

**COPYRIGHT TOWN MEETING: Denver, June 28, 2001**

**Copyright & Primary Source Materials  
Colorado Digitization Project  
University of Denver, Denver  
Draft Meeting Report**

Nancy Allen, James Williams, Welcome and Introductions

**Presentations:**

Peter Jaszi, An Introduction to the Issues

Bernard Reilly, Intellectual Capital and Building Museum-Media Relationships

**Panel: Issues Encountered, Questions Asked, Decisions Made**

James Williams, Copyright and the University of Colorado's Digital Future

Kevin Anderson, Giving Credit: the Permissions Cycle

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**Nancy Allen, James Williams, Welcome and Introductions**

Some 70 participants were welcomed to the Town Meeting by Nancy Allen, Dean and Director of Penrose Library at the University of Denver, and by James Williams, Dean of Libraries at the University of Colorado at Boulder.

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**Peter Jaszi, An Introduction to the Issues**

Peter Jaszi opened by referencing the recent [Tasini v New York Times](#) case (decided June 25, 2001), in which the National Writers Union sued publishers for reproducing authors' works in electronic databases without seeking permission. In this case, Jaszi said, the Supreme Court effectively ruled that there was a new electronic right and that a publisher had no right to publish material electronically, without seeking the author's permission. Jaszi thought the Tasini case had relevance to museums as it shows traditional copyright law and its underpinning value structure colliding with the realities of the digital environment. His theme was how the old rules work in the new environment and what decisions museums and archives need to make as the proprietors of intellectual property.

**Electronic Right?**

Since the 1991 Feist decision (that determined that the compilation of facts into a

database, such as the phone book, through “sweat of the brow,” does not qualify for copyright protection), one of the essential definitions of copyrightable work is its “originality.” It’s still a low threshold said Jaszi but it remains a question, especially in the context of derivative works – works based on or derived from an original work (<http://www.loc.gov/copyright/circs/circ14.pdf>). So, if a museum owns an object and wants to photograph and digitize it, assuming the object is in the public domain, what is the result and does the nature of the original affect this? The 1999 [Bridgeman v Corel](#) decision offers a little guidance, but it’s not much. In that case, Judge Kaplan ruled that simple documentary photographs of two-dimensional objects do not qualify for copyright protection because of the lack of originality involved. Jaszi noted that Judge Kaplan might have been clearer and that this might or might not be the right rule, or a good general rule, but could serve as an important warning: that the application of traditional principles in the new environment might not always favor would-be copyright proprietors.

### **Compilation Right**

Sticking with the theme of originality, Jaszi pointed out that when a museum organizes an original exhibition, even if it does not own any rights to any of the individual items, or their digital surrogates, it would own the compilation right of that exact patterning of works. Again though this right is of limited efficacy.

### **Publication of Unpublished Work**

Many museum works are presumed to be in the public domain, but we shouldn’t assume this. The 1976 Copyright Act gives unpublished historical materials federal protection until 2003, if not published before midnight December 31, 2002. If they are published prior to this date, they are protected under the new Copyright Term Extension Act, until 2047. One question is whether artworks are covered by this; and, what exactly publication is. However, the question here is what factors should influence a museum’s decision to publish such an unpublished item in their collection.

### **Infringement**

When a museum does have rights to work that it places online, what would constitute infringement of those rights. Would the Ticketmaster “deep linking” case against Microsoft apply (where customers were delivered to ticket order forms deep inside the Ticketmaster site, avoiding many layers of pages containing advertising)? Or, he surmised, suppose a practitioner downloaded material from a museum web site without authorization. The museum may or may not have rights and there are fair use issues, but if Tasini is any indication, Jaszi thought this an area that courts might revisit.

Summarizing, Jaszi said that museums, like other proprietors, are finding in the digital environment that rights they might expect are being limited by various traditional

doctrines that exist to encourage information sharing and the development of new knowledge out of old.

But not all the news is bad for museum properties and those who want to strengthen their hold on digital assets.

