

COPYRIGHT TOWN MEETING: New York City, Sept. 24, 2001

**Intellectual Property & Multimedia in the Digital Age
New York Public Library
Meeting Report**

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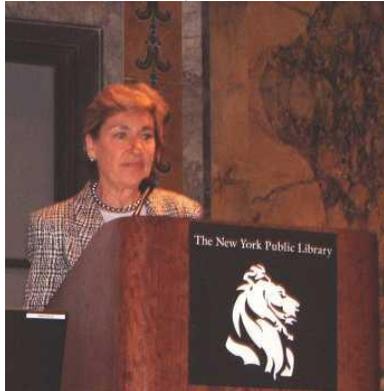
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Heike Kordish welcomed over 200 participants in the fourth meeting of the third series of Town Meetings, held in the Celeste Bartos Forum. She encouraged attendees to take part in the discussion and not to hesitate to bring their own experiences to bear on the topic at hand. She then introduced Paul LeClerc, President of the NYPL, who stressed the importance of the Town Meetings series in general, was pleased to be working with NINCH and thanked everyone for their participation.

David Green offered an overview of the Town Meetings. He thanked the hosts, the local organizing committee, with members from the Frick Collection, NYPL, New York University Library, and the NYU Humanities Computing Unit, and, finally, he thanked the Samuel H. Kress Foundation for its continued support of the Town Meetings series.

Keynote 1: Intellectual Property Owners in the Digital Environment
Peter Jaszi, *Aggressive Asset Management*

Peter Jaszi opened by discussing the apparent but possibly artificial opposition between intellectual owners and users of intellectual property. As a precursor, he suggested a terminological shift from "user" and "consumer" to "information practitioner." But his main point was to speak from the rhetorical perspective of copyright owners, suggesting a provisional set of strategies that a cultural institution might employ to identify and maximize control over its intellectual property assets, in order to secure an economic return or to control their use and representation. He reserved for later the question of whether, when considered in the context of nonprofit cultural institutions' overall objectives, these strategies were actually desirable.

The most significant difficulty facing nonprofits in creating an aggressive asset management strategy is that often much of their physical assets is not protected by copyright law. Institutions might own the objects in their collections, but often not the copyright. Therefore, part one of this rhetorical strategy was for cultural institutions to establish copyright claims to images of their assets based on the value added when they photographed or reproduced them. However, the courts gradually drifted away from supporting this perspective, as in the *Bridgeman Art Library v. Corel Corp.* case where judges demanded a "spark of creativity" be present before owners could claim copyright. The court ruled that documentary photographs lacked such a spark and the rationale of that decision seems to have extended to digital reproduction as well. Nonprofits need to attack the decision in *Bridgeman* if they are going to make the most of their portfolios. They also need to develop new content from their collections. Part two of the aggressive asset management strategy is for nonprofits to take steps to assure that as many rights as possible are gathered into the institution. And, one way to do so is to ensure that they hold the rights to their employees' work.

With regard to digital asset management, Jaszi explained that institutions' assets were likely to be exploited by the Internet. From the perspective of proprietors, the Internet has the advantage of extraordinary reach at relatively low cost. But the disadvantage is what Jaszi called "extreme porosity," or the ease with which assets can be exploited without compensating the institution. In order to maximize the advantage and minimize the disadvantage, institutions should campaign vigorously in the courts for recognition that unauthorized links to proprietary content should be barred as unauthorized invasions of the exclusive rights of owners. Institutions might adopt an aggressive litigation strategy to encourage a narrow interpretation of the fair use doctrine and to implement pay-per-view technologies, watermarks, and click-through barriers.

Jaszi suggested that it is fortunate that the Digital Millennium Copyright Act (DMCA) prohibits and penalizes the circumvention of protections as well as the provision of any means of such circumvention. Those prohibitions are under attack by users, so proprietors should stand shoulder-to-shoulder in support of the DMCA. He noted that

the information marketplace is global and therefore we should all adopt anti-circumvention provisions, despite a movement in the European Union toward moderation.

