

## **5. TORONTO:**

### **COPYRIGHT & FAIR USE IN THE DIGITAL WORLD: VIEWS FROM THE WORLDS OF SCHOLARSHIP, PUBLISHING AND MUSEUMS.**

**1998 Annual Meeting of the College Art Association  
Toronto, Canada  
Thursday February 26, 1998**

#### **Panelists: (in order of presentation)**

Robert A. Baron, Arts Information Consultant  
Peter Walsh, Davis Museum and Cultural Center, Wellesley College  
Gary Schwartz, Curators of Dutch Art (CODART), Netherlands Institute for Cultural Heritage  
David L. Green, National Initiative for a Networked Cultural Heritage  
Leila W. Kinney, Department of Architecture, Massachusetts Institute of Technology  
Maxwell L. Anderson, Art Museum Network; Director, Art Gallery of Ontario  
Howard Besser, School of Information Management & Systems, University of California, Berkeley

#### **Introduction**

The last town meeting in this series was organized by the Toronto Town Meeting Committee, co-chaired by Robert Baron, Arts Information Consultant, and Leila Kinney, School of Architecture, Massachusetts Institute of Technology.

Loosely following the model of the Town Meeting at the American Association of Museums, this meeting was presented in two parts: part one consisted of presentations of three papers, followed by discussion; part two consisted of a two-part debate about the issue of licensing and Fair Use of images.

As Robert Baron pointed out in his opening remarks, the subjects for discussion had now moved beyond the Conference on Fair Use, which looked increasingly irrelevant to immediate concerns. As Mr. Baron put it, "After CONFU, we are discovering that the lines of self-interest are becoming more resolutely drawn--and perhaps, in this process, more clearly perceived." While not neglecting to strengthen and confirm the rights and privileges endowed by copyright law, the community of educators and scholars had to discover acceptable new strategies and protocols for securing continued delivery of copyrighted images and other material.

#### **SESSION ONE: Strategies and Technologies**

##### **1. Peter Walsh, "The Coy Copy: Technology, Copyright and the Mystique of Images."**

Peter Walsh's presentation broadly illustrated the fact and the problem that copyright law was developed originally for printed text and then adapted for other media and thus the law is always somewhat distorted for the visual domain. In particular, he examined the differences in the notion of the copy in text and visual environments, and argued for a clarification in the law over the value of different types of copies in the visual domain.

First, Walsh demonstrated how prevalent and deeply ingrained in artists' practice was the fact of copying and adapting the works of others. A Rubens painting, "after Caravaggio," accepted today as perfectly legitimate, was made in 1611 shortly after Caravaggio's death. Under current U.S. copyright law, this would have been illegal and prosecutable.

He also briefly followed the life-history of the images on the slides we examined (painting to photograph to multiple copies, to printed plate, to published book illustration to projected slide). Other versions, ranging from student copies to engravings, would have been made from the originals and reproduced as lithographs, postcards, slides, book illustrations in short, as many different kinds of production versions that scholars know and recognize, each, in its own way, bestowing different meanings to its own level and kind of copy. But copyright law only recognizes a fair and an unfair copy (legal and illegal). With literature, whether a copy is fair or not is comparatively clear (it's either under copyright or not).

Today, many maintain that each photographic copy of an original work is itself copyrightable, bestowing on any given work a series of layers of copyright ownership. With literary works, however, copying does not affect the original. In this way, Walsh maintained, a photograph of an original work of art was simultaneously an original, a copy and a derivative because it is based on "pre-existing material." Because the law doesn't distinguish between kinds of visual copies, it becomes, he said, "impossible to untangle these three notions."

## **2. Gary Schwartz: No Fair! Long-Term Prospects of Regaining Unencumbered Use**

Gary Schwartz addressed what he saw as a schizophrenic situation, in which scholars were thrown into a defensive posture over a set of longstanding practices that depend on free or low-cost use of images. Hitherto comparatively invisible in the market place, art historians were ironically being seen now as a source of profit as they found themselves "on the cross-hairs of two antagonistic realms:" the copymakers selling machines and techniques encouraging more profligate copying and the copyright protectors aggressively tracking and charging for use. This was threatening the economics of the discipline of art history that, Schwartz suggested, should be re-named: "The History of Art in the Public Domain."

Contrary to its intent, Fair Use was clearly not viewed by publishers as a social principle, but rather as a mechanism to deal with market failure--an inability to negotiate with the small-scale users of their property. Now that electronic technology can increasingly help track and charge for use, publishers could see no justification for the Fair Use defense and were clearly intent on destroying it: "The more capital is invested in intellectual property, the more pressure is going to be brought to bear on Fair Use, and the more anachronistic it is going to look."

In response, Schwartz called for a more aggressive response from scholars. Given that "the doctrine of Fair Use is too ill-defined to provide us with the right to use, on our own terms, materials controlled by others," scholars should become more demanding in fees for their own products: "Any use of the ideas, knowledge and information we produce, by museums, image brokers, the press or any other party, should be charged for at a rate that would offset--at a premium--what we are being asked to cede by way of payment for and control of images."

