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

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Most of you with Special Collections are not off the hook when I mention “digital” or “media”
• Drafts and versions of writings will come in on hard disks and memory sticks after people die
• You’ll have to get their family and conference meeting photos off of Flickr, their thoughts and reactions to life off of their own website or off Facebook, their “home videos” off their hard disk or YouTube
• And where will you find their correspondence?

People don’t write many letters any more

And even our Oral Histories are increasingly Video (and distributed via iTunes University) Berkeley Bancroft

The Challenge of Copyright & Difficult Materials-
• What is Copyright
• Public Domain, Fair Use, & First Sale
• What do we want to do at Universities?
 – Traditional Library Services (Access, Preservation, ILL)
 – Faculty-related Issues (distance learning, classroom presentation of library materials, …)
 – Impediments and © Office recommended changes
• The need for an Information Commons

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
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?

- 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?

- 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

A Fair(y) Use Tale

Eric Faden (2007)
http://cyberlaw.stanford.edu/documentary-film-program/black-fair-use-tale

- Chapters 1 (0:00-2:50), 3 (3:45-5:34)

Just figuring out when © expires is complicated
Pragmatic Considerations:
Public Domain-Unpublished Works

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<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 1939</td>
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<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 1889</td>
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<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 1889</td>
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Copyright Navigator tool
http://navigator.carolon.net/

Copyright Navigator tool
http://navigator.carolon.net/

Importance of Public Domain and Fair Use

- What are they?
- A robust public domain is essential for a common heritage and for the creation of new works
- Fair Use is a powerful tool for both education and social commentary (20th century art, music sampling, mash-ups all rely upon fair use)
- First Sale is important for social aims (and allows for used recordings and book stores)

Important mechanisms to assure an Information Commons of available content

Fair Use is Disappearing

- Criminalizing Fair Use
- Copyrighting DB contents in perpetuity
- Proposed Legislation (USCITA, etc.)
- The 1998 Digital Millenium Copyright Act & anti-circumvention provisions
- The 1998 Sonny Bono Term Extension Act
- …Hollings Bill, INDUCE Act, Broadcast Flag, …
The erosion of the public domain -

• What is it?
• What threatens it?
• Why should we care?

Lawyers defining the Public Domain

• "things in the public domain can be appropriated by anyone without liability for infringement" (Black's, 1996)
• "the law’s primary safeguard of the raw material that makes authorship possible" (Litman, 1998)
• "a commons that includes those aspects of copyrighted works which copyright does not protect" (Litman, 1990)
• the converse of property rights in information where the government prohibits certain uses or communications of information to all people but the owner; the public domain “is the range of uses privileged to all” (Brandley, 1999)
• "the ultimate source of all new works (because nothing is ever wholly new in and of itself)” (Kastala, 1998)
• “copyright’s raison d’etre is to benefit the public by encouraging the production and dissemination of new copyrighted works” (Kreiss, 1995)

Content in Public Domain

• Shakespeare
• Ballads
• Fables
• ...

Public Domain -- a simpler explanation

• resources freely available for all members of society to do whatever they want with them
• no prior permissions or fees required
• no tracking of what you read or use

What’s part of Public Domain?

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<th>Still is</th>
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<td>Ideas &amp; Facts**</td>
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What threatens it?-

• An aggressive Content Industry
• Term extension
• Returning out-of-copyright works back to copyright
• Mickey Mouse
• Elimination of Fair Use and First Sale
• Licensing
• Other forms of Contract Laws
Pat Schroeder's New Chapter: The Former Congresswoman Is Battling For America's Publishers —Washington Post, 2/7/01 (color added)

- 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.
- No joke. Of all the dangerous and dot-complex problems that American publishers face in the near future — economic downturns, competition for leisure time, piracy — perhaps the most explosive one could be libraries. Publishers and librarians are squaring off for a battle royal over the way electronic books and journals are lent out from libraries and over what constitutes fair use of written material.
- Grossly oversimplified: Publishers want to charge people to read material; librarians want to give it away.
- "We," says Schroeder, "have a very serious issue with librarians."

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. —ZDNet News, July 12, 2001

Content Industry trying to control all Downstream Use

users will no longer "buy" content; they'll "license" it

- Pushing new legislation
- Lawsuits
- Copy protection
- Contract Law
- New business models

Proposed Broadcast Flag Legislation

- All consumer devices sold in US must enforce copy-protect schemes
- What happens to Fair Use rights?