Finally, Jaszi noted that "things are never simple," and acknowledged that many nonprofits side with ordinary information practitioners rather than with for-profit content providers in the policy disputes over copyright law. He demonstrated in his talk that the "traditional pro-access position" of the nonprofit cultural community should not be taken for granted. He concluded that the Town Meeting would allow panelists and audience to explore the pros and cons of the practical options and policy positions facing nonprofit cultural institutions.

Panel 1. Intellectual Property Owners in the Digital Environment **Adam Eisgrau, *Policy Issues***

Eisgrau discussed the policy impact of issues surrounding intellectual property and new technologies. He argued that copyright is key to U.S. self-identity but that the balance between market forces and the advancement of knowledge it has striven to protect is under threat as a result of the defensive response to new technologies by rights owners.

The notion of balance remains key to our understanding of copyright. Eisgrau mentioned that the proprietary community feels very threatened by the advent of the Internet, which it sees as a tool of perfect reproduction and wide distribution. In the early 1990s, rights holders began proposing changes to the law to protect their assets, actions the public sector saw as a threat to the delicate balance between owners and users dictated in the Constitution.

In 1995, a Clinton administration white paper recommended radical changes to copyright law. These included that access to copyrighted material should no longer be freely available for previously lawful purposes. Rather, it would be available "by sufferance." The central premise of the changes was that owners could not afford NOT to make the copyright system watertight. When legislation arising from the white paper failed to pass, however, rights holders pressured the U.S. government to work with the WTO to enact its central assumptions in a World Intellectual Property Organization (WIPO) Treaty. However, the resulting 1996 W.I.P.O. Copyright Treaty included strong statements about signatory nations' rights to extend into the digital environment pre-existing copyright exemptions (such as fair use in the U.S.)

Eisgrau pointed out that when the DMCA was enacted, it contained section 1201 that created a new cause of action for copyright owners, a copyright protection mechanism not dependent on the infringement of owners' rights, per se. The new legal protection was for owners who had implemented a technological means to protect a work that had then been circumvented to get to the material behind the "digital wrapper." The provision contradicted the Supreme Court decision about Sony Betamax (see Tyler Ochoa's presentation at the Houston Town Meeting, "From Betamax to the DMCA: Copyright Owners and Device Control"). The law went into effect with one exception; the Librarian of Congress would have to conduct a rule making every three years to exempt categories of works from the anti-circumvention provisions of the DMCA. The categories chosen, though, were extremely narrow, and so the kinds of works that the public sector had historically championed and made use of were in jeopardy, and remained so.

Ryan Craig, *Distance Education*

Craig discussed current developments in the field of "e-learning," which, he explained, provides educational content online, including audio, video and interactive tools. Quality online education should have clearly stated learning objectives and a clear learning plan. The content may be mediated by an expert or a discussion board and there may or may not be evaluation by an expert.

According to Craig, sufficient bandwidth will allow online learners to do everything their in-classroom counterparts do. The goal is to expand educational opportunities, especially to working adults. One risk, however, is that traditional institutions may lose students to online education. Another risk is the incursion of for-profit companies into secondary and higher education. Still, according to Craig, the reality is that almost all K-12 e-learning supplements, not replaces, in-class learning. And on college campuses, 80% of technology applications are used to supplement on-campus learning. Fair use is a major issue in e-learning and the recent TEACH Act, if passed, should extend fair use to the digital learning realm.

Craig explained that there are three types of activities related to e-learning. The first is the capture, creation, and development of content; the second is teaching the content; and the third is delivery of the course to the learner. Each activity is linked to a different business model. Intellectual property issues arise around content development because that content can be so valuable.

