The Challenge of Copyright & Difficult Materials:
Underlying rights, Orphan works, media and remixed works, teaching exceptions, & exceptions for digital preservation and access

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Origins of Copyright

• Statute of Anne -- Copyright Act 1709
  – “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned”
  – Gave monopoly to authors for 14 years
  – Required that copies be given to 9 important libraries (legal deposit)

• XX

What is Copyright About?

• The Congress shall have power ...to provide for the ... general welfare of the United States To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
  -US Constitution, Article 1, Section 8 (underlining added)

• (exclusive control) Incentivizing creators to create more
• (limited time) Establishing a vast and rich public domain for use as new creative materials, as well as for public edification and appreciation

Limitations on Copyright

• Term ends, then becomes usable by anyone for any purpose
• Fair Use/Fair Dealing
• Exceptions for education, political comment
• No real exceptions for cultural posterity

Copyright is not about Guaranteeing continuous income to Rightsholders

“The primary, objective of copyright is not to reward the labor of authors, but [to] promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of sciences and art.”

* Justice Sandra Day O'Connor, FEIST PUBLICATIONS, INC. v. RURAL TELEPHONE SERVICE CO., INC., 1991
What is Copyright?

• Copyright is a delicate balance between users and creators, but is supposed to be clearly oriented towards the public good
• Copyright is NOT an unlimited Economic Right
• Copyright is really a temporary monopoly right granted to creators in order to fulfill the societal need to increase creativity
• The Copyright monopoly is temporary, then works become freely available for all purposes

What has copyright become (1/2)

• Who actually holds Copyright?
  • More often a corporate distributor than an original creator
  • Archives beware: owning a work does not mean that you own the © of that work!
• Licensing is replacing copyright in the digital age
• Legislation lengthening duration
• Erosion of Fair Use

What has copyright become (2/2)

• The larger trend -- moving long-standing common-law or constitutional rights into the arena of person-to-person business transactions, where these rights no longer apply
• licensing eliminating fair use
  – privacy
  – international arena
  – increasing time before work enters public domain

Historically, copying of Art was viewed as homage, or at least as perfectly acceptable commentary

Madonna & Child

The Adoration, with the Infant Baptist and St. Bernard
Fra Filippo Lippi
Tempera on panel, c.1432

Wilderness Adoration of the Child with Saint John
Jacopo di Poggibonsi
Tempera on panel, c.1443-45.

Adoration of the Child and Saint John
Jacopo di Poggibonsi
Tempera on panel, c.1443-45.
Art (particularly 20th century) builds upon prior Works
new works involve repurposing old

- Collage
- jazz
- Pop
- Postmodern
- Rap/Sampling
- Shakespeare

Picasso’s Violin (1912)

Duchamp (1919)

Hostility between Content Industry and Cultural Repositories

Pat Schroeder’s New Chapter:
The Former Congresswoman Is Battling For America's Publishers

- Schroeder is president of the Washington- and New York-based Association of American Publishers, sponsor of the event. Like a nurturing shepherd, she moves gently among her flock. But when she talks about threats to the group, she stiffens her back.
- And who, you might be wondering, is giving Schroeder and her publishers such a fright?
- Librarians, of course.

Publishers Accuse Librarians

- They’ve got their radical factions (librarians), like the Ruby Ridge or Waco types,” who want to share all content for free, said Judith Platt, a spokeswoman for the Association of American Publishers.
- “We,” says Schroeder, “have a very serious issue with librarians.”