Schwartz briefly proposed eight strategies, the first six dependent on contesting current practices of the owners of material and the last two revolving around making counter-claims or organizing to claim financial benefits from the value added by scholars to cultural heritage knowledge:

### **1. Contesting charges by public institutions**

2. Contesting reproduction rights on art in the public domain
3. Contesting reproduction rights based on ownership
4. Contesting claims to copyright on photographs
5. Contesting claims on second-generation reproductions
6. Challenging abuse of power in the management of resources
7. Introducing a system of virtual counter-claims
8. Maximizing our own collective position as holders of copyright.

Regarding art history as a discipline that had met with great success over the last 50 years, Schwartz pointed to the fact that that success has not translated into protections and benefits for its practitioners: "the status of the art historian is legally unprotected and socially undefined." Indeed the chance for art historians to receive public support in conflicts with the lawyers and producers of rock singers and movie stars was minimal.

The challenge that art historians were facing in the recent copyright battles was, in fact, greater than copyright itself: "The history of copyright law is in this regard no different than that of labor law and anti-trust law: only groups which have been able to consolidate their position and convince society of the legitimacy of their rights have been able to achieve a proper level of legal protection. If we can do that, we will have achieved much more than winning a battle with the copyright industry."

### **3. David Green: "Your Copyright Future is Being Determined Now, or: Public Interest? What Public Interest?"**

David Green focused on copyright legislative activity of the 1997-98 Congress, examining two competing visions of copyright underlying various bills before Congress. He presented the current "debate" over copyright as one very much akin to the recent culture wars over public funding for the arts and humanities: "the copyright status of digital media, too, is a war about values, values of a classic American kind that resurfaces throughout our history: culture versus commerce, private gain versus public interest."

Green reviewed the relevant legislative developments in copyright and Fair Use, including the life and death of the Conference on Fair Use, and the World Intellectual Property Organization's Copyright Treaty, ratification of which underlies current copyright legislation.

He also reviewed three competing concepts to copyright, what lawyer Peter Jaszi has labeled "quasi-copyright" (new database protections); "para-copyright" (encryption technology negating Fair Use); and "super-copyright" (contract law pre-empting federal copyright), which Green saw as allied with the Administration's vision of future copyright.

Against all this, there were poised two companion bills in Congress that offered an alternative vision of the future: a comprehensive and balanced Senate bill introduced last September by Sen. John Ashcroft and a companion House bill introduced in November by Representatives Rick Boucher (D-VA) and Tom Campbell (R-CA). Both address the issues of privacy, Fair Use and liability. Campbell-Boucher also addresses first sale and the issue of the relation of state contract legislation to Federal Law. (It clearly asserts that negotiated contracts cannot pre-empt one's privileges, such as Fair Use, guaranteed by Federal law).

These two bills are currently the focus of a major campaign organized by the Digital Future Coalition. A useful side-by-side comparison of the Boucher-Campbell Bill (H. R. 3048) with what is now the " Digital Millennium Copyright Act" is available on the DFC website

<<http://www.dfc.org/issues/wipo/DMCanal/dmcanal.html>>. This campaign is clearly about which version--which vision--of control and access to copyright material will be dominant in the future.

As far as what to do about the future, Green recommended individuals and organizations contact the College Art Association, the National Humanities Alliance or the Digital Future Coalition to determine how they could best work to effect legislative change. On the educational front, NINCH was encouraging the active development of campus and institutional policies and principles on the use and management of copyright material as well as copyright and Fair Use educational programs.

## **SESSION TWO: Educational Image Site-Licensing Debated: Will Site-Licensing Eliminate Fair Use?**

Leila Kinney introduced a debate over educational site-licensing by making a number of personal observations from the point of view of an art historian. First was her sense of the community's having traveled a long way from the early drafts of the CONFU Guidelines for the Fair Use of Digital Images, in which she felt that many scholars' longstanding practices were virtually criminalized. The rejection of CONFU served to anticipate a new, sophisticated use of high-quality digital images, replete with contextualizing metadata, that could be made available for reasonable prices through educational site licensing consortia.

Second, her perception that in many discussions, the debate seemed to posit two homogeneous communities: that of producers and users, whereas in fact these communities are mixed--the "producers" themselves also needed Fair Use. The prospect of a brilliant digital image library should also imply collaboration and feedback between scholars and curators, universities and museums.

Ms. Kinney welcomed the apparent "zone of freedom" that a user would have with digital images delivered under the AMICO license but worried that it might then be compromised by having to renew contracts annually. This issue of "temporal" portability she then applied to those who could use images at one location where they worked, but not at another that did not license the works, or those who were independent scholars.

