BOBCATSSS ACCESS 2000: Intellectual Property vs. The Right to Knowledge. Proceedings of the 8th International BOBCATSSS Symposium, Jagiellonian University, Krakov, Poland, January 24-26, 2000.

Art Online: Access and Copyright Issues for Digitized Museum Information

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1 Museums as Information Providers

Museums are traditionally information providers. They interpret their collections for visitors who come to museums to gather information and learn about the collections. With the advent of the Internet, museums can reach out to the public and provide museum information for a broad audience (Schweibenz 1999). David Bearman (1995b, 15), president of Archives and Museums Informatics, asserts that the "Internet, and the future information highway (I-way), present museums with a unique opportunity to reach broad and narrow, local and international, publics in new ways." Most museums are well aware that the digital environment is different from print: "On-line services, broadcasting, and multimedia CD-ROMs are 'hotter media' (to use Marshall McLuhan's famous distinction) than traditional print publication. As such, they only work when large numbers of images are available" (Bearman/Trant 1997, 270). Rina Pantalony (1999, 227), who is with the Canadian Heritage Information Network, takes the same view when she states: "In a knowledge based society, intellectual property is the 'value added to the knowledge traded' and visual communication has become paramount." Museums try hard to supply images for digital communication. Bearman (1995b, 15-16) estimated that by the end of the last decade over 20 million original museum objects have been digitized. In this way, museums and the digital information they offer will become loadstones of content for the growing multimedia industry and for museum initiatives for outreach to the public (Bearman 1995a, 12).

There are several examples that support the opinions of these experts and show that the computer and multimedia industry is interested in cooperation with libraries, museums and archives, e.g. the Microsoft Art Gallery CD-ROM, made in cooperation with the National Gallery, London; several projects of IBM for digital access to museums, for example the St. Petersburg Hermitage; and Bill Gates' Corbis Corporation (Gerrard 1996). This indicates that museums are important resources for cultural content of the new information society, but they have a lot of concerns about access and copyright issues for digitized museum information in the digital environment because they fear to lose control about their images and information. In this situation it is important for museums to think about access and intellectual property issues.

2 A Survey on Intellectual Property Issues

Museums have been concerned about reproduction of images from their collections for a long time, especially about the quality of reproductions and the ability to alter or exploit images in unauthorized ways (Steiner 1992, 62). These concerns have been increased by the advent of digital technology because digital images can be altered and reproduced in an almost infinite number of ways (Steiner 1992, 62-63; Akiyama 1997, 263; Bearman/Trant 1997, 270). The ease of making copies and distributing them to vast audiences has spawned a debate over multimedia copyrights (Bearman/Trant 1997, 269). In order to understand this debate one has to take a closer look at some of these issues.

2.1 A Survey of Copyright History

According to Pantalony (1999, 225-226) the origins of copyright law were founded in 15th and 16th century Europe, where publishers or printers of books were granted exclusive rights for certain manuscripts. The United Kingdom was the first country to recognize authors' rights with the Act of Anne in 1709. In the aftermath of the French Revolution, exclusive reproduction rights for authors were established in continental Europe. Due to historical development, there are important differences between the legal systems. In civil law countries, such as in continental Europe, authors' rights are recognized as fundamental, whereas in common law countries, such as the United Kingdom and the United States, copyright protects a bundle of economic rights, while other countries like Canada have a hybrid copyright legislation, including both civil law and common law principles. This shows that copyright is a territorial right which needs harmonization if used in an international context (Defries 1998), especially when Internet distribution makes territory in a juridical sense meaningless (Akiyama 1997, 266).

The first international treaty was the Berne Convention of 1887 which provided general guidelines with respect to copyright and moral rights governing literary and artistic works (Pantalony 1998). The treaty was ratified by a majority of European nations and joined later by other states, e.g. Canada in 1928 and the USA in 1989. Currently, 140 states have joined the Convention (Pantalony 1999, 226). A new attempt to standardize copyright is currently under way in the European Union. The fifteen Member States try to harmonize copyright law so that the owner of a work created or held in one country will have the same opportunity of exploiting it economically in the Single Market (Cornish 1999, 217).