- ZDNet News, July 12, 2001
Content Industry Myths

- Recording labels speak for Music Industry on © issues (Pho, Love, …)
- MPAA speaks for independent filmmakers
- Publishers speak for writers on © issues (ask Tasini)

Libraries try to provide resources to people with disabilities

- Purchase of large print books
- Typeface enlargement
- Text-to-speech

Einstein Theory of Relativity in Microsoft Reader

Sign of the Fish in Adobe Reader

Disability Issues

- “Authors Guild” claimed that reading a book out loud is a violation of their copyright. March 2009 Amazon changed Kindle to allow authors to deactivate text-to-speech
- We can’t legally provide these services when breaking anti-circumvention technology is a criminal offense

Creators/Users commonality

- Make good use of content created by others
- Want widest possible distribution of content
- Benefit from moves away from perpetual “locking up” of content
- Have interest in works persisting over long periods of time
When © Term ends, work should be freely available

- For anyone to use without prior permission
- For new creators to offer their own interpretation, re-contextualization, or re-mix
- For culture to build upon

A Fair(y) Use Tale
Eric Faden (2007)
http://cyberlaw.stanford.edu/documentary-film-program/film/a-fair-y-use-tale

Just figuring out when © expires is complicated

Pragmatic Considerations:
Public Domain-Unpublished Works

<table>
<thead>
<tr>
<th>Type of Work</th>
<th>Copyright Term</th>
<th>in US public domain as of 1/2009</th>
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<tbody>
<tr>
<td>Unpublished works</td>
<td>Life of the author + 70 years</td>
<td>Works from authors who died before 1899</td>
</tr>
<tr>
<td>Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)</td>
<td>120 years from date of creation</td>
<td>Works created before 1899</td>
</tr>
<tr>
<td>Unpublished works when the death date of the author is not known</td>
<td>120 years from date of creation</td>
<td>Works created before 1899</td>
</tr>
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Copyright Censorship

- Material is sometimes withheld from producers for reasons of politics or embarrassment
  - NYT refusing © permission for Michael Moore reprint their Iraq coverage editorial apology
- Some material never makes it into productions because © is too expensive or difficult
- The current copyright regime imposes censorship in the form of “prior restraint”

Fox takes Franken to court; they think they own “Fair & Balanced”

ABC makes Spocko’s ISP shut down his blog because he posted racist ABC video clips
“This Film IS Not Yet Rated” feared being censored for using MPAA clips

EMI and Sony try to shut down DangerMouse’s re-mix of vocals from Jay-Z’s Black Album and Beatles’ White Album

Recut, Reframe, Recycle: Quoting Copyrighted Material in User-Generated Video

Preservation steps can raise serious Copyright Issues

Interpares:
Identifying the influences of Copyright on Archival Preservation

Viacom sues YouTube for $1 Billion
InterPARES 2
International Research on Permanent Authentication Records in Electronic Systems

- Ongoing international archival world project examining how to make electronically-generated records last over time
- Developing the theoretical and methodological knowledge needed, then will formulate model policies, strategies, and standards
- Reliability, accuracy, authenticity
- In 2003 was extended to include dynamic, interactive, and experiential works

InterPARES:
Identifying the influences of Copyright on Archival Preservation

- General Problems of © and Archives
- What are we trying to do?
- Background
  - Migration/Emulation issues
  - Underlying Rights
- What we’re looking at
  - Problems caused by Underlying Rights
  - Legality of Refreshing/Migration/Emulation
  - A Preservation right to copy
  - Dangers involved in infringement
  - Jurisdiction issues
- How we’re going about it
  - Examining laws, directives, WIPO, Berne
  - Case Studies
  - Bibliography

General Problems of © and Archives:
Archives struggling with IP laws in an age of digital access

- Digitizing & making works accessible
- Exhibits and displays
- Archives unable to even collect works
- Scholars’ research & teaching
- Copyright SHOULD expire sometime; what about “this is under ©” warnings?