### **Which road forward?**

Museums could engage in a systematic attempt to “publish” all the unpublished material in their collections to which they had copyright, to stop them entering the public domain: but should they? Is this vision of the copyright grab necessary and appropriate?

Similarly, museums might modify the way documentary photographs and subsequent digital images are made to increase their “authorship:” but should they?

Museums could take advantage of provisions under DMCA through encryption and password protection to curtail access to materials on web sites and threaten or pursue lawsuits against those wanting access without complying with the terms. Museums might also take action against unwelcome linking or framing. They might want to join corporations in promoting new legislation like UCITA to strengthen click-through licenses. But to all these scenarios, there remains the question of whether museums should follow such action.

Jaszi turned to developments to establish legislation to protect databases that could not be protected under traditional copyright law, with its originality requirement. Museums again might benefit from such legislation and could line up with those supporting strong protection – or with most cultural nonprofits and scholarly groups in resisting such legislation.

He closed by stating that these were hard questions and that organizations were in a cultural, political and economic dilemma. But these were questions the community had to face and what was important is that they find the means to have the discussions within the community and decide what is the best way forward.

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### **Bernard Reilly, *Intellectual Capital and Building Museum-Media Relationships***

Putting Jaszi’s political observations into a broader context, Bernard Reilly spoke about the precarious balance that cultural institutions have trodden, in the absence of cultural policy and professional consensus, between responsible fiscal management and the wide dissemination of cultural resources.

He saw the recently intensified interest in copyright issues by cultural institutions as a by-product of the flurry of licensing activity and its promise of new revenue streams from the digital environment. This nicely engages an entrepreneurial flair with the need to sustain digital projects and collections.

### **Beyond Content for Cash**

However, Reilly saw the standard licensing model (“content for cash”) as far too limiting and suggested an amplification of both terms in the equation. “Content” should be redefined as the full range of intellectual assets possessed by a museum, including the knowledge and expertise of its staff and the information and research by-products developed as part of museum work. “Cash,” on the other hand, i.e., the monetary return on use of museum content, is potentially not as valuable to a museum as other forms of compensation, such as visibility and community goodwill.

As a tool, the Internet could be used by museums as more than a one-way collection delivery system. It can very effectively gather information about a museum’s digital visitors, their interests and responses. It can also be an instrument for the internal repurposing of digital assets, such as exhibitions, publications, marketing or planning.

Because of the way that the Internet fosters the fluidity and interchange of information, Reilly noted the trend in museums toward a convergence of some of the traditionally distinct activities in museums, e.g., between curatorial research and public programs, marketing and development, exhibition and publication. This kind of convergence better enables organizations to optimize the value of their intellectual or knowledge assets.

### **Beyond Content**

Reilly further elaborated on what might be revealed in an audit of an institution’s intellectual capital. Assets would include:

- **Collections** and the objects within them
- **Stock:** the multimedia array of reproductions of the objects and collections together with the body of accompanying information: the texts, databases, interpretations, and presentations created by staff and others and controlled by the institution;
- **Intellectual Property:** the copyrights, patents, and licenses for use of the above materials owned by the organization;
- **Resident Expertise:** the knowledge and competencies of the organization's staff -- curatorial, editorial, design;
- **Relationships:** the penumbra of goodwill resident in the creative and local community around an institution, from publishers to photographers to authors to the subjects of oral histories;

- **Reputation:** the identity of the organization and its values (historical accuracy, authenticity, public trust).

With a broad and secure sense of its assets, an institution is in a better position to negotiate or barter with other organizations.

### **Beyond Cash**

Reilly then surveyed what those other organizations often bring to the table aside from cash. These included:

- Production and marketing capabilities (to carry the institution's assets out to a broader stage, for example, he cited the Smithsonian/History Channel collaboration on films on the U.S. Presidency)
- Visibility and location (he cited the new relationship between the Rochester-based George Eastman House (with a collection of 400,000 photographs and the International Center of Photography, with exhibition space in midtown Manhattan--see their joint [Photomuse](#) website)
- Collections (adding richer context to objects); and
- The Goodwill of the community that strengthens the organization's reputation.

