use of images in journals that will be published electronically, leaving many unresolved questions about who pays for, administers, and monitors electronic image rights.

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### **Petra Chu and Peter Trippi, Starting an Art History E-Journal: The Rights Issues for “19th-Century Art Worldwide.”**

Petra Chu briefly described the history of the electronic art history journal, [19th-Century Art Worldwide](#), launched at the 2002 CAA meeting in Philadelphia.

The journal arose over several years from the need for a journal devoted entirely to 19th-century art. The need was felt more acutely after the establishment, ten years ago, of the Art Historians of 19th-Century Art (AHNCA), an affiliated society of CAA, which quickly grew to more than 500 members. A specialized journal was the number-one need expressed by AHNCA's membership.

After considering a traditional print journal and exploring the possibilities of publishers, AHNCA began to consider an electronic journal, with the advantage of being, as Chu put it, “extremely naïve” about electronic publishing. With a \$10,000 grant, AHNCA found an excellent web designer with good experience in designing a journal and launched the first issue in electronic form.

Since its launch in 2002, the journal has made headway establishing itself as a legitimate scholarly venue, with its own index and International Standard Serial Number (ISSN). Three issues have been published, with a fourth about to be posted. The journal has also raised enough money to keep the site open free of charge, allowing some 9,000 hits per month.

Chu raised several of the rights issues that had come up with running an electronic journal. Although the journal has copyright notices protecting itself and its authors, monitoring and enforcing this copyright, however, has proved problematic for an organization with limited funds. Verbatim paragraphs from the journal had been found on another website—such piracy is of course much easier when material is in electronic form.

The journal had begun registering itself in the form of CDs with the Copyright Office to ensure that its content would be preserved. More even than copyright, Chu said, the issue of archival preservation of Internet materials was of foremost concern to e-journal authors and editors.

Peter Trippi spoke of issues raised by licensing images for the new journal. He explained that each article in the journal might have as many as 32 images, more than many paper journals can afford. One recent article included the author's own photographs of a previously unpublished site and a slide show—exciting examples of what web publishing can offer. The journal has also enjoyed positive cooperation from

museums that provide installation shots of exhibitions and thus has been able to regularly illustrate installations more often than most scholarly journals.

The journal posts images, Trippi said, in a size that makes them clear enough for readers' understanding, but not high-quality enough to be used by pirates making t-shirts and postcards (see example). As with CAA publications, authors are required to obtain permission for images and to pay reproduction fees. To help inexperienced authors, the journal has included on its website a sample request form and other image rights materials. Wherever possible, the journal requests images in electronic format to avoid the costs of shipping and express services.

The authors themselves have photographed many of the images published in the journal. Still others are out of copyright range. Rights holders for other images have generally been prompt and cordial in responding to requests, charging fees in the range of \$50-200, negotiated down in many cases.

Trippi concluded by citing the need to deal with reproduction fees totaling as much as \$1,500 per article—a great burden for a young scholar— as well as the need to centralize and standardize image distribution across institutions.

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## **Discussion**

Much of the discussion centered on the limited terms often encountered in seeking permission to use images in e-publications.

In response to questions, Trippi and Chu explained that three years was the term that their Journal told authors to request for image use. They said three years was manageable for them—in five years there could be a completely different environment. After the term expires, the editors would take down the images or make a link, with the museum's permission, to a website image.

Chun said that as author, the Metropolitan typically asks for perpetual permission, but rarely gets it. A three-year term is typical.

Several people, including Chu, questioned the logic in having to remove images after a term permission expires. "The image in a book is still there," she said. But several rights holding participants explained that term limits were imposed as a protection against uncertainty— because no one could say how things might change in the future. Others emphasized that term permissions, like everything else, were subject to special pleading and negotiation by rights holders, and were subject to future discussions.

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## **RIGHTS, PERMISSIONS AND RISK MANAGEMENT**

### **Introduction**

Robert Baron introduced the second section of the Town Meeting. He explained that the focus would now change to a discussion of the conflicts between users of images and copyright owners, beginning first with what happens when permission to reproduce was refused.

