THE PUBLIC DOMAIN: MEETING REPORT

Tuesday, January 11, 2000
Chicago Historical Society
Chicago, Illinois

Introduction

David Green placed the meeting in the context of the series as a whole and its several related themes. The double goal of the meetings were to inform audiences of the facts of online copyright and fair use and then to share concerns and issues between assembled experts and audiences. Situated as we are in the continuing struggle to assure balance in copyright and to keep fair use alive, we should, nevertheless also look ahead. He cited the National Academies report, "The Digital Dilemma: Intellectual Property in the Information Age," , in which the assembled committee wrote that "society needs to look further out than today's crisis, try to understand the nature of the changes taking place, and determine as best it can what their consequences might be, what it would wish them to be, and how it might steer toward fulfilling the promise and avoiding the perils."

Bernard F. Reilly, Director of Research and Access at the Chicago Historical Society and the host and master of ceremonies of the day, welcomed the audience. He emphasized how critical these copyright issues were to the historical society--now delivering whole collections onto the Web.

THE PUBLIC DOMAIN: WHAT IS IT?

Diane Zorich

Diane Zorich opened with "Why the Public Domain Is Not Just a Mickey Mouse Issue," referencing the "poster rodent" for this issue and his recently postponed entry into the public domain (from 2004 to 2024) due to H.R. 2589, the Sonny Bono Copyright Term Extension Act.

An ardent appropriator of intellectual property herself, who also works as a museum consultant, Ms. Zorich underlined that she, as most of the audience, was both an owner and user of online intellectual property. After reviewing several definitions of

the public domain she declared her own practical definition: that the public domain encompasses "all entities, information, and creative works that are available for use by anyone for any reason without restriction."

Ms. Zorich reviewed what was currently in the public domain: those things that cannot be copyrighted (facts, numbers, ideas, short phrases, etc.,); government documents and publications; works whose copyright had expired or had not been renewed; and those works either donated to the public domain or whose copyright claims had never been exercised.

The value of the public domain, she posited, is that its content is not only widely and freely available but is also significantly cheaper than copyrighted material: there are no royalties to pay and no restrictions to its use. Also, competition with other potential publishers of public domain material keeps the price of a product down.

Zorich emphasized the relationship between the public domain and the domain of copyrighted material. If copyright offers an incentive for creators to contribute to the public good, the public domain, with its wide reservoir of resources for creators to build on, is a great catalyst for creativity. She noted that what she called the delicate feedback system between copyright and public domain (incorporating creators' needs for economic return and society's need for free exchange of information) was now shifting to a system in which the economic factors were receiving increasing emphasis at the expense of the public good. "In other words, the feedback system is being threatened and the public domain is eroding because of these threats: works are not going in as fast nor as often, and more frighteningly, some public domain works are actually falling back into copyright."

Zorich concluded by enumerating how the public domain was diminishing:

1. Extensions of duration of copyright: from the 1790 copyright law that gave 14 years protection to the 1998 Sonny Bono Copyright Term Extension Act, that gave 95 years, the duration of protection has steadily increased (with, as a result, the extremely unlikely chance that anyone would see a work created during their lifetime enter the public domain). Currently, the Term Extension Act has effectively placed a 20-year moratorium on any copyrighted material entering the public domain;
2. Unpublished historical documents: the 1976 Copyright Act gives unpublished historical materials federal protection until 2003, if not published before then; if they are published prior to this date, they are protected under the new Term Extension Act, until 2047.
3. The restoration by the Uruguay Round Agreements Act (URAA) of copyright protection of foreign works that had fallen out of copyright for various reasons;

4. The increasing regard of culture as a commodity with wide economic ramifications;
5. The increasing use of trademark and patent to offer intellectual property protection to phrases, processes, and even ideas that we associate solidly with the public domain. "Soft" patents especially, those that don't cover a physical invention are pushing the envelope of this particular legal regime and "are also pushing into what has heretofore been considered some of the most sacred cows of the public domain."

