

# **COPYRIGHT TOWN MEETING: St. Louis, March 23, 2002**

## **The Changing Research and Collections Environment: The Information Commons Today**

### **Summary**

In "Imagining the Public Domain," Michael Shapiro reviewed the history of this legal concept from the 19th century, when it was negatively defined as that which was unworthy of protection, to the last two decades when it has been seen in more positive terms. Modern theorists have included David Lange, who in 1981 saw the public domain as a potentially rich resource threatened by overweening publicity rights, and Jessica Litman, who in 1990, trying to undermine the notion of originality and individual authorship as the basis for copyright law, presented the public domain as a device allowing the overall system to work by leaving the raw material of authorship available for others to use. Today, Shapiro pointed to a renewed burst of activity, especially in the wake of the Copyright Term Extension Act and other legislation, much of it under the banner of broad environmental metaphors. James Boyle and Lawrence Lessig in particular have called for an intellectual/creative commons that would spur the development of the public domain as an active and positive entity.

Jeffrey Cohen complemented this review with his practical work in creating a free shared online space of images for teaching architectural history. He wanted a "landscape of images" that was free and freely available to complement copyrighted and licensed images, calling for active contributions to such a landscape and for concrete support for a robust public domain. Cohen reviewed the current hybrid moment (of using analog and digital images) and imagined the "tipping point" when a critical mass of digital material would be available. He trusted we would all push toward that moment by helping develop the potential of digital materials and in developing shared cataloging. A shared teaching resource would expand access, avoid duplication, be defined by teaching requirements (not by the accidental availability of images) unfettered by particular narrative structures. He demonstrated how the built environment had special needs and how this tool would show its special advantages.

In questions, Cohen welcomed the greater flexibility that digital materials allowed in teaching than is possible with fixed text books. He called for tenure review to include in its considerations faculty's provision of digital resources. He encouraged creativity and a looser approach to quality and digitization standards and also emphasized that individual contributions to the provision of any national resource would have decided trickle-down benefits to local communities. Robert Baron commented on the language used to describe the public domain and encourage more positive imagery and the development of a bundle of rights.

Counterbalancing the outline of the current state of the public domain in the first half of the program, the second half reviewed the state of licensing and reminded the audience of the role of fair use.

Mary Case briefly reviewed the recent history of licensing, popular in the 1990s with publishers who were anxious about controlling digital content, who found licenses gave clearer, more definite limits to use than fair use did, and who followed the licensing model provided by software manufacturers. Licenses do give librarians a new burden in monitoring clearly defined sets of uses and users. However, licenses have evolved quickly, especially as librarians, often with the weight of consortia behind them, and others have contested terms and developed model licenses. The acknowledgement of fair use and the allowance of broader uses by broader sets of users is increasingly common. But Case advised participants to always refuse any fair use restrictions and any liability requirements. One of the big hurdles in licensing is the lack of guaranteed long-term availability of digital material. Access may be lost in the annual contract renegotiation but far worse is the concern that if libraries do not own a local copy, many works may never reach the public domain because copyright terms are so long and it may not be economically feasible for content-owners to maintain works as their value declines. If content providers don't confront this issue and libraries do not own copies, there is no way of knowing what digital content will be available for the long term.

Robert Clarida reminded participants of the basics of fair use, something like a middle road between the totally unfettered use possible through the public domain and the very constrained use created by licenses. He reviewed the four factors. Despite his corporate practice, Clarida is a strong advocate for the strengthening of fair use and was optimistic about its survival as it provides great flexibility, despite the difficulties presented by the DMCA. He cited a number of cases and ended by exhorting the audience to support the TEACH Act, which despite its many conditions could be a demonstration of how fair use can work in the digital age.

Tony Gill, from the Research Library Group, presented, as an example of a progressive licensing scheme, the licensing mechanism for a rich resource being developed by RLG. "Cultural Materials" is a web-based collection compiled from the resources of its 47-member institutions. It offers a rich tool set and is free to RLG members. Fair use is at the heart of the license, which allows a wide user base and a wide range of uses. Currently under consideration are an 'individual service' freely available on the open web, pay-per-view and click-through licensing, a referral mechanism for non-standard uses, and a revenue sharing model for alliance members.

In the discussion forum, Gill replied to a question about the place of unaffiliated independent scholars in a licensed universe by stating that RLG plans a free public web version of the Cultural Materials database. From the audience, Jennifer Trant added that the AMICO Library was available now for individual, unaffiliated users. On what to do if confronted by a license that overrides fair use, Case pointed to language in the Liblicense Standard Licensing Agreement that you could add. Again she warned that libraries should never sign a license that restricts the fair use rights of users. On the subject of new models for the public domain, Jennifer Trant suggested an IP Conservancy that followed the Nature Conservancy model by considering IP in terms of mutual values to producer and user. The final subject for discussion was risk management, an area in which several participants noted that institutional counsels were generally very risk averse, which did not further the goals of a networked cultural heritage. Should nonprofits push a case to the courts so that there was a judgment that could clarify acceptable practice? In his response, lawyer Robert Clarida considered whether the benefit to a nonprofit organization would outweigh the cost of such a case. This type of risk might better be handled by a commercial organization with more money. He did say that in intellectual property rights cases, it is often difficult to quantify the costs and benefits.