RealDVD case

- Federal court case Apr 24, 2009
- $30 software allowing user to store purchased DVD on own hard disk
- Part of "Facet" project that Real wants to license to consumer electronics manufacturers to time-shift on DVD players (like TiVo)
  - Cheaper version of Kaleidescape, which won Federal suit
  - "Our objective is to get the illegal choices out of the marketplace" Greg Goeckner, MPAA VP
  - "Way to Copy Movie DVDs To Computer Is on Trial, NYT, Apr 24, 2009"

Web 2.0 Content Companies may stop delivering to some countries

- "A significant portion of traffic on Facebook and YouTube comes from areas of Africa, Latin America and Asia that deliver relatively meager advertising revenue."
- "Last year, Veoh, a video-sharing site operated from San Diego, decided to block its service from users in Africa, Asia, Latin America and Eastern Europe, citing the dim prospects of making money and the high cost of delivering video there."
- "One Internet Village, Divided. NY Times, Apr 27, 2009"
What do we want to do at Universities?

- Libraries
  - provide resources to people with disabilities
  - ILL
  - Preservation
  - Support electronic access
- Faculty
  - Use protected resources within the classroom
  - Recombine material for teaching, commentary, research
  - Teach remote users

Provide resources to people with disabilities

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

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

Anti-Circumvention

- A library can break a DRM one time to determine if they wish to acquire a work, but then can’t break it again to preserve the work
- But it is illegal to write and distribute software that breaks the DRM!
- DMCA Anti-Circumvention Provisions-
### DMCA Anti-Circumvention Provisions

- The DMCA prevents consumers from making back-up copies of DVDs they own in order to protect them from scratches and loss. It also stops parents from using DVD control software to protect their children from undesirable DVD content and forbid fast-forwarding through unskippable advertisements before feature movies.
- MP3 players can be found in 23% of American homes, but the DMCA makes it a crime to provide a music fan with software that helps him get his music from a copy-protected CD into his iPod, or from his iPod back to the computer.
- A garage door opener company has invoked the DMCA to prevent a competitor from selling interoperable replacement garage door “clickers.”
- Laser printer giant Lexmark has used the DMCA against the toner cartridge remanufacturing industry, leaving consumers with fewer choices and higher prices.
- Former White House Cyber-Security Chief Richard Clarke has called for DMCA reform based on concerns that the DMCA is chilling computer security research vital to our national security.
- A Princeton University computer science professor was threatened with a DMCA lawsuit for trying to publish a research paper about weaknesses in watermarking technologies.

### ILL Issues

- Digital copies can’t be used for ILL

### Preservation Issues

- Section 108 requires prior loss, deterioration, damage to a work before preservation can occur
- 108’s narrow definition of obsolete format doesn’t even permit transfer of vinyl LPs because turntables are still available in the marketplace
- Multiple copies
  - Digital world requires multiple redundancy
  - Lots of interim copies made with digital (or even film preservation)
- Access needed to tell if digital repository content is going bad
- Very serious problem for capturing websites or complex media
- Digital preservation--© and the InterPARES project

### What did we trying to do in Interpares ©?

http://besser.tsoa.nyu.edu/howard/Papers/interpares-copyright.pdf

- 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 outdated, 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
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

Electronic Access Issues

- Outside contractors not included in library exemption
- Many things can only happen “on premises”, and no clear definition of premises (satellite campus? faculty on sabbatical?)

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 online 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 site
(Materials taken from Univ of Mich Labade Collection)

www.whitmanarchive.org

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

Rights Clearance for historic photos is incredibly burdensome

- Technically, you should:
  - Identify photographer
  - Find out whether it was ever later published
  - Find out whether they 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)

Orphan Works problem (1/2)

- For vast amounts of content, the © holder is difficult (or impossible) to identify
  - Historic photographs in archival collections
- Even when the original creator is identified, who holds © now may be impossible to find
  - Which descendents got the rights to which works?
  - When corporate entity (publisher, photo studio) dissolved, who obtained which assets?
- Granting agencies won’t fund unless you make works publicly (usually Web) available, but you can’t afford to do the search before submitting the grant
Orphan Works problem (2/2)

- Changes in © law that have made it easier for the rightsholders to hold on to rights have also made it more difficult for users to find out who owns the rights
  - 1989-removal of requirement for "©" label and date
  - 1992-removal of renewal registration requirement
  - 1994-foreign © moved from public domain back into © coverage
- With no required record of © ownership, much more difficult to find current owner