Traditionally, faculty members were considered to own copyright in their written work (the so-called "teachers exception to the "work-for-hire rule). While universities

and colleges claimed patents to inventions that emerged from their laboratories, distance-education courses fell somewhere in the middle and it was unclear if they could be considered "work-for-hire." Most of the time, employment contracts were silent on this issue, although the law (as far back as the late eighteenth century) supported a professor's right to the content of his or her courses until the late 1980s.

In 1989, in [*CCNV v. Reed*](#), the Supreme Court set out a multi-part test of what constituted the scope of employment. Applying that test to post-secondary education would have deprived professors of the copyright to their courses. In 1998, a court found course creation to be within the scope of faculty members' employment. When courses are fully online, the university's claim to copyright is even stronger, and especially when the school's IT resources are utilized. Craig pointed out that the risk to schools that stand firm on this issue, however, is that faculty might decline the opportunity to create online content. Still, the financial investment in such courses is significant and schools typically hesitate to pursue online education unless they can secure or significantly share in the rights of the courses.

Under Columbia University's 2000 copyright policy, the university owns the nominal copyright in any digital media product created with substantial use of university resources, leaving the definition of "substantial" purposely vague. The university also maintains a generous revenue-sharing policy with faculty.

Don Waters, *ArtSTOR: A Case Study of Responsible Use of Copyright Materials*

Waters offered a case study of the kinds of responsible strategies nonprofits could pursue as owners of intellectual property. He outlined the principles the Mellon Foundation applies in supporting [JSTOR](#) (an electronic archive of over 150 journals in the arts and sciences) and ArtSTOR (a planned library of digital images for the arts and humanities), and the related principles the Foundation applies when making grants to projects that result in the development of intellectual property.

Waters suggested that the categories of creator, owner, and user are difficult to define. Ownership ranges from full exclusive control of a work to very limited control. The ownership stake of JSTOR and ArtSTOR in the content of their collections is slim because they are aggregators and distributors of content that is fully owned by others. The nonprofit missions of both organizations charge them to balance their limited rights against the rights of original owners, creators, and users in the larger interests of advancing scholarship.

Waters acknowledged that rising concern about intellectual property and multi-media in the digital age corresponded with the rise of the Internet and related technologies, and their dual potential as tools for both the distribution of knowledge and massive copyright infringement. Waters suggested that what unites many in the nonprofit sector is the conviction that the primary way of promoting the advancement of science and the useful arts is through the educational processes of research and learning. Such a conviction, he said, is what should drive cultural institutions in their approaches to intellectual property and the Internet

However, confusion among policy makers about the goal of copyright law has led to two reactions in cultural institutions. First, many institutions have not used new technologies to their greatest effect because of paralysis in the face of intellectual property concerns. Avoiding copyright problems, they consequently aim low in terms of quality and quantity. They either produce and distribute low resolution images or they act alone, making higher quality results available only to those behind institutional firewalls. These approaches tend to result in duplication of effort and limit the possible economies of scale that could be achieved through collaboration.

Second, some institutions have succumbed to the "gold rush mentality," by focusing on the profit-making potential of digitizing collections. Cultural institutions have begun to behave like big corporations, suffering from "mission drift," thereby creating competition within the community and forgetting about their original educational missions. In response to these two widespread problems, Mellon has developed a set of core principles in relation to intellectual property and is incorporating them into the agreements it makes with its grantees.

JSTOR's intellectual property rights are based on contracts made with both publishers of the journals in its database and its users. The agreements embody three principles:

- to protect the rights of creators and owners by obtaining a limited, nonexclusive, but perpetual, license to digitize the content for nonprofit use;
- to "preserve the educational commons" by making content available for educational purposes; and
- to create a regulated environment in which users formally agree, through the terms of a license, that they will restrict their uses to nonprofit, educational purposes.