Rights Clearance for historic photos is incredibly burdensome

- Technically, you should:
  - identify photographer
  - find out whether it was ever later published
  - find out whether s/he ever sold the rights
  - ... etc.
- Only if you can affirmatively trace back and clear any/all rights should you publish it (make it accessible electronically)
- But, if we did this, we’d never be able to publish most of our historical photos (because the photographer is unknown & we can only guess the date)

Clearing photos is still burdensome, even with proposed liberalized “Orphans” changes

- Orphans hearings -- finding mechanisms to make it easier to clear rights on works for which no rightholder appears to have an active interest
- But even most of the proposals by libraries still carry heavy burdens for archives to clear photos
- A record-keeping requirement for conducting a search
  - (pretty hard to do for each photo, especially if you have no idea who the photographer was and can only guess the time-period)

Works may be scanned, but then withheld from online access because of IP fears

- “The Alfred C. Berol Collection of Lewis Carroll is one of the pre-eminent collections of Lewis Carroll (a pseudonym of Charles L. Dodgson) materials in the United States. It contains his correspondence, manuscripts (firsts, autographed copies, presentation copies, and proofs), drawings, and photographs. It also contains drawings by his foremost illustrators John Tenniel and Harry Furniss. Additionally, there is a wide cross section of ephemeral materials related to Lewis Carroll which illustrate his work’s contemporary and ongoing cultural impact, as well as, Alfred C. Berol’s correspondence and notes on the provenance of the materials in the collection.”
  http://www.nyu.edu/library/bobst/research/fales/cdfa.htm
Exhibits & Displays

• Great value in using material from other archives in an exhibit
• But can you be sure that you’re not violating IP Laws when you use material from another institution?
  • © of the other institution (easy; contact them)
  • Underlying IP rights that remain unclear

UK Nat’l Archives, educational

www.whitmanarchive.org

Copyright SHOULD expire sometime; "this is under ©” warnings can be misleading

AU/Rockefeller Study

Some material never makes it into productions because © is too expensive or difficult

• American University/Rockefeller2005 study on © problems for documentary filmmakers
  – Rights clearance costs are high, and have escalated dramatically in the last two decades.
  – Gatekeepers, such as distributors and insurers, enforce rigid and high-bar rights clearance expectations
  – The rights clearance process is arduous and frustrating, especially around movies and music.
  – Rights clearance problems force filmmakers to make changes that adversely affect—and limit the public’s access to—their work, and the result is significant change in documentary practice.
This is not only a problem for film/video producers, but also for archives & exhibitors

- If the producer relies upon "fair use" or "public domain" instead of clearing ©, everyone downstream insists upon indemnification
- A distributor won’t handle a work that hasn’t explicitly cleared every tiny ©
- An exhibition venue (a broadcaster or even an archive) will be reluctant to exhibit a work unless every single sub-piece has cleared ©
- A funding agency often won’t give resources to an archive wanting to restore a work unless they’re convinced that it can be shown or copied without © restrictions
- Even professional organization such as AMIA insists that we sign a contract stating that we’ve cleared © for every little thing we want to show as part of a conference Talk-

What did we try to do in Interpares ©?

- Macro--examine governmental laws & policies to see where they affect an archive’s ability to preserve digital records
- Micro--examine how an archive’s internal policies and procedures need to adapt to the broader legal environment
- Macro--suggest general changes in governmental laws and policies that impede an archive’s ability to preserve digital records

Background:
Migration/Emulation Issues

(General)

- Because physical storage strata both deteriorate and become outmoded, management and maintenance of electronic records requires that they be periodically “refreshed”
- Because file formats quickly go out of style (and the new formats that replace them are not backwardly-compatible), either Migration or Emulation will be necessary (the Wordstar problem)

Background:
Migration/Emulation Issues

(Problems)

- Migration requires copying into new formats.
  - But any form of copying is regulated by copyright laws, which may make copying for Refreshing or Migration illegal
  - Migration can involve some form of transformation which may run up against the moral rights of a copyright holder
  - Migration may involve circumvention of digital protection mechanisms, which is illegal in many jurisdictions
- Emulation requires the creation of new software to view the work
  - The software needed for emulation often involves reverse-engineering or other adaptation of previously-existing software, and in many jurisdictions this is illegal