### **CHS Strategy: Licensing; Strong Website; Asset Management**

Reilly continued by outlining the three-part strategy of the Chicago Historical Society in this arena. First, there was an aggressive licensing operation, with a sophisticated schedule of fees, scaled to the nature of the use and the user (for-profits paid significantly more). Secondly, CHS ramped up its digitization capabilities, mounting a critical mass of materials online from its collections, available free of charge, as a result of a commitment to public service and an understanding of an implicit compact with the Society's funders and the people of Chicago. Thirdly, active management of all of the organization's resources and close collaboration with many internal departments, such as Public Relations, Development, and Marketing.

### **Results**

At the Chicago Historical Society, the results have been impressive, with web pages jumping from 350 pages to 7,000 and expenditures rising from \$165,000 to \$250,000 in three years. Reilly then fleshed out one relationship, that with the local public television station WTTW in producing "Making History," six 3-minute on-air segments. WTTW had production and marketing capabilities and achieved great visibility for CHS. The upshot included much stronger relationships with the media and a considerably greater media exposure for the Society in the Chicago area community.

In closing, Reilly emphasized that a strengthened relationship with the community depends on those relationships being actively managed, being managed centrally and covered by clear agreements.

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## **Issues Encountered, Questions Asked, Decisions Made**

### **James Williams, *Copyright and the University of Colorado's Digital Future***

James Williams spoke of the University of Colorado's Digital Sheet Music Project (3000 digital images of historical sheet music with a Colorado connection) within the Colorado Digitization Project. The source material is out of copyright and it supports a specific research project of a faculty member in the College of Music on socio-historical musicology.

Generally he felt pessimistic about the future of copyright law to facilitate what needed to be done, especially for Congress to understand the difference between the needs of higher education and those of the entertainment industry. He felt it vital to be vigilant, to stay the course with legislative activity, and to continue to negotiate for the rights of users.

He then raised the array of issues, many of which intersect with IP questions, facing UCB as it works to create a digital library of primary source materials. Fundamental, he said was a need for new models of how different entities could work together, in creating the life-cycle management of digital materials and in evaluating their impact on teaching, learning and research.

Research libraries had a lot more to learn about selecting material for digitization, using digital primary resource materials, integrating teaching and research resources, and supporting experimental scholarship initiatives on campus.

Williams thought the major challenges UCB had to face included changing organizational culture, how to incorporate innovation and develop a clear vision and set of aspirations that accommodate to constant change and how to act as an incubator of new scholarship ventures in the development of new models of scholarly communication.

He felt the emergent new model will probably be strongly influenced by primary source materials and would be built around a distributed academic server farm involving university presses, research libraries, academic computing centers, and communities of scholars, all serving as equal partners in the venture. He cited BioOne, EPIC at Columbia, the SPARC Initiative at ARL, and Highwire Press as examples of

the way forward. He noted that in many of these projects, the creator obtains a non-exclusive, limited license for educational purposes, so that the products may be shared freely within the educational community, including their distribution through publicly available web sites. This is the model that protects and fosters a true intellectual commons.

Williams concluded that practice was needed (before more theory), especially along the collaborative lines of the CDP, where he found a useful adjustment to the scope of local responsibility while contributing to other digital repositories.

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**Kevin Anderson, *Giving Credit: the Permissions Cycle***

*The best way to preserve our heritage is to share it.  
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In Anderson's experience at the Casper College Library in Wyoming, digitization brings the archivist's "twin responsibilities" of providing access and protecting rights into sharp relief. While researchers are now routinely referred to Casper's digital image database, rather than having to wait for duplicate prints to be made, they then typically expect the entire collection to be available publicly on the Internet: they don't understand the rights issues yet.

On the other hand, he said, archives, too often left responsibility for finding out about copyright to users, asking them, to sign a use agreement accepting full responsibility for copyright clearance, without giving any guidance.

Rights the library had to protect include those of: the creator, the donor, the subjects of the works, and the institution.