Mellon is now applying these principles to the development of ArtSTOR, which was announced in April 2001, funded with a \$5 million start-up grant. Its mission is to develop, store, and provide electronic access to digital images for the study of art, architecture, and other humanities fields. ArtSTOR is keen to develop relationships with museums and will include a digital design collection from the Museum of

Modern Art. The database will also include the Mellon International Dunhuang Project, a collection of high-resolution images of paintings, drawings, manuscripts, and printed books, and other materials from Dunhuang, China and museums and libraries from around the world. The breadth and depth of these collections of images should make ArtSTOR useful to students and researchers throughout the arts and humanities.

The three principles outlined above have been central to the intellectual property agreements that Mellon is making on ArtSTOR's behalf. But, in order to be most useful as a scholarly tool, ArtSTOR will also be creating digitized image collections on a massive scale from sources where it will not always be possible to get permission from every owner. Waters explained that the Foundation is exploring a risk management approach that would make it possible to reproduce hundreds of thousands of images, provided that the images are distributed in a "nonprofit, carefully regulated online environment limited to use for educational purposes." ArtSTOR believes the presence of an image in its database will only enhance the value of the original work, not harm it. However, if harm is demonstrated, ArtSTOR will remove the image from its database.

It is the Foundation's contention, said Waters, that this approach to intellectual property could be a way for institutions to avoid the paralysis that has kept them from developing high quality, collaborative projects. It could also limit "mission drift," helping cultural institutions stay focused on their scholarly and educational purposes, rather than embarking on a dubious quest for profit.

Discussion

An intellectual property attorney suggested that any tension between copyright law and the first amendment should be resolved in favor of the first amendment, particularly in the case of databases. Jaszi suggested there was indeed massive tension between copyright and the first amendment. Fair use could be considered a safety valve that released that tension, although not completely. However, the situation has changed because of the evolution of copyright law, the DMCA, and its anti-circumvention provisions.

A librarian asked who was going to defend "free information"? Jaszi agreed that libraries and public service institutions were squeezed by the cost of information resources, licensing costs, and their missions to provide information for free.

A curator for a for-profit organization that owned 6,000 presidential letters and other manuscripts said that he was confused about what they actually owned, noting the distinction between owning the physical objects as opposed to their copyrights.

Eisgrau said that copyright law did not protect facts; rather the specific expression of those facts was protected. However, compilations of facts, such as databases, were protected because of the work that went into their creation.

Keynote 2: Intellectual Property Owners in the Digital Environment

Linda Tadic, *Intellectual Property Versus the Digital Environment – Rights Clearance*.

[\[Complete Paper\]](#)

Linda Tadic opened by stressing that her address reflected her own opinions and not those of her employer, HBO, or AOL Time Warner. In clearing rights, Tadic said that both for-profit corporations and nonprofit cultural institutions face many of the same issues in identifying copyright owners and securing permissions or licensing agreements. If the use does not fall under the fair use provision, permissions had to be secured.

Defining terms, she stated that an "asset" was a work or an object that can be owned and exploited by: society as a whole (public domain works); a creator (writer, composer, artist, etc.); a corporation or organization (often through licensing agreements); or the government (rights to cultural landmarks). In the U.S., the Copyright Code gives a copyright owner the exclusive right to reproduce, distribute, perform, display, or license his or her work (or asset) as well as to produce or license derivatives of the work. Putting assets or derivatives of assets on a website or on the internet is in effect reproducing, distributing, performing (if audio or video), and displaying the works. Before an individual or organization decides to reproduce a work or "asset," it needs to be determined who "owns" the asset. This could be quite complicated.

She divided her presentation into the use of four media: still images, audio, moving images and web sites.

1. Still Images

Possible owners of the rights to reproduce and distribute a certain image include a photographer (unless the work was produced as work-for-hire); an artist; a publisher (if a book cover); the subject of an image (under rights to privacy/publicity); or a corporation (either owning work outright or with the rights to license digital

reproductions). Some artists or their estates take care of their own permissions and licensing, while others use agencies or clearinghouses to license the reproduction of their work (e.g., [The Artists Rights Society](#)). Some artists, however, use companies who are only responsible for licensing digital reproductions. For example, the Ansel Adams Foundation must be contacted for reproducing an Adams photograph in print, but Corbis has the digital reproduction rights.