Difficulties in using Recorded Sound

http://www.arscaudio.org/copyright-recommendations.html

ARSC Copyright and Fair Use Committee Recommendations (endorsed by Music Library Assn)

- Place pre-1972 U.S. recordings under a single, understandable national law by repealing section 301(c) of Title 17, U.S. Code, the provision that currently keeps pre-1972 recordings under state law until 2067.
- Harmonize the term of coverage for U.S. recordings with that of most foreign countries, i.e. a term of between 50 and 75 years.
- Legalize the use of orphan recordings, those for which no owner can be located.
- Permit and encourage the resale by third parties of "abandoned" recordings, those that remain out of print for extended periods, with appropriate compensation to the copyright owners.
- Change U.S. copyright laws to allow the use of current technology and best practices in the preservation of sound recordings by non-profit institutions.

Copyright Office studies and proposed legislation-

- Section 108 Study Committee
- Orphan Works legislation

Section 108 Study Committee

- Library & Archive exemptions need to be updated for the digital world
- 19 members
- Met for 3 years
- Final report March 2008

Section 108 Recommendations

- Museums should have Section 108 eligibility, as they perform many of the same functions as libraries and archives
- A new exception should be added to section 108 to permit certain qualified libraries and archives to make preservation copies of at-risk published works prior to any damage or loss. Access to these "preservation-only" copies will be limited to the library premises
- A new exception should be added to section 108 to permit libraries and archives to capture and reproduce publicly available web sites and other online content for preservation purposes and to make those copies accessible to users for private study, research or scholarship. Rights holders would be able to opt out of this provision
- Libraries and archives should be permitted to make a limited number of copies, as reasonably necessary, to create and maintain a single replacement or preservation copy. This alteration to the current three-copy limit would, among other things, enable libraries to more securely preserve digital materials, which often involves making copies.
More Section 108 Recommendations (do something, but can’t agree what)

- Issues of digital technologies in relation to Interlibrary Loan need action
- Current exclusion of non-text based works from Section 108 needs legislative attention.

Section 108 Study Group report-media
March 28, 2008
http://www.sammn08.gov/

Section 108-Copying Exception 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(c) 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(c) 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. Include the categories of "adjunct" works that may be eligible for subsection 108(d) and (e) treatment, such as a translation other than "adjunct" that captures the concepts of "similar" or "subsequent.

3. If subsection 108(c) is amended so that subsections 108(d) and (e) apply to additional categories of works, then additional conditions should be included in subsections 108(d) and (e) to address the risks particular to those types of works.

Orphan Works Legislation-Issues

- Bill introduced April 2008 and died
- Directs Copyright Office to establish a system to facilitate copyright searches for non text works (but how?)
- Requires a "reasonable diligent search" but doesn’t define it; will probably include both guidelines and a record-keeping requirement for conducting a search, which still places a heavy burden on library/archive
  - (pretty hard to do for every single photo, especially if you have no idea who the photographer was and can only guess the time-period)

Section 108 Study Group report-unpublished
March 28, 2008
http://www.sammn08.gov/

- Subsection 108(b) should be limited to unpublished works that have not been publicly disseminated.
- Number of Copies
  - Subsection 108(b)‘s three-copy limit should be amended to permit libraries and archives to make a limited number of copies of unpublished works as reasonably necessary to create and maintain a copy for preservation or security purposes. This amendment should include a provision for the number of copies, which would be no more than the number of institutions to which libraries and archives can deposit a copy of an unpublished work.
  - Subsection 108(b)‘s three-copy limit on the number of deposit copies of unpublished works that can be made should be amended to a reasonable limit on the number of institutions to which libraries and archives can deposit a copy of an unpublished work.
  - Subsection 108(b) for legislative history should clarify that a library or archives that receives a deposit copy of an unpublished work from another library or archives is not permitted to make further copies for preservation purposes or deposit in other libraries or archives.

New Orphan Works recommendations and legislation

- 2006 Copyright Office report
  - Users must take reasonable steps to determine that the work isn’t still under ©
  - Limit liability for good-faith users (non-profits just have to take it down)
- 2008 Shawn Bentley legislation
  - (514.b.1.) “performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright; and was unable to locate and identify an owner of the infringed copyright;
  - (514.b.1.b) attribution to original © owner
  - (514.b.2.a) "A qualifying search under this subsection shall ordinarily be based on the applicable statement of Recommended Practices made available by the Copyright Office and additional appropriate best practices of authors, copyright owners, and users to the extent such best practices incorporate the expertise of persons with specialized knowledge with respect to the type of work for which the search is being conducted.”