### **1. Howard Besser: "The Erosion of Public Protection: Attacks on the Concept of Fair Use."**

Howard Besser, rather than make a case against site licensing, opened a broader discussion beyond AMICO, wanting to give, as he said, a context for intellectual property in the digital age. He began his talk with the basics of copyright and Fair Use, emphasizing that in the mix between commercial gain and public good it should be the public good that gains, but observed that the balance was currently going the other way.

The first round of licensing of digital resources by commercial companies has been rather bumpy and, from Besser's perspective, licensing seems to have been used frequently to make an end-run around Fair Use. Problems exist when libraries enter into licensing arrangements with publishers, for, rather than being bought outright, material is only leased. Consequently libraries cannot build collections of historical resources, and cannot govern when controversial items might be removed from a licensed resource. Furthermore, if licensed resources are licensed or controlled from a central source that is able to track use, then serious privacy issues may easily arise.

Besser agreed with Schwartz that commercial copyright owners viewed Fair Use as an economic threat and marshaled other evidence to prove that big business was attempting a "copyright grab" of materials

that should be more freely available. By this phrase, Besser was referring to the article by Pamela Samuelson published in the January 1996 Wired magazine, available on the Web at <<http://www.hotwired.com/wired/4.01/features/white.paper.html>>.

## **2. Max Anderson: AMICO & Fair Use**

Max Anderson is Director of the Art Gallery of Ontario and of the Art Museum Network, a project of the Association of Art Museum Directors, that is parenting the Art Museum Image Consortium (AMICO).

AMICO is a nonprofit cooperative of art museums founded to create a collective library of digital images with rich contextualizing metadata to be licensed for educational use on a cost-recovery basis. A separate session explaining how AMICO worked was offered the following day at the conference.

Anderson was a little nonplused since the advertised "debate" about site-licensing had failed to appear, and he had no intention to defend licensing as a whole. AMICO, he claimed, is quite different from commercial licensing operations in a number of important ways. It was nonprofit; it is based on cost-recovery; it was formed to enable the fullest possible use of material by the educational community. Unlike dealing with a commercial company like Corbis, where a museum might not feel that it was controlling its own destiny, AMICO offers a nonprofit community-based solution to marketing digital images.

AMICO was formed to solve a number of problems: one of these was the inability to find and use affordable, high quality digital images from art museums; another was the difficulty that museums have had with dealing with a high volume of individual requests for digital material. AMICO solves both by creating a centrally administered collective library of images. The current 23 museums that have joined AMICO have had their own collection information systems, their own databases and will continue to market their own collections, but finding material across such a number of museums is a nightmare that only a collective library can successfully solve.

Anderson assured the audience that the AMICO license allowed uses far beyond those traditionally allowed under Fair Use, including, for example, features like remote access, manipulation for study purposes, retention in a portfolio, and regular use in curricula.

Anderson answered a variety of questions both from the floor and from the Town Meeting Web site <<http://www.pipeline.com/~rabaron/ttm/TTM.htm>>. Many of these inquiries concerned the financial viability, not only of AMICO, but of the project of networking cultural heritage materials in general. While Anderson maintained that AMICO was seeking minimal cost-recovery in a project that museums were using as a way of furthering their public educational mission, Besser, reporting from a study he was involved in, claimed that museums would be lucky to truly recover their costs in digitizing their collections from such an enterprise and would have to depend on traditional commercial markets to make any kind of income. Anderson agreed that a combination of fundraising and licensing income would have to be at the heart of AMICO's future viability.

All agreed that substantial funding still had to be raised from government and foundations to seriously tackle the task of networking cultural heritage materials: this was a task that was not being confronted head on.

## **CONCLUSION**

The Town Meetings were conceived as mixing the presentation of fact and the provision of a forum for discussion. The range of questions, spanning present reality and future possibilities included: what is copyright law, what is fair use, what are the fair use guidelines, how do they apply to your situation, how does the digital environment change the equation, what do we do without CONFU guidelines, what do we require from new legislation, what are the guiding values of this community and, finally, what are new economic models for access to intellectual property that we need to contend with, or imagine, in our digital future?

The meetings met with very warm and active receptions around the country. There was clearly a need for information and advice on copyright and fair use issues and a need to discuss the present and future scenarios that members of the educational community found themselves in. Much changed even over the one year of the meetings. At the beginning the proposed CONFU Guidelines were the hot topic. By the end they were dead, and audiences and panelists were focusing on other issues: legislation, licensing, organizing and new forms of guidance in the classroom and the study.

In this rapidly developing environment, the needs are broadly still those of:

- making the case that these issues are important for those producing and using cultural materials and will become increasingly critical as more distribution and use of cultural resources occurs online;
- explaining the basics of copyright law and fair use;
- explaining the current state of intellectual property legislation and what is changing;
- explaining, considering and speculating on the impact of digital networking on the use and management of intellectual property;
- exploring new, additional economic and social models;
- discussing specific cases, issues and problems.

There is much more to be done on these issues in many different forums and we are ready for organizing a second generation of town meetings that will build on the strengths of this first series and incorporate what many of have learned in the process of taking these town meetings to our communities across the nation.