Tadic considered some cases where users might think about using images online without seeking clearance. These included:

- Copyright notice: Simply placing a copyright notice next to an image obtained without permission means nothing.
- Thumbnails: Citing the Kelly v Arriba case (in which Arriba's search engine returned photographs by Leslie Kelly) Tadic said that re-using thumbnail images had been ruled as fair use (as the quality was below acceptable commercial use).
- On-site use: Cultural institutions may provide access on-site to digital copies of copyrighted items in their collections, for which they do not own distribution rights, (under Section 108), as long as there is no commercial activity; the collection is open to researchers and to the public; copyright notice is displayed; and the copy is not made available outside the premises.
- Marketing web sites: Some companies encourage the downloading of authorized images from their marketing web sites for use in creating fan web sites, screensavers, e-cards, etc. In these cases, the company decides what images are authorized for downloading; and the consumer is not allowed to use the downloaded image to sell products.

2. Audio

Possible owners of audio rights include: the producer; the production company or performer(s); the composer; the recording label; the distributors (different ones for different markets); or the subject of an an interview. In using audio on web sites, Tadic explained that one needed to obtain *composition rights* (for public performance of the composition itself); *recording rights* (for the recorded work); and *reproduction and distribution rights* (for both the composition and the recorded work). Licensing organizations such as ASCAP and BMI act as clearinghouses for licensing composition rights. A recording company owns the specific recording of a piece of music. It is a common practice that rights revert to the performer 35 years after the recording's release. Internet transmissions involve reproduction and distribution, which are separate from public performance and involve two steps: reproduction occurs in downloading the music to a hard drive or server; distribution occurs by making the music widely available over the Internet. While public performance of a composition might be handled by ASCAP, reproduction and distribution rights for a

composition are represented by the National Music Publishers' Association and are licensed through the Harry Fox Agency, a clearinghouse for reproduction and distribution. In her paper, Tadic presented some useful examples to help illustrate these different rights.

Just as for-profits take rights management very seriously, nonprofits need to as well. Once a museum, library, or archive includes an asset owned by others on its web site, it steps into the same realm that the for-profit community lives in. As argued by Georgia Harper, under certain circumstances, an educational nonprofit could argue that its use of copyrighted assets is fair use and should be protected. However, it could be argued that the use of that asset was negatively affecting the asset's market value (Jupiter Media Metrix has estimated that single paid downloads represent \$25 million in sales).

3. Film and Video

The streaming of video on the Internet is another new digital copyright issue. Already film studios have created joint ventures offering subscriptions to online movies, protected by anti-piracy software. Currently, few nonprofits can afford to mount more than short clips of streaming digital video; however, many public domain films are available online (for example at the [American Memory](#) web site of the Library of Congress).

Possible owners of moving image rights include: the producer; the production company; the performer(s); the composer; the distributors (different ones for different markets); the subject of an interview; actors; the screenwriter; the director; the location.

Determining the rights owner to a film or video can be particularly difficult because films and their rights are frequently sold and one also needs to investigate whether the rights of actors, producers, writers, performers, guilds, or music need to be cleared. To research film and video copyrights, Tadic recommended the Copyright Database at the Library of Congress that lists claimants and copyright ownership to works created after 1978. To search before 1978, one needs to search the Library of Congress online catalog, LOCIS, or the published lists.

Tadic noted also that different companies own distribution rights in different markets, such as national, international, cable, and the Internet, although the definition of Internet rights is still unclear.

Privacy and publicity rights also influence the use of moving images and audio on the Internet and this can affect a nonprofit's use of home movies or oral histories. For example: A donor can give rights to use his/her family's home movies in an

exhibition/web site, but the organization then needs to obtain clearances from other members of the family who are represented in the footage.