Eric Eldred

Public domain advocate Eric Eldred, a lead plaintiff in *Eldred v. Reno*, the lawsuit to overturn the Sonny Bono Copyright Term Extension Act, followed with a discussion of this case. Bothered by how public domain authors were somehow claimed by current authorities, Eldred started Eldritch Press to publish public domain books online. He started with works by Nathaniel Hawthorne (and the site became one of the first cited by the NEH EdSitement project).

Agreeing with Zorich's observations on the diminishment of the public domain, Mr. Eldred noted the chilling effect of H.R.2265, the 1997 No Electronic Theft Act, which many felt was over-reaching with its criminal penalties of up to a $10,000 fine and three years in jail. [2] Mr. Eldred felt that the Copyright Term Extension Act undermined the Constitutional basis of copyright law and one of the principle reasons for his suit was to hear the Supreme Court give guidance on this issue. Other reasons for the suit included:

1. a belief that copyright should truly be an incentive to living creators rather than be given retrospectively to the current holders of the copyright;
2. a belief that there should be an Internet analogy to the First Amendment;
3. a belief that, just as it has a responsibility to protect the wilderness and important other public lands, the government has a responsibility to protect public intellectual property. In fact, he felt strongly that we need to argue for some incentives to bolster the public domain--something like an Intellectual Property Conservancy, along the lines of the Nature Conservancy.

Questions & Discussion

To a question about whether, should his case reach the Supreme Court, it would find for the government, Mr. Eldred responded that in that event he would trust that there would be some healthy debate about an issue on which much of the press had been silent. In fact, he said, the legislative history shows that copyright term will soon be extended to perpetuity, unless there is more effective organized opposition, or the courts recognize a Constitutional basis for limited copyright term, rather than the corporate theory of intellectual property (thus the lawsuit).

Richard Weisgrau asked if there was a statutory regulation for copyright holders to give their works to the public domain, what kind of provisions would need to be in it? Ms. Zorich replied that there would need to be a provision for how one could formally "donate" their work, and a provision/limit on whether the copyright owner could rescind/remove the work from the public domain after it had been donated. Mr. Weisgrau then followed up by asking that if such donation could be codified whether it could be challenged by heirs. It was pointed out that Mark Twain, who suffered many copyright violations and was an advocate for strict copyright control, still thought that even if his children should be supported by the rewards of his work, his grandchildren should "fend for themselves." Diane Zorich added that perhaps the opposite could also be codified: if a work was copyrighted that the heirs could then place it in the public domain.

WHO HAS ACCESS? WHAT DOES IT MEAN?
Peter Hirtle

In opening the discussion about access, Peter Hirtle, co-director of the Cornell Institute for Digital Collections, was determinedly an advocate for maximum online access to educational materials. Cornell, like the Chicago Historical Society was heavily engaged in networking collections. In Cornell's case this included among many projects, some 70,000 pages of journals; some 27,000 items in its art museum and some 50,000 pages of Icelandic Saga material. Hirtle was also an advocate for the public good as the primary reason for copyright law, citing Chief Justice Hughes in United States v. Paramount Pictures, Inc. "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." [334 U.S. 131, 158 (1948), quoted in chapter 3 of *The Digital Dilemma*]

Hirtle viewed copyright as an incentive for creators by its giving them a monopoly that was limited by certain exceptions: fair use, library copying for inter-library loans and preservation, compulsory licenses for certain uses; and by time frame. The digital environment, however, was clearly affecting perceptions of the copyright contract. Many copyright owners were displaying a fear of gratuitous copying and were seeking greater control. Hirtle cited several "education campaigns" by copyright owners that had the effect of encouraging users to forget their rights and implying that any unauthorized copying of published material is illegal. Though it was a criminal violation to remove copyright information from material, he noted, it was not illegal to post false copyright information.