Underlying Rights Examples

- In recording an interview, a radio is playing in the background. The owner of the song could sue the person recording this and the archive for copying this as a © violation, even though it is only a very small part of the background.
- In a videotaped interview, a television or website is in the background. The owner of the television program or website could sue both the person recording and the archive.
- In documentary photographs or video on a street, the owner of a background advertising poster or product or car manufacturer could sue the recorder and the archive
- New laws (”broadcast flag”) may cause all recording devices to immediately shut off if they detect a copyrighted song or television signal in the background
Underlying Rights
A film/video of 1950s home life should not have the tv on

Background:
Underlying Rights

- Archives may have a right to the whole but not have a right to the components.
- Third party information, underlying rights are often granted for a limited time or a particular kind of use, or a particular geographic region. This is particularly salient for multimedia works.
- Eyes on the Prize, It’s a Wonderful Life, photos in Barbara Kruger works-

Kruger’s Untitled 1990 (It’s a small world but not if you have to clean it)

Underlying Rights are everywhere

- The copyrighted music playing in the background of an audiotaped interview
- The copyrighted television program playing on a television set in the background of a street scene or a videotaped interview
- The copyrighted billboard in the background of a street scene photograph
- The stock footage used in a documentary where the filmmaker only got 10-year non-theatrical exhibition rights, or 5-year cable TV rights, ...
- The web page that displays a copyrighted photo by linking to it (not actually copying it)

NYU/WNET © Audit

- Music Licenses
- Composers
- American Federation of Musicians, local 802
- Licensing agreements for individual segments
- Underlying literary material
- Artwork and still photos
- Contracts for location shots
- Footage licensing
- AFTRA contracts
- Writer contracts
- Composer contracts
- Consultant contracts
- Director contracts
- ...
NYU/WNET © Audit

Term of contract

- Many individual performers, especially those belonging to AFTRA, had contract periods of around three years. Given that these expired about twenty years ago, they will each require re-negotiation. This might prove incredibly costly, as many of these performers have attained high celebrity status since the broadcast of this program. Independent producers, and stock footage licenses also limited the time of use to around three or four years. On the positive side, many contracts allow NET to use the material “in perpetuity,” although this does not mean that all conceivable rights were given to the station. See use stipulations.

Use stipulations

- Nearly all of the contracts allow use for educational broadcast purposes. Many will further permit audiovisual rights, which in 1970 meant closed circuit transmission, in-school showings, non-theatrical exhibition and other non-commercial use. Yet in very few cases will a contract give NET the right to distribute material through other means (“any and all media” clause), and many will specify that the material cannot be sold, licensed or duplicated. With these restrictions, it would appear that WNET does not have the right to distribute most of the series on DVD, as this would almost undoubtedly be a commercial use of the production.

Incomplete files

- A few members of this group came across episode files that appeared to be incomplete. In some cases, segment sheets at the front of the files listed performers included in the episode, but there would be no corresponding contract. Other episodes would contain music cue sheets that might list a number of titles licensed for the show, but again there would be no contract. These sheets, however, do list the rights holder of the compositions, and should be referred to when further investigation is conducted (see, for example, episode 5).

Music

- Much of the music used in the series was licensed from music libraries. While many compositions appear to be in the public domain (Beethoven, for example), standard contracts from the distributor were still signed by NET for the recording rights. The fees for these contracts were generally quite low, from $1 - $10, making it appear that the risk for re-use of this material is also low. However, the group cannot conclude that WNET should ignore these contracts. Music rights have changed drastically since 1971, and considering the incredibly vague language of some of the music licenses, it advised that these music contracts be carefully considered.