4. Web Sites

Possible owners of web site rights include all of those listed so far together with an author (if the site includes an unpublished text); a translator; or the publisher (if the site includes a published text).

5. Digital Rights Management

As assets are distributed over the Internet, owners and distributors want to control, track, and protect their use. Digital rights management essentially comprises: tracking who created the asset; tracking who owns the rights to control usage; and protecting the content. Tadic then cited a number of examples of digital rights management systems currently available.

6. Nonprofits and For-profits: Similarities and Differences

Before concluding, Tadic briefly summarized the issues for nonprofits and for-profits.

For-Profit

Issues

Owns assets (IP)

Wants to provide access to assets (profit motive), but to control that access/distribution

Rights management awareness firmly in place

Solutions

Content protection. Can't access assets unless have authorization or pay (subscription services)

Digital Rights Management tools to track ownership and usage

Nonprofit

Issues

Owns physical item (sometimes IP)

Wants to provide access. Profit isn't usually a motivating factor. Any control placed on that access is out of fear/respect for rights.

Rights management awareness still new concept

Solutions

Content protection usually limited to giving copyright credit on web site. Not enough (see Kelly v. Arriba).

Follow new business model:

- Be strict in clearing rights/permissions; non-profits are now in the "distribution" business

- Secure rights to publish electronically; don't assume that a contract to "publish" also applies to the internet.

- Consider rights to privacy and publicity

- Protect content

- Copyright your own websites (design and content)

In conclusion, Tadic said that she believes Congress will revisit the DMCA, and that it is important for users of copyrighted materials to keep up to date with changing law and cases in the courts. Nonprofits that place assets owned by others on the Internet have in effect become distributors. As a new distribution model for the Internet is created, nonprofits and for-profits might discover that they have more intellectual property rights issues in common than they had previously thought.

Panel 2. Intellectual Property Users in the Digital Environment

Siva Vaidhyanathan: *Copyright and How We Talk About It*

Vaidhyathan called for a new rhetoric of copyright that would facilitate a broad, civil, and nuanced discussion of the sort of copyright system that might work best for owners and users. He thought there is a clear "vocabulary gap" in the way elites and the general public discuss copyright issues within the public sphere. Substantive discussions of copyright are largely restricted to "experts" even though the public has just as much at stake. The common rhetoric about copyright obscures more than it enlightens. He outlined some of the fundamental differences within the rhetoric of copyright.

First, he argued that copyright discussions remain within the domain of experts because of their elaborate jargon. Although jargon can provide precision and concision for those "in the know," it more often limits useful discussion. The metaphor "intellectual property" — the analogy between real property and the world of ideas — is particularly problematic, he said. When one side uses metaphors of property, accusing the other side of theft when referring to unauthorized uses of copyrighted materials, the other side is "imprisoned" by the metaphor. According to Vaidhyathan, "property talk limits our imagination." When words like "theft" dominate the discussion, a broad, nuanced, and civil discussion about what kind of system would work best is almost impossible ("because," as he put it, "it's impossible to argue FOR theft.").

Vaidhyathan urged the audience to think about copyright as a set of important policy choices, and not a fundamental property right, suggesting that such a rhetorical shift could alter the future of copyright law. He went on to urge nonprofit organizations to abandon the phrase intellectual property in favor of copyright, and even more specific terms that allude to strands or bundles of rights.

He referred to a "battle for the rhetorical high ground," claiming that post-1998 copyright limits creativity. The new copyright law rigs the system for "the established" and limits the choices of "the emerging." Historically, copyright was a fluid, open system about distribution and publication. Now it actually affects the creative choices of creators. Some owners of copyright argue for a strong, perfectly sealed regulatory system, that they claim would encourage creativity (for example, the Motion Picture Association of America claims that without the DMCA there would be no video disks because owners would not have had the confidence to distribute their work). Vaidhyathan acknowledged the truth of that claim: much digital content might not be available. However, he argued that "content creativity," is far more important for our culture than "format creativity," and we should protest the circumvention of that creative freedom.