### **Christine Sundt, Permission Denied... Questions Desperately Seeking Answers**

See complete paper: <http://darkwing.uoregon.edu/~csundt/copyweb/denied.htm>

Christine Sundt discussed a series of questions that are raised when permission to use someone else's material is denied— either outright, by requests for high licensing fees, or by the imposition of restrictions

too difficult to meet. What risks are involved in publishing without permission and how can they be assessed and balanced?

Sundt pointed out that, by legislation, granting permission is the right of the creator, at least for “limited times.” But changes in copyright term have stretched “limited times” from as little as 14 years to life plus 70 years. She also pointed out the exemptions in copyright, including fair use and the public domain, were designed to balance the rights of copyright holders and the public. Such exemptions, she said, should allow us to proceed to publish in some cases, even after permission has been denied.

Why doesn't fair use cover our needs? Sundt asked. What else besides fair use might apply? When does free speech protect us? What exactly is in the public domain? Must we always be risk averse? In some cases, Sundt said, good advice is to make full use of fair use protections or, in other cases, not even to ask permission to publish as this implies that the petitioner acknowledges that permission is required. Failure to make use of fair use exemptions might even result in the loss of those exemptions.

Sundt concluded by listing some “unanswered questions” about use:

- If an author wishes to reproduce an artwork that is clearly in the public domain, and has good material to reproduce the work from, need she pay a reproduction fee requested by the museum owning the work?
  - Should publishers accept the argument that the work is in the public domain as acceptable for publication?
  - Should the author, believing her publication to be covered by fair use, sign the publisher's copyright warranty?
  - Can state contract law trump federal law in control of the public domain?
  - If contract law can trump the public domain, are there any fair use provisions within the body of that law?
  - What happens if the contract holder goes out of business or is bought out by another corporation?
  - How many layers of law or claims of ownership attach to the reproduction of an artwork?
  - Can the museum control the method of presentation in publishing an artwork?
  - Should we assume that all artists' heirs have rights to royalties?
  - What proof should we request from those heirs?
  - Could the artists' moral rights, in some cases, continue in perpetuity
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## **Siva Vaidhyanathan, Give Us Some Breathing Room**

Siva Vaidhyanathan began his talk by citing the Supreme Court's famous 1994 ruling on 2 Live Crew's parody of Roy Orbison's “Pretty Woman.” The Supreme Court held that parody is protected from copyright litigation by fair use [see [Campbell v. Acuff-Rose Music, 510 US 569 \(1994\)](#)].

Fair use appears, Vaidhyanathan said, from this and other cases, to be “alive and well.” But you could still find yourself paying thousands in court costs to prove it. So we should be more confident about making use of fair use and breathing easy. But we are not.

Vaidhyanathan cited a number of cases— many brought up by friends who came to him for free advice— where fair use of material was unclear or was challenged or where scholarly publishers were “too chicken” to accept a fair use argument from an author.

Problems with or questions about fair use figured, for example, in making scholarly use of unattributed political cartoons from 1940s newspapers, in reprinting ads from the 1930s and '40s in a book on African-

American culture, and in the quotation of country music songs in a cultural history of country music. Even quoting the lyrics of 2 Live Crew's protected parody of "Pretty Woman" in a book or article is, he said, too legally ambiguous and complicated for most publishers to deal with.

Thus Vaidhyanathan claimed fair use, as a practice, is more endangered than ever.

When friends call him about advice in such cases, he, as a non-lawyer, gives two answers: what he calls the responsible one and the irresponsible one. The responsible answer is the one typically given by copyright lawyers: "it depends." The irresponsible answer is: "What is your financial risk tolerance? Are you willing to strike a blow for fair use and academic freedom that might take about a decade?" He could understand, he said, when these non-tenured friends decided that publishing a scholarly book on time and in budget was more important than fighting for the greater good.

Fair use as an exercise in freedom is, in fact, endangered, Vaidhyanathan said— for the following reasons:

1. Fair use is only as good as your publisher's faith in and ability to understand fair use.
2. Copyright holders are often impossible to find. Invisible copyright holders can't grant permission but they can surface later and sue.
3. As more and more copyright material is tied up in contracts— and users sign away fair use rights in return for access— fair use becomes irrelevant.
4. As material becomes sequestered in database schemes and copy protection systems, publishing fair use excerpts becomes not only more difficult but illegal.