Hirtle agreed with Zorich that perhaps the most dangerous trend was the growing number of non-copyright methods being developed to control access to material: trade

marks and patents, publicity rights and rights of privacy and especially the rise of the concept and practice of licensing. The new territory of licensing was particularly troubling because licensing agreements tended to supplant federal rights and there were many unanswered questions. These included, for example, will access to material stop with the termination of a licensing agreement?; and will users still be able to exercise their fair use and other rights as guaranteed by federal law. Licenses, Hirtle noted, were even now being used with public domain material. In short, licensing can be a way of circumventing the balance seen in the copyright law.

Echoing Eric Eldred, Hirtle asked the audience to think about "copyRIGHT" as the right to copy material and to think through what rights they want to have. "Do we want to enter a Faustian bargain with copyright owners or do we want something closer to the spirit of the Constitution?"

Brad Nugent

Brad Nugent took up Hirtle's challenge, speaking as an artist who is an avid user of material but also as Assistant Director of Imaging at the Art Institute of Chicago, an institution whose livelihood, he maintained, depended on protecting its property and its property rights. Like many museums, the Art Institute doesn't own copyright on much of its possessions. It also does license material that is in the public domain. The justification for this, said Nugent, is that the institution invests considerable financial resources in providing access to the material and has an interest in at least recovering its costs. While content may be in the public domain, the specific form or treatment may be controlled by copyright, patent, trade mark or property rights. For Nugent, CopyRIGHT was the right to own and protect intellectual resources.

In the digital arena it was suggested that there could be a "resolution ceiling" attached to works that could be available free to all (see this in the AMICO model) and then offering value-added benefits in licensing the best quality

Questions & Discussion

Eric Eldred developed the scenario of an individual wanting to post a 1920s photograph on the web. Would the Art Institute allow this use of one of their public domain images? Nugent replied that it would depend on a variety of factors. Was it a unique image or did other repositories also have it; what was its condition; had the Institute spent funds on restoring it; were they public funds; how would the individual be using the image? There were clearly other issues involved than simply whether the image was in the public domain.

Hirtle commented that no one objected to an institution trying to recapture costs in making material available; but it became problematic when it tried to limit further use

of a reproduction. He felt that libraries seemed to be more single-minded about their mission here in striving to give unrestricted access to material.

Mr. Nugent declared that there was a need for a public domain distribution service (one that he had himself outlined) operated with government subsidies and grant funds to make public domain material more easily available. Short of that, he declared, there was no compulsion for any repository to make a public domain image or text available free of charge to anyone for any reason.

A member of the audience at this point emphasized that the discussion was, in fact, not about access but rather about the ability to copy, or to re-use material. How closely tied were the issues of the right to access and the right to copy? In the past, access was rarely the issue; but, especially since the DMCA, access had increasingly become the issue. With its focus on electronic control of content, the DMCA has also emphasized that the issue is access.

Richard Weisgrau tried to internationalize the situation by emphasizing that the US-UK copyright regime was in fact different from the situation in most of the rest of the world, where the principle, "I create, therefore I own," is more prevalent. Today, US copyright holders were pushing to internationalize the issues, that tended to stress owners' rights over public good.

Another comment focused on institutions' fear of being sued by copyright owners they had no knowledge of. Although Cornell had one complaint from an heir of the owners of material in a microfilming project, neither Cornell nor the Art Institute had had any serious claims made against them. Both agreed that risk management was increasingly a large part of what they did and that one of the unexpected impacts of the Web has been the focus on clarifying the rights landscape of institutions' holdings. Copyright records were usually quite bad in most institutions. As one commentator put it, "now that more of us are becoming our publications, clarity on rights matters has become very important."

THE DIGITAL COPYRIGHT MILLENNIUM ACT: WHAT'S NEXT?
See the Library of Congress web page for a summary of the DMCA
Tyler Ochoa
In the third section of the program, Tyler Ochoa, associate professor and co-director of the Center for Intellectual Property Law at the Whittier Law School, opened by reviewing some of the basics of copyright and its limitations.