Vaidhyathan pointed to the rhetorical gap in discussions of fair use. Users and the public simply want to know what they can "use," while experts can only reply "it depends." He outlined the three theories or approaches to fair use, now in play:

- **Statutory theory:** Fair use is simply an affirmative defense to an accusation of infringement. Therefore, its criteria are only relevant as a defense.
- **Law and economics theory:** Fair use is a vestige of the analog age when transaction costs for small amounts of content were too high to justify regulation.
- **Democratic theory:** Fair use is a fundamental user's right, a public benefit that exist within culture.

Howard Besser: *The Fate of the Commons*

Howard Besser responded to Vaidhyathan's comments on "property talk," arguing that there was at least one useful metaphor of property for the user community, and that was "the commons." He continued by discussing the particular problems of twentieth-century art, which he maintained was, above all, multi-media in format and very often about the re-contextualization of existing works. The creation of multi-media requires access to content, but, he pointed out, content is increasingly "locked up." Overall, Besser said, there has been a significant shift from information as part of the commons to information as commodity.

Besser pointed out that it is difficult to distribute team-created multi-media works and the need to renegotiate rights each time a work is transferred to a new delivery device is problematic.

Besser pointed out the high degree of commonality between users and creators of information. Strong copyright laws are bad for both creators and users because both make wide use of old content and both want the widest possible distribution of their new content. Both benefit from moves away from perpetual restrictions on content; both benefit from the survival of works over time. In fact, Besser argued, users *are* creators because they reconstitute content in their minds each time they read it.

The Content Industry

Leading myths about the commercial content industry include:

- that recording labels represent the music industry (Besser cited [Courtney Love's speech](#) before the Digital Hollywood online Entertainment Conference

in May 2001, where she argued that the record labels' fight with Napster was about protecting their profits, not the welfare of their recording artists);

- that the Motion Picture Association of America represents filmmakers; and
- that publishers represent authors.

According to Besser, the content industry does not serve creators or users, and he advocated an alliance between content producers, users, and librarians, who have more in common with each other than they have with the content industry.

Imagine a World with No Public Domain

Besser described a world in which rights to all content would be negotiated and re-negotiated. Historically, he said, we have had an “information commons” upon which creators develop new work, scholars make new discoveries and teachers find teaching materials. The information commons is a key element of public discourse. But it is under increasing threat and rapidly being eroded as fair use and first sale are being limited. Licensing, tracking, and perpetual copyright are all eliminating the public domain. The threat to the public domain mirrors the erosion of public spaces.

Besser suggested that as copyright laws are strengthened, they will be used to limit free speech and stifle creativity, citing the case of *The Wind Done Gone*, Alice Randall's controversial parody of *Gone With the Wind*.

The dangers we face are the elimination of the public domain, fair use, and a public commons. The result will be control over social and political commentary, satire, the creation of derivative works, the criminalization of acts that impede digital commerce, and the web as a tool of consumption rather than production. The content industry wants to monopolize production by limiting the public voice in the production of information and culture.

Besser referred attendees to his own web site on intellectual property issues, and to Lee Felsenstein's 1993 article “The Commons of Information.”

E. Jane White: *The Internet Moving Image Archive*

Jane White opened by declaring that she had worked on both sides of the intellectual property issues discussed by the previous speakers. In her position at ABC News Interactive, she became interested in working with archival footage and the myriad problems with gaining rights to multi-media.

[The Internet Archive](#) was founded by Brewster Kahle in 1996 with the goal of building a digital library of Internet sites and other cultural artifacts in digital format. It now provides free access to scholars, researchers, and the general public. Its central purpose is to provide open access, and thereby encourage alternative voices to the mainstream media. White argued that an open archive helps people better understand their world, a particularly important need in light of the events of September 11. The Internet Archive was built on the inherent promise of the Internet, that information should be free and available to the public. The Internet Archive consists of an Internet Library, the Internet Moving Image Archive, an election archive of 1996 and 2000, and the International Children's Digital Library. It contains forty-three terabytes of information, including four billion pages on the 2000 election.