Despised by entities like Hollywood and the entertainment industry, fair use depends on exercise. You must use it or lose it. If major players act as if there is no such thing as fair use, "and the rest of us cower," then the experience of fair use, of education, of culture will be "painful and cold."

Vaidhyanathan also cited the Supreme Court's decision in *Eldred vs. Ashcroft*, which recently held that the Sonny Bono Copyright Extension Act was constitutional, even though it extended copyright terms beyond what many considered to be "limited time."

He concluded with a brief description of the "Eric Eldred Act," a proposal in Congress, which would mitigate the limits on the public domain brought about by Bono by allowing copyright to expire after 50 years, unless renewed and re-registered for a nominal fee.

Finally, he urged his listeners to continue to exploit fair use and to challenge the courts to "give us some breathing room."

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### **Kenneth Crews, The TEACH Act: The Relevance of the TEACH Act to E-publishing**

See *Presentation Slides*: as [Powerpoint](#); as [PDF](#)

Kenneth Crews noted the consternation and confusion about copyright he had heard in the first half of the Town Meeting and commented, "It's clear that we need to break free of these things that are binding us and keeping us locked in. It's clear that we need to move more towards fair use." But his subject for the day, the TEACH Act, was not the same as fair use. It had to be noted up front that the TEACH Act was completely separate from fair use, although fair use remains alive and well as an alternative for distance education.

The TEACH Act was ostensibly designed for the benefit of distance education. But it also provides

tremendous evidence of the interrelationship between the rich variety of exceptions in the copyright act and the world of publishing.

Signed into law in November 2002, the TEACH Act creates exceptions to the rights of copyright holders—under certain circumstances and in certain cases and subject to certain limitations— in the service of delivering distance education. The details of the act require educational institutions to develop policies, make notices of copyright to students and users, and limit access to specific persons and for specific periods. Once this system is set up, the content is further subject to limitations. Certain types of works can be used in full; certain other types of works can be used only in part.

The TEACH Act is evidence that education and the world of publishing, according to Crews, are approaching and looking like one other. Publishing is moving toward delivery of information and content, and looking a little like distance education. Distance education is the delivery of content to students wherever and whenever they might need it—much like publishing. Congress was thus well aware that the Act would have profound implications for publishing, or at least that publishing would have a profound interest in the TEACH Act.

Crews described restrictions in the Act that were drafted specifically with the future of publishing in mind. For example, materials created for distance education must preserve technical measures to identify and clarify that material. Works that are specifically marketed for digital distance education may not be copied and included in a course. There are restrictions on instructors and their ability to digitize content, requiring them to check the market to see if the material is already marketed in digital form. Only lawful copies may be used and access to copyright materials must be circumscribed— limiting any adverse consequences for copyright owners. There are further restrictions on downloading and copying.

Certain types of works, for example, *Citizen Kane*, can only be used in part, in order to protect the market for the full-length version. There are restrictions on retention of materials, further suggesting the direction of the law in general— to reserve future markets for copyright holders.

Congress gives rights, Crews concluded, and Congress creates exceptions to those rights, giving some concessions to copyright owners, and some to the public. Ultimately, however, in its provisions, the Act provides careful protection of the interests of owners. Market forces shape the law and the law puts the burden of use on education to comply with the many conditions in the law. Thus the TEACH act is an opportunity for education, which should perhaps be taken advantage of, even within its restrictions, at the same time that it offers opportunities for new markets.

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## Discussion

The discussion here centered on how stakeholders in copyright issues attracted and held the attention of lawmakers.

Vaidhyathan explained that when the Sonny Bono and Digital Millennium Copyright Acts were in consideration in Congress, both went through the standard special interest process. Pro-fair use organizations like the American Library Association and the Digital Futures Coalition were “in the room,” but they didn’t have the public behind them to get attention. Public concern is higher now— the question is not so much one of lobbying dollars but of awareness and support.

As fair use of material becomes more restricted, some cultural artifacts— for example, sampling in rap music— are disappearing. In other cases, permissions are becoming standardized by the growth of consortia. The common denominator position in a consortium is always “no.” So, speaking from the least common denominator the consortia will usually say no to a request. That answer sends the issue back to

the user, as it always does. Trademark law is also used to extend a claim. Ironically, organizations like Disney make full use of public domain material like Jane Austin's novels, then declare that they own rights that last forever.