Other

- The group occasionally encountered other problems that would complicate a re-release or distribution of this series. For example, sometimes a contract would not be signed (by one or both parties). In other cases, the language would be so vague that the student could not reach any conclusions about the terms of use. It should also be considered that the episodes were not available for viewing, so rights issues contained within the image (trademarked names, logos, etc.) were not assessed.
All Stakeholders: 2008 Recommended changes to US © Law
http://www.section108.gov/

- Section 108: Copying Exceptions for Libraries--A/V works excluded from permission to reproduce or distribute
  - 1. It may be possible to expand the exceptions in subsections 108(d) and (e) to cover certain non-text-based works that are not currently eligible. More factual investigation, however, would be helpful to determine whether eliminating subsection 108(i) in whole or in part would adversely affect the markets for certain works currently excluded from coverage under subsections 108(d) and (e), or would otherwise harm the legitimate interests of right holders.
  - 2. If subsection 108(i) is retained, it should be amended as follows:
    - a. Limit the excluded categories of works to those where copying under subsections 108(d) and (e) might put the work at particular risk of market harm.
    - b. Broaden the categories of “adjunct” works that may be eligible for subsection 108(d) and (e) treatment, and use a formulation other than “adjunct” that captures the concepts of “embedded” or “packaged with.”
  - 3. If subsection 108(i) is amended so that subsections 108(d) and (e) apply to additional categories of works, then additional conditions should be included based on a formulation of subsection 108(i) and (e) to address the risks particular to those types of works.

What Interpares looked at-
- Problems caused by Underlying Rights
- Legality of Refreshing/Migration/Emulation
- A Preservation right to copy
- Dangers involved in infringement
- Jurisdiction issues

Underlying rights
- Impacts many different types of records and collections
  - 3rd party information, underlying rights (from collage to incidental capture (music playing in background of famous person’s home movie))
  - Rights granted for limited time or for particular use or particular geographic region
  - Often impacts the Archive’s ability to show works to researchers; sometimes inhibits the Archive’s ability to make preservation copies
  - Some European countries have exemptions for “incidental capture”

Is Refreshing/Migration /Emulation Legal?
- Some countries have refreshing/migrations exemptions oriented to consumers -- can put their music tapes onto CD if they then destroy the tapes. But these consumer exemptions are dangerous for preservation repositories, who may need to keep the previous copies (audit trail to guarantee that changes didn’t creep in during transformations, to follow parallel emulation and migration strategies, ...). The archival community needs its own exemptions, and cannot rely on exemptions meant for consumers.

Right to copy as part of Preservation
- Do archives have the right to make the copy—is it something that is an explicit right or an assumption?
- Should copyright exceptions be explicitly spelled out in detail, or should it be more general? (Some European laws are purposely less explicit. US CONFU experience with “fair use” where librarians and archivists thought it better for the guidelines to be less explicitly spelled out.)

Beyond Preservation
- Exemptions for archives in copyright law should address/allow copy for access, not just copy for preservation issue
- Access Inside/Outside the Archive
  - Outside to a constrained group?
  - Private use?
Dangers for Infringement

- Are Archivists who violate copyright laws as part of their work treated similarly to those who download or distribute music or movies?
- Do the laws indemnify Archivists for areas where they might intrude on copyright laws:
  - 3rd party information
  - Underlying rights
  - Rights that were granted for limited times or for particular use
- What are the damages for infringement? What risks does an archivist run with copyright infringement?
- Recommendations for:
  - Records creators to put an archival clause in the copyright for the works they create, and organizations or groups that commission works to have an archival license generated
  - Anti-circumvention allowances for archives

Jurisdiction Issues

- What country’s copyright laws are followed, particularly when underlying rights are involved?
- And what about records created in jurisdictions that have no copyright laws (Antarctica)?

How we went about it-

- Looking at laws of individual countries
- Looking at international and multi-national bodies and directives
- Looking at issues that emerge from case studies

Looking at laws of individual countries

- US
- Canada
- UK
- Belgium
- France
- Singapore
- Hong Kong
- China
- Australia
- + Case Laws

Bibliography

<table>
<thead>
<tr>
<th>Author:</th>
<th>Crawford, Tad</th>
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<tr>
<td>Title:</td>
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<tr>
<td>Journal or Book:</td>
<td>Legal Guide for the Visual Artist</td>
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Chapter 7 of this work is entitled “Moral Rights.” This chapter analyses the Visual Artists Rights Act (VARA), the “landmark legislation creating moral rights for artists in the United States...enacted on December 1, 1990, as an amendment to the copyright law...[which] took effect on June 1, 1991,” and b.) two landmark court cases in the United States concerned with moral rights.