Some of the problems that face the Internet Archive are that, despite the fact that content exists in vast quantities, it is locked up, in part because owners are not able to catalog their holdings and make the material available. Also, rights holders too frequently have an outmoded business model, based on the fear of duplication of their material. White argued that archives are underutilized and restrictions exacerbate the situation. She urged nonprofits to ask themselves what their philosophy is: should there be more or fewer voices? White argued there should not be such a firm distinction between users and owners, declaring that emerging users or creators are much less text-based and more visually- and audio-based. And yet, the very material that is being most restricted by the DMCA and other legislation is audio and video.

The Internet Archive puts the idea of the intellectual commons or preserve into practice, and suggests the commons be administered like the National Parks Service, as a national treasure. The Internet Archive is not in the business of commodifying intellectual property.

White presented a case study of the [Internet Moving Image Archive](#), that started with Rick Prelinger's enormous personal archive of ephemeral films. Believing that if he makes them available on the web, he will not lose money, Prelinger has done so and, so far, there have been 100,000 downloads of his films from the site, and his sales have increased. By making the images available online, more people become aware of the collection. White argued that wide access does not dilute the value of the films, but enhances it.

Discussion

A participant argued that, despite Tadic's suggestion that it is in the interest of publishers to distribute material and thus make a profit, publishers control access in

order to prevent the public from getting to the information. He suggested publishers, or the content industry, lock up works in order to manipulate their value, citing Star Trek as an example.

Vaidhyanathan argued from the perspective of the content industry, saying that publishers have no direct interest in limiting access because that would limit sales. However, the only way publishers can recoup their investments is to create unnatural scarcity, particularly within the culture of abundance facilitated by the Internet. Besser suggested that for any content holder there are several possible business models, but the content industry has relied on traditional, “overprotectionist” models.

An audience member asked the speakers to offer some guidelines for nonprofits who find themselves looking to for-profit business models to exploit their collections. Vaidhyanathan said that it is important to remember that every content producer is equally dependent on a rich public domain, and if all content is locked up, there will be no building blocks of new content. White encouraged nonprofits to give their content to an information commons or preserve. If they offer their works at a lower quality, many users will be willing to pay for high quality reproductions. Besser encouraged nonprofits to think carefully about digital preservation.

Full Program Discussion

David Green offered a summary of key themes covered throughout the day’s program. He pointed to the dramatic utopian and dystopian views of the digital revolution presented by several speakers. The issue of access to material seems to have overtaken reproduction as a central concern of owners. Green was intrigued by Mellon’s new model for the deployment of ArtSTOR, commenting that there were few institutions willing to take similar risks and to stand by their principles. The importance of new economic or business models was a recurring theme, and nonprofits are encouraged to explore the possibilities and to resist the temptations of traditional, for-profit models. Green was intrigued by Vaidhyanathan’s suggestion of the need for a linguistic revolution in the way copyright is discussed. He pointed to the threat of database legislation and the promise of the TEACH Act, that will give distance educators more options than fair use currently does, as areas in need of public attention.

One audience member urged participants to note, and oppose, the Security Systems Standard and Certification Act (SSSCA) to be introduced by Fritz Hollings (D.-S.C.). If passed the Act will restrict access to software by embedding copy-protection controls in consumer electronic devices and personal computers. Jaszi encouraged individuals, or citizen constituents, to let their Members of Congress know of their

concerns with regard to intellectual property. (See a report on this issue in [Wired](#) Magazine).

An audience member asked Tadic if there are any calls from the for-profit community to streamline rights clearing processes. Tadic suggested that for-profit organizations will not make the process easier because the system, while quite cumbersome and difficult to navigate, protects their content.