Recombine material for teaching, commentary, research-

- Show excerpts in classroom
- Create new works (compilations, commentary, …)
- Underlying Rights issues
Show DVD Excerpts in Classroom (1/2)

- **Arms of Strangers—Kindertransport** 2000 (DVD)
  - Play Movie, play first 10 minutes (conventional documentary format, using archival footage mixed with home movies)
- **Seabiscuit** trailer (http://www.apple.com/trailers/universal/seabiscuit/)
- **JFK** 1991 (DVD)
  - Play movie, skip to 1 minute mark, play for 1.5 additional minutes (historical footage used to set stage for fictional film)
- **Zelig** 1983 (DVD)
  - Play movie, play for 2 minutes (historical footage incorporated into fictional film in creative way)
  - Then skip to next scene (Greenwich Village)
- **Capturing the Friedmans** 2003 (DVD)
  - Play movie, play for 4.5 minutes (until mother’s interview appears on screen)
- **Lost Horizon** 1937 (DVD)
  - Special Features, Restoration Audio Commentary, On, Play Movie—play several minutes until see the name “Robert Riskin” (film cut many times, footage lost, long process)
  - Special Features, Restoration: Before & After—play first 5 minutes (propaganda, film, interviews)
  - Special Features, Photo Documentary—play first 5 minutes until book (new beginning, production stills)
- **Metropolis** 1927 (DVD)
  - Special Features, The Restoration, English, Start, fast-forward 2 minutes to split screen, and play for about 2 more minutes (treatments, corrosion)
- **Captain Celluloid vs. the Film Pirates** 1969 (DVD)
  - Play chapter 1, first 7 minutes (approximate), after completion of duping of *Greed* and until end of intertitle: “Now that I am a member of the Film Distributor’s Association, I can suggest...”

New Works, Compilations, Social Commentary

- **So You Think You Can Be President? - Debate Remix (Jonathan McIntosh)**
  - APPROPRIATE SOURCE MATERIAL under section 107 of the US Copyright Law:
  - So You Think You Can Dance Season 3 & 4
  - 2008 US Presidential Debates 1, 2 & 3 PBS, BBC, PBS
  - Road to the White House MSNBC
  - “The Politics of Dancing” sung by Re-Flex
- **The Dark Bailout**
- **This Land is Your Land (JibJab)**

Show DVD Excerpts in Classroom (2/2)

- **Lost Horizon** 1937 (DVD)
  - Play Movie, play several minutes until see the name “Robert Riskin” (film cut many times, footage lost, long process)
  - Special Features, Restoration Audio Commentary, On, Play Movie—play several minutes until see the name “Robert Riskin” (film cut many times, footage lost, long process)
  - Special Features, Restoration: Before & After—play first 5 minutes (propaganda, film, interviews)
  - Special Features, Photo Documentary—play first 5 minutes until book (new beginning, production stills)
- **Metropolis** 1927 (DVD)
  - Special Features, The Restoration, English, Start, fast-forward 2 minutes to split screen, and play for about 2 more minutes (treatments, corrosion)
- **Big Sleep** 1946 (DVD)
  - Special Features, 1945/46 Comparisons, play 16 minutes (delayed release, Bacall’s career, war, reshooting, use of correspondence, scripts, and newspaper articles actors left on cutting-room flr, new actress)
- **Captain Celluloid vs. the Film Pirates** 1969 (DVD)
  - Play chapter 1, first 7 minutes (approximate), after completion of duping of *Greed* and until end of intertitle: “Now that I am a member of the Film Distributor’s Association, I can suggest...”

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Re-Mix

http://www.djspooky.com/art/birth.html

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**, early 1987; II 1990
  - became unavailable due to lapse of underlying rights by mid 90s
  - Jan-Feb 2005: Eyes on the Screen civil disobedience
  - Aug 2005: Grants for clearing rights ($800K Ford, $250K anonymous) announced
  - Needed to clear videos from 82 archives, 273 stills from 93 archives, 120 song titles, many of which weren’t able to be cleared (so were either silent, or had substitutions)
  - $800K was just for fees for content-holders, and didn’t cover all the research, writing, begging, legal wrangling...
underlying image from Thomas Hoepker’s “Charlotte as seen by Thomas,” Originally published in German photography magazine Foto Prisma in 1960

photos in Barbara Kruger works-

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

It’s a Wonderful Life

Re-showing 1970 Earth Day documentary

Underlying Rights are everywhere

- The copyrighted music playing in the background of an audiorecorded 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 3-year cable TV rights, ...
- The web page that displays a copyrighted photo by linking to it (not actually copying it)

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”

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

AMIA Conf Recording Contract

1. You hereby grant AMIA permission to record, edit, transcribe, duplicate, distribute, and publicly perform your presentation as delivered at this program, in any and all media now existing or hereafter developed, throughout the world.