Mr. Ochoa noted that over the past 20 years copyright owners had mounted what he called a "concerted attack" on the public domain. This was led by their dis-satisfaction with the current state of balance between owners and users and by their economic self-interest. He observed a "three-pronged attack" on the status quo: term extension; restriction of access to material through technical means; and an attempt to change the copyright bargain through replacing copyright law with contract law.

The DMCA reinforced these last two efforts and Mr. Ochoa focused on section 1201, what he called the "thou shalt not hack" anti-circumvention provision, that prohibits tampering with or circumventing the intellectual property management software that protects access to digital material. Mr. Ochoa emphasized that this applied to all digital media that require an algorithm to read it.

Section 1201 goes into effect in October 2001 and, in the interim the Library of Congress has been tasked with deciding which classes of work should be exempt from the provision. Comments from users about the presumed impact of the provision on their own livelihood are due at the Library of Congress by February 10. Ochoa cited a number of problems with this. These included the fact that the burden of proof is placed on those on seeking exemption, whereas he thought it should be on the copyright owners. Also this presumes that the Library of Congress can define what "non-infringing use" comprises. It is also difficult to gauge ahead of time what our inability to gain access will be. One exception has already been defined for libraries for making preservation copies.

One big problem is that DMCA prohibits reverse engineering, a standard procedure that allows software manufacturing competitors to de-compile software to discover how it works. This is possible because computer software is copyrightable only as a literary work and one cannot copyright its functional aspects. The DMCA, however, is now allowing de-compiling only to enable the identification of a program but specifically not to allow for competitors to produce a derivative work.

Richard Weisgrau

Richard Weisgrau, has represented the American Society of Media Photographers in legal circles for twelve years, as its executive director. An advocate and a photographer, he was most concerned about the effect of the DMCA on individuals. He developed an undersea copyright analogy, in which he placed individuals as plankton in the copyright sea, negotiating with the whales (the large copyright owners like Time Warner, etc.); and fish (the nonprofits).

He referred to Jane Ginsburg's 37-page summary article on the very complicated DMCA [3], characterizing it as the fruit of intensive lobbying from the whales. Thus although originally a piece of constitutional and motivational genius, copyright law

was now becoming more about the regulation of commercial interest and less about the public good.

Weisgrau was worried about what he saw as the limiting of access to those who need it and by an expansion of fair use, as he called it, through new distance education provisions that redefine what a "classroom" is.

He declared the DMCA essentially flawed, an act that no one was happy with and predicted a new act altogether. So unhappy was he with this law that he had developed an understanding of what the DMCA actually meant for different constituencies: "The government calls it the Digital Millennium Copyright Act. The educational community calls it Devious Manipulation by Corporate America. The library community calls it Delusional Misunderstanding of Concerned Authors. The publishing community calls it Dreadful Misappropriation of Copyright Assets. The public domain promoters call it Deficient Management of Copyright Appropriation. The copyright purists call it Deliberate miscarriage of the Copyright Act. To me it represents Deferral of a Major Constitutional Argument."

Based on his own ten years of experience, he predicted a new future in which most intellectual property will be housed in limited access digital services where there would be no alternative supply. In spite of the importance of the public domain, the bottom line is that there wouldn't be the work if there wasn't some reward; there must be an economy of creation.

Weisgrau feared that the public would get only what's left, because there is no public advocate: the public and the creator were both being left out of this increasingly commercially dominated conversation.

Questions & Discussion

Tyler Ochoa responded by broadly agreeing with Mr. Weisgrau's predictions, characterizing his views as illustrating a natural rights perspective (everything is free unless you protect it); felt that the strict line between commercial and non-commercial is fanciful (everything has some kind of effect on the market) and to Weisgrau's undersea analogy added law professors as the coral (they build an elaborate structure but are completely ignored by the whales: a case in point was that only law professors had submitting a formal protest to the Term Extension Act).

