

COPYRIGHT TOWN MEETING: Cleveland, April 12, 2003

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

Sponsored by:

Center for Law, Technology and the Arts, Case Western Reserve University School of Law
Cleveland Intellectual Property Law Association
Americans for the Arts

Summary Report

The Cleveland Copyright Town Meeting, "Copyright for Artists and their Public: Artists' Rights and Art's Rights," divided into three parts: an expert review of copyright law and its evolution in the digital age, a discussion of the copyright and contract issues artists face when they go to work for, or sell work or rights to, organizations, and an exploration of the legality and consequences of art that appropriates work that is copyright protected.

June Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School, masterfully reviewed copyright law, emphasizing among other topics: the distinction between ownership of an object and ownership of its intellectual property rights; the number of rights included in the copyright bundle; moral rights (generally downplayed in the US); the range of exceptions to copyright control and the particular challenges of the digital landscape, the legal response to date and what may be expected down the road.

She illustrated her discussion of the fair use exception with two cases: *Rogers v. Koons* (1992), in which photographer Art Rogers successfully sued sculptor Jeff Koons for selling three sculptural copies of a photograph of his for over \$100,000 each, with no reference and certainly no permission from Rogers; and *Leibovitz v. Paramount Pictures* (1998), where photographer Annie Leibovitz lost her suit against Paramount for its parody of her famous Vanity Fair cover of a nude and pregnant Demi Moore. Apart from the merits of the cases, the Supreme Court's 1994 ruling on 2 Live Crew's parody of Roy Orbison's "Pretty Woman" made a strong impact on decisions for parody as a *bona fide* fair use.

Invoking the digital challenge (it's easier to collaborate, modify work, share it with colleagues and publicize it, but it makes copying and illegal uses much easier too), Besek noted that for the majority of academics and creators, the publicity is valuable and the Internet poses little real threat – although the issues are less financial than about the integrity of the work and getting credit for it. Turning to legal responses, she focused on the 1998 Digital Millennium Copyright Act (DMCA) and its provisions for protecting digital material: Anti-Circumvention (Section 1201) and Integrity of Copyright Management Information (Section 1202). Two cases illustrated how courts were translating the Act. In *Kelly v. Arriba Soft*, photographer Leslie Kelly lost his claim against Arriba's display of thumbnail displays of his images discovered in a web crawl (this was a useful and transformative fair use, according to the court, with no economic impact on Kelly) but won against Arriba's use of an in-line link allowing large size versions of Kelly's photographs to be viewed, which implicated the right of public display and did imply a market impact. She also reviewed the Napster case, in which she emphasized Napster's secondary liability for permitting illegal copying and distribution of material. The case she said was not about the innovative peer-to-peer technology but its conjunction with a centralized database of information about the location of copyrighted works available for (often unauthorized) copying.

While the worst elements of the DMCA were being countered in new proposed legislation, June Besek saw the future in a combination of enforcement of the law and development of new business models.

Turning to the intertwined issues of copyright, contracts and work for hire, Alberta Arthurs gave a rich contextual introduction to the conflicts, invoking the 2002 American Assembly report. Legal scholar, Maureen O'Rourke, powerfully demonstrated the situation of the individual creator in the post-Tasini digital world, in which corporate publishers force creators to give up all rights for the same price paid a few years ago for print-only rights. Copyright offers no protection in this area and contract law favors the large industrial players. The only way forward, she suggested, would be in collective action along the lines of the National Writers Union. In discussion, the audience was very interested in how this might operate.

O'Rourke's legal perspective was given heft and color by photographer Richard Kelly, who said he spent more time negotiating contracts than taking photographs, but felt lucky when he could negotiate, as most publishers cannot afford the time for individual negotiation. Artists needed a just and balanced regime in which they were compensated for electronic rights to their work. Kelly expressed dismay that the legal hurdles facing artists are not discussed in art schools, and noted the need for artists to become educated about their rights.

Kelly was followed by attorney Deborah Coleman, who offered an informed discussion of a museum's perspectives on these issues. She registered the frequent conflict between educational mission and economic survival and the need to rely on contracts in a sea of legal uncertainty. The Cleveland Museum was concerned about the integrity of images and their fate in the world but was not satisfied by the efficacy of legal or technical protection measures to date. In questions, Alberta Arthurs expressed her disappointment that the goals and balance of copyright were currently being displaced and needed re-adjustment. She particularly felt it was difficult to organize the many voices of the arts community into a unified viewpoint to match that of the corporate world (which, though sometimes disparate was much more united and forceful on these issues).

In the third section of the meeting, allowable access and use of artistic work online was examined by a lawyer/musician, a new media musician and a photographer. Attorney Mark Avsec recounted his experience defending himself against the charge of misappropriation, outlining the "test" of the elements necessary to prove infringement as proclaimed by the landmark 1946 case, *Arnstein v. Porter*. In conclusion, Avsec proposed consideration of whether we still need copyright law and whether it was successfully serving its purpose. A "copyright optimist," firmly supporting copyright's monopoly, he still had serious questions.

Avsec's challenge was illustrated in style by Mark Gunderson, who demonstrated the signature music collage format of his audio art band, The [Evolution Control Committee](#) (ECC). Giving full credit to their sources, ECC's work (in for example playing radically edited sections of Dan Rather's CBS Evening News reports against AC/DC in the "Rocked by Rape" piece) was illegal, but should it be encouraged or squashed? Mark Avsec commented that the work was arguably derivative and it would be interesting to see CBS' response to the latest release of the single.

Finally, photographer Walt Seng recounted his involvement in a case of unauthorized commercial use of his photographs and concluded that strong and clear copyright education was very badly needed and could save many people's time in unnecessary lawsuits.

In a final discussion about international law and copyright, the utility of registering copyright and creators' ability to make their own licenses through the new Creative Commons organization, there was final agreement that artists need to collaborate proactively on these issues and to educate and be educated further about copyright and its implications in the digital world of today.