4. You warrant that your presentation and any other material you submit are original with you, and/or licensed for this purpose, and that their publication will not infringe on the rights of others, and that you have full power to grant this license. Should your presentation or other materials require permission from another for use by AMIA, you agree to obtain that permission from the copyright proprietor consistent with this Agreement and, on request, to provide a copy of it to AMIA.
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”

AU/Rockefeller Study

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

- 2004 American University/Rockefeller 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.

Strong Content Control Threatens Creativity

imagine:

- Having no public domain to draw upon
- Having to negotiate rights for every clip, every drawing, every still image, every sound sample
- Having to renegotiate all these rights every time you redistribute it in a different form or in a different media

American U (Social Media Cntr & Wash College of Law) have been bringing stakeholders together to come up with © decisions they can all live with

- Documentary filmmakers and public media repositories and insurers
- Dance librarians, Dance Companies, Scholars (release next week)
Strong © protection/DRM can inhibit Teaching

- Sound or film clips
- dist learn violating ©-
- Teach Act-
- My stories-
- Threats for posting readings
- Curricular Materials-

Distance Learning: Violating ©

TEACH Act (2003)
Technology, Education, And Copyright Harmonization

- Fixes © exemptions dissolved by 1998 DMCA
- Allows classroom/distance use of © material provided certain conditions are met:
  - Under actual supervision of instructor as part of an accredited nonprofit educational institution
  - As an integral part of a class session
  - Access controls protect against non-student viewers
- Only certain types of Works
  - Exemption doesn’t cover works marketed for mediated classroom
  - Can convert analog to digital only if no digital is available (no digital version is protected)
  - More open about using nondramatic works than using dramatic works

DMCA Take-Down Provisions
DMCA protects OSPs (universities) from damages if a student or faculty posts something in violation of copyright only if the OSP:

- Notifies the Copyright Office of a designated agent to receive complaints about copyright violations from rightsholders
- Accommodates industry-standard technical measures used by owners to protect their works from unlawful access and copyright infringement
- Develops and posts a policy for termination of repeat offenders
- Takes down works immediately after being warned (no chance for faculty or student to challenge)

http://youtomb.mit.edu/
Licensing-Curricular Materials

- In designing courseware, faculty often rely upon licensed works (photographic images for Art Hist class)
- After major investment in courseware, what happens when:
  - University decides not to renew the photographic image use-license
  - Vendor chooses to withdraw works from the licensed set
  - Faculty member takes sabbatical and cannot access the licensed material
  - Faculty member moves to another institution that has not licensed this material

Licensing schemes and other prior permission-seeking inhibit teaching flexibility.

- Much needed material won’t be part of any blanket licensing agreement
- The vast amount of time required to negotiate permission with a rightsholder is prohibitive
- Licensing schemes are negotiated for general use; the model seldom fits innovative uses of new technologies. In addition, licensing arrangements are unequal partnerships, with the content-holder dictating the terms and the school having to either take it or leave it.

Licensing-Libraries

- Publishers reluctant to sell material in digital form; instead they license
- Library licenses contain clauses controlling use, and publishers claim that these trump legal traditions like “fair use”
- If library doesn’t continue to pay license fee, the works disappear (including backfiles)
- Publishers can choose to withdraw works from digital license for censorship or economic reasons (Tasini case; changing historical record)
- Most licensing agreements prohibit ILL
- What about library services for faculty on Sabbatical or Leave? For Distance students?