Peter Hirtle had a question about the Feb. 10 deadline and the attempt to define classes of materials to be exempted. How would archives, receiving encrypted material be able to de-encrypt. Would "anything that is in my institution" be defensible as a class of materials? Tyler felt that the Library of Congress was most interested in moving this whole question to the courts rather than for itself to define.

Mr. Ochoa also felt that "the whales" in this instance were going for quick protection rather than doing any serious rethinking of their basic business models. Weisgrau quoted a Time report from 1989 that predicted that "in the entertainment industry the winners will be those who control the greatest number of copyrights and the means of distribution."

One reason for the recent pass both Weisgrau and Ochoa concurred was that there was so little public understanding of copyright. Weisgrau put it: "We teach children not to steal the book but don't teach not to steal the IP." He gave several examples of art directors who had no understanding of copyright whatsoever. He reported that many major rights holders had recently established the Copyright Heritage Society to promote copyright education. Ochoa, however worried that the education would be rather one-sided. And questioned whether we need education or a change in the law.

OPEN FORUM
Before the open forum all speakers were asked to give summary statements.

Richard Weisgrau appealed for common sense and plain and fair dealing in the daily struggle of providing access to copyright material. Diane Zorich commented that few institutions were prepared to respond to the February 10 deadline for comments on the impact of section 1201 on their work.

Ochoa and others felt that ultimately technical protection will not work; already there is much skepticism (and the recent case of the cracking of the DVD encryption). The real sting comes that to get access requires you to click on license: so you can be sued for breach of contract.

This brought up discussion of the UCITA (the Uniform Computer Information Transactions Act). Peter Hirtle commented that the difference between what you can do with a book and what you can do with software will disappear&-that we are moving away from the important "first sale" model of print publication. Hirtle felt that the courts were being intimidated by technology.

A question from the audience raised the case of Indiana University wanting to digitize public domain material that had been microfilmed by a corporation. The corporation claims they own copyright to the microfilmed material, a comprehensive bibliography produced in 1974 and not registered. The questioner claimed that it was popular "folklore" that microfilmed public domain material was copyrighted. She was afraid that corporations would then try to digitize and license the material, the reason behind Indiana's digitization project. Mr. Ochoa agreed with the Indiana decision but cited

the database legislation and the attempt to own rights on material over and beyond copyright.

To a question about libraries' ability to digitize for preservation purposes, the panel responded that the DMCA does give the right to make three copies for preservation purposes and the ability to migrate and prepare a derivative version of material currently encoded in an obsolete file format.

To a question about unpublished manuscripts, the response was that material unpublished prior to 1978 goes into the public domain in 2003 (under the 1976 Act). However, if published in the meantime it would be protected until 2047

One questioner commented that this session was dedicated to the public domain but that the audience represented mostly those working in libraries, museums, archives and universities. How do we get the message about the public domain out to the "real public." Panelists agreed that the public didn't understand the value of the diminishing public domain.

Ms. Zorich responded that perhaps we could reframe the issue. For example, she said, the public understands the concept of "the public good," and donate their papers and personal effects to cultural institutions like libraries, archives and museums because they trust that they will maintain them for posterity and make them available for public use. As papers are donated to institutions we should begin to use the term "public domain." We should build on the already existing trust they have in these institutions and use it as an opportunity to equate their belief in the public good with the public domain. This could provide one example of a much-needed educational campaign on the identity and value of the public domain.

Notes

1. *The Digital Dilemma: Intellectual Property in the Information Age.* Computer Science and Telecommunications Board, National Research Council. National Academy Press. 2000. Available online at http://www.cstb.org.

2. See Kenneth Crews, "President Signs New Criminal Copyright Bill: Raising The Stakes For Electronic Copyright Responsibilities," Copyright and Higher Education: Announcement of Recent Development December 18, 1997. Copyright Management Center, Indiana University.

3. Jane C. Ginsburg, "Copyright Legislation for the 'Digital Millenium,'" Columbia-VLA Journal of Law and the Arts (Spring, 1999) 23.