- **Credit:** Although, of course, the creator of a work has the right to the monetary rewards from that effort, Anderson had found that very often the copyright holder is more concerned with receiving proper credit than in receiving financial reward.
- **Citation:** Citing a work correctly is crucial, as it expedites the discovery of the copyright owner, should a user want to copy or further use it.
- **Fidelity:** Archival and historical institutions have to be particularly on guard against the publication of altered items or must demand clear notice to the

public of any alterations that are made when historical information is presented to the public.

- **Donations:** Archives need to cover copyright by license or assignment, or perhaps by negotiating “extended fair use,” as well as to give credit to creator and donor.
- **The Archives:** Archives themselves should receive credit for preserving and providing the materials to the public.

He warned that although any rights assigned to the institutions should be protected, it was important to clarify the limits to those rights (this includes clarifying the rights that donors actually possess and can assign to the institution)

### **Image Acquisitions:**

While researching and acquiring images for Casper’s National Historic Trails Interpretive Center, Anderson made the following observations:

1. **Time & Money:** Copyright research takes time and money: It took him two months to locate the bibliographies, acknowledgements, and institutional policies needed simply to determine and locate who had physical ownership and use rights to the image, and who had copyright and other intellectual rights to the image. Copyright clearance centers often have limited information, or charge for access. Locating the original copyright holder’s heirs, or following the path of ownership from the original publisher through all of the subsidiaries and mergers of the past few decades, requires a lot of information.
2. **Tools Needed:** Most use agreements tend to distance themselves from the details of copyright, although one institution, provided a “decision table” to assist the researcher.
3. **Beware Production Values:** Designers emphasize “production values” (cropping, tinting, etc.) over historical accuracy and dislike citations, which compounds the permissions problem – if you don’t cite correctly and in full, then we are back to why this was difficult in the first place. Contracting out to other producers exacerbates the situation.
4. **If at First You Don’t Succeed:** Follow-up is essential when seeking permission as staff often don’t read or understand a request letter on the first time round, which sometimes includes requests to alter the image.

On a positive note, Anderson reported that the Trails Center is planning an “image acquisitions” notebook with full information for assisting with copyright questions.

### **Good Practice**

Anderson posed some examples of good practice in this area by other organizations. These include:

- Full citation of images, including an accession or negative number
- Not allowing any alterations to images without permission and an explanation in the credit line.
- Not allowing any alterations that would embarrass the subject of an image.
- Not allowing digitization of images for a project by a vendor at a resolution greater than 75 dpi (and destruction after the project of any master files that need to be created at higher resolutions to produce such images)

An example of actual practice at the Casper Library was the donation, shortly before Richard Cheney was selected as George Bush's running mate, of a large photographic collection by the Casper Star-Tribune that included assignment of copyright. The subsequent demand for images of Cheney caused the Casper Library to revise their use agreement to not allow cropping or alteration of the image without permission, nor to allow use of the image in a way that would embarrass the subject; to place credit lines and a copyright notice on the digital image itself; and to ask for donations rather than implement a use fee (wanting to share its historical information, the Library also wanted to avoid lawsuits).

### Local Experiments

The Casper Library will be experimenting with watermarking images, software locks and password protection on its ftp site, along with a copyright notice, published policies, and downloadable request forms.

It will also strengthen its donor agreements (clarifying the difference between ownership of a work and ownership of copyright); its use agreements (clarifying which rights Casper has and how to discover and contact other copyright owners); and the information in its database (on the copyright status of a work; on the photographer; original information that came with the image together with assigned terminology, authority records, and thesaurus information and more cross-references).

Casper's longer-term ambitions include: Developing a complete in-house image database; include photographs of local homes and other buildings; OCR indexes, tables of contents, and lists of illustrations, in order to improve access to published items; offering the text component of the database free online, worldwide; and altering our permission forms to include the rights to digitize.

In conclusion, Anderson proclaimed that perhaps his greatest desire was to see a free central clearing house for permissions to cultural material.

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**RESOURCES**

Legal Issues To Consider When Digitizing Collections (September, 1999)

Prepared for the CDP by Jean Heilig