**Bibliography-Annotation** (1 record)

- Chapter 7 of this work is entitled “Moral Rights.” This chapter analyses the Visual Artists Rights Act (VARA), the “landmark legislation creating moral rights for artists in the United States...enacted on December 1, 1990, as an amendment to the copyright law...[which] took effect on June 1, 1991,” and b.) two landmark court cases in the United States concerned with moral rights.

**Worldwide Copyright**

- Berne Convention (1886)
  - Automatic – no registration or active interest required
- WIPO Copyright Treaty (1996)
  - Response to digital age
  - Includes rules against Circumvention (even when the use is perfectly legal)

**WIPO Development Agenda**

- Attempts by developing countries to change WIPO’s agenda so laws are not only motivated by commerce-

**Establishing a Development Agenda for WIPO** (Sept 2004, Section IV)

- “The provisions of any treaties in this field must be balanced and clearly take into account the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States.”
- “In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software.”

**Geneva Declaration on the Future of WIPO Oct 4, 2004**

- “As an intergovernmental organization, however, WIPO embraced a culture of creating and expanding monopoly privileges, often without regard to consequences. The continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation. WIPO needs to enable its members to understand the real economic and social consequences of excessive intellectual property protections, and the importance of striking a balance between the public domain and competition on the one hand, and the realm of property rights on the other. The mantras that “more is better” or “that less is never good” are disingenuous and dangerous — and have greatly compromised the standing of WIPO, especially among experts in intellectual property policy. WIPO must change.”

**Access to Knowledge (A2K) Movement**

- “a loose collection of civil society groups, governments, and individuals converging on the idea that access to knowledge should be linked to fundamental principles of justice, freedom, and economic development”

- [http://www.law.yale.edu/intellectuallife/6542.htm](http://www.law.yale.edu/intellectuallife/6542.htm)
WIPO pressured to deal with © issues posed by Digital Preservation

- WIPO International Workshop on Digital Preservation and Copyright (July 15, 2008)

InterPARES--Looking at © from International & Multi-national bodies and directives

- What do these say around preservation, access, technological manipulation?
- Do regulations from the larger bodies prevent individual countries from creating more preservation-friendly environments for archives? (some contend WIPO/Berne prevents US from re-implementing © registration requirements)
- Including:
  - European Directives
  - Berne
  - WIPO

Copyright & Indigenous Rights

- World Intellectual Property Organization (WIPO) is studying the extension of copyright to cultural artifacts, ideas, styles created by indigenous peoples (Traditional Cultural Expression—TCE)
- Due to pressure from indigenous peoples over mis-use of religious songs, photographs, symbols, and artifacts for commercial purposes
- South Africa is the first to implement a law like this, but their goal is to collect the maximum profit from selling these, not to protect indigenous artifacts and ideas from being mis-used

Pragmatic Considerations: Creating Digital Materials (1/2)

- No assurances + laws rapidly changing
- Providing web access may constitute “publishing”
- Clearing rights can be a nightmare
- Worry about underlying rights
- Deep linking
- Masters/Derivatives
- Standards/Best Practices

Pragmatic Considerations: Creating Digital Materials (2/2)

- Fair Use Considerations
  - Purpose & character of use
  - Nature of copyrighted work
  - Amount and substantiality used
  - Market effect
If we really want to do our jobs responsibly…

- We are going to continuously have trouble staying within the confines of the law

Sources

- http://www.interpares.org/
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- http://www.section108.gov/
- http://www.nyu.edu/tisch/preservation/
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