Licensing--Privacy

- Increasingly, library licenses access material housed at publisher’s website (vendors likely to attempt to track who is reading what “so that we can help suggest other things you might like to read”)
- Patriot Act--libraries must divulge circ records and even websites visited, and cannot inform anyone that this info was requested/divulged

Pragmatic Considerations: Acquiring Digital Materials

- With licenses, try to get rights to:
  - Make preservation/back-up copies
  - Transfer to different formats/media
  - Perpetual access
  - Cap on annual license fee raises
  - Set your own standards for “authorized” university community (walk-in use, etc.)
  - Do your own user authentication (privacy)
  - Use the work in course readers
  - ILL

Anti-Circumvention & Rule-Making (1/2)

- DMCA compromise required Rulemaking by LoF as to which circumvention measures should be allowed
- Concern from library and other communities that circumventing protection mechanisms to engage in perfectly legal acts (like fair use and preservation) would make them subject to criminal penalties
- House Bill Section 1201(a):
  - No person shall circumvent a technological protection measure that effectively controls access to a work protected under this title.
  - “While sounding innocuous, what the provision does is create a brand new and unlimited right to control access to copyrighted works. If enacted into law, this new right could bypass the carefully crafted balance between exclusive rights of ownership and public access to works for educational, scholarly, and scientific purposes, which has been part of copyright law for the entire 20th Century. In short, it could eliminate fair use from copyright law.” (John Flannery, National Humanities Alliance, 6/5/98)
Anti-Circumvention & Rule-Making (2/2)

• On 10/28/00, Lof C ruled that the following should be exempted until 10/28/03:
  – Compilations consisting of lists of websites blocked by filtering software applications; and
  – Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.
• Immediate responses of outrage from librarians, consumer protection groups, digital divide groups, etc.

Outrage at Anti-Circumvention Rulemaking Decision
Digital Future Coalition 10/26/00 press release

• "Unfortunately, today's decision took 70 pages to essentially say that few persons may ever circumvent a technological protection measure — even to gain access to a work solely for legitimate noncommercial purposes."
• "Once again, content owners have successfully promoted their own narrow financial interests over the broader public interest in preserving consumer access to literary, scientific, and other works."
• "Deep disappointment that content owners effectively had been given a green light to use technological protection measures to lock up access to copyrighted works."

Outrage at Anti-Circumvention Rulemaking Decision
American Library Assn ALAWON 9:85, October 26, 2000

• "The Librarian of Congress James Billington has ruled against the American public and library users by negating fair use in the digital arena."
• "Because of this decision users of digital information will have fewer rights and opportunities than users of print information. In fact, the pay-for-use scenario that librarians have feared appears to have now become a reality with this rule."
• "The Copyright Office has issued a misguided ruling taking away from students, researchers, teachers and librarians the long standing basic right of 'fair use' to our Nation's digital resources," said Nancy Kranich, ALA president. "All library users will be impacted."

Concern about Anti-Circumvention Rulemaking Decision
US Dept of Commerce National Telecommunications and Information Administration (NTIA) 9/29/00 letter to Copyright Office from Gregory L. Rohde

• "NTIA believes that implementation of far-reaching access control technologies without carefully drawn exemptions would not only invert 200 years of judicial interpretation regarding the scope of protections given to copyright holders, but also eviscerate individual scholarship and the notion of free inquiry. NTIA’s immediate concern is the very one envisioned by the Commerce Committee when it warned of the development of a legal framework that would incoherently create a pay-per-use society."

Librarian of Congress rulemaking after 2000 became a little more reasonable

• Every 3 years, responding to difficulties from anti-circumvention provision
• 2006—OK to break circumvention locks on DVDs, but only in face-to-face teaching of a valid media class
• This month—re-opening these rule-makings on topics like extending current exemptions and now ones for blind, etc.
20th century creativity built upon prior Works
new works involve repurposing old

- Collage
- Jazz
- Pop
- Postmodern
- Rap/Sampling

Picasso’s Violin (1912)

Duchamp (1919)

21st Century creativity, teaching, and commentary will depend even more on Re-Mix

- George Bush Don’t like black people (Black Lantern)

We can’t do our jobs if we operate within the © law as it currently stands

- Preservation of 21st century types of works (websites, works with underlying rights, …)
- Support for more contemporary teaching methods (distance learning, compilations, re-mixes)
- Provide access to complex material for users who are very mobile

Maybe we have to violate the law?
The Challenge of Copyright & Difficult Materials

- http://www.librarycopyrightalliance.org/
- http://besser.tsoa.nyu.edu/howard/Papers/interpares-copyright.pdf
- http://besser.tsoa.nyu.edu/howard/Copyright/
- http://besser.tsoa.nyu.edu/howard/Copyright/commons.html
- http://www.nyu.edu/tisch/preservation/

Additional Recommendations & Guidelines

- Copyright Navigator Tool http://navigator.carolon.net/
- Howard Section108 Testimony http://www.section108.gov/docs/Besser_NYU.pdf
- CCAA © http://www.ccaaa.org/copyright.shtml
- Stanford Library Copyright and Fair Use http://fairuse.stanford.edu/