2.2 The Impact of Technology and Current Problems

When talking about the impact of technology on copyright, one has to keep in mind that copyright law was developed in the analog age to protect the rights to print works and then adapted to other media, but not always well (Walsh 1997, 364). The development of copyright law has been driven by technology, as Peter Walsh (1997, 363) shows. Each new technology made it possible to reproduce original works more easily and to profit from the distribution of inexpensive copies of the original work which allowed to serve a mass market.

Digital technology and networks have made copyright ownership even more important and more complex. Problem related to the digital form are quality and quantity because with digital technology originals can be reproduced in an almost infinite number of ways without a loss of quality and numerous high quality copies can be easily distributed and multiplied across networks where it is difficult to detect copyright infringement (Defries 1998). Especially the World Wide Web has facilitated the merging of massive data stores with interactive media and networks for distribution. Its effects may rival the adoption of Gutenberg's system of using movable type. In this situation the existing law is always out of step with evolving technology, although the debate on the protection of intellectual property is alive, no matter which legal system is concerned, civil law or common law (Rees 1995, 53).

2.3 The Purpose of Copyright

The purpose of copyright is to protect someone who makes a creative intellectual work and give him or her compensation for it. Without protection and compensation there would be little point in creating something (Defries 1998). To put it into more legal terms, copyright is

> "a property right available to authors, artists, and the creator of literary, dramatic, musical, artistic works. Copyright actually protects their economic rights and prevents people from exploiting the works in an unfair fashion. [...] Copyright law covers works created, or original works. Copyright lasts for a limited period, unlike a right relating to some forms of real property. [...] the other fundamental concept, is that it does confer a number of exclusive rights on the owner." (Defries 1998)

In his definition, Graham Defries, a British copyright attorney, sums up the essential points of copyright. There are many interesting points involved in copyright law but not all of them can be discussed here. So the focus will be on some key rights that are interesting from the museum's perspective.

2.4 Some Key Rights from the Museum's Perspective

2.4.1 The Protection of Exclusive Rights of the Creator

Copyright gives exclusive rights to the creator of a work to encourage the creation of original works by giving him or her monopoly control over copies of the original for a limited time (Walsh 1997, 363). In the USA the period of protection is 50 years, in the European Union 70 years from the end of the year in which the author died (Pantalony 1998). After the protection expires, the work enters the public domain and is available to anybody at no costs.

Apart from the period of protection there are other differences between legal systems. In the U.S., prior to 1976, copyright of works of art automatically transferred with ownership of the work. Since 1976 it stays with the creator if not explicitly transferred to the owner, an assumption that had been long applied in Europe (Walsh 1997, 364). So most works in museum collections are either in the public domain or copyright belongs to someone else and not to the museum because the ownership of the physical work of art means nothing to copyright (Keshet 1997, 283). This is important to keep in mind when dealing with image rights and publication of images of artworks, especially when the works have entered the public domain. Although museums might acknowledge that parts of their collections are in public domain, a lot of them attempt to control reproduction of those works by controlling their photographs of them (Walsh 1997, 366).

2.4.2 Exceptions from the Protection

Copyright laws often contain an escape clause that suspends the exclusive rights of the creator for certain non-commercial and educational purposes. In UK copyright law these exceptions are called fair dealing, in U.S. copyright law fair use. These exceptions allow copies that are of no economic significance, i.e. copies that are meant for private study and research, criticism and review of current events. The European Union copyright law seeks to limit the Anglo-Saxon concepts of fair dealing/fair use and tries to introduce a new right of communication to the public. This right makes exceptions for such copies that have no economic significance, for illustrating teaching and scientific research, and for copies that are necessary to the technical processes required to use a document, e.g. downloading something legitimately is not a copyright infringement because it results in one or more temporary copies for non-economic purposes (Cornish 1999, 221-222). But these exceptions do not apply to any form of electronic copying except for technical purposes. Therefore a museum might take a photograph of a work of art in its collection but might not digitize it and make it generally available unless there are exceptions in the copyright law of the specific Member State. If there are no exceptions in a Member State, it would be illegal to transfer the digitized image to this state. In order to standardize the law the European Commission might introduce something like "fair practice" that is close to fair dealing/fair use (Cornish 1999, 221).

2.4.3 The Concept of Originality

The concept of originality means that a work has to be creative to attract copyright (Cornish 1999, 219). Therefore it is not enough to use existing concepts or ideas to create a work, neither is it sufficient to need judgement, skill, and effort to create a work. The problems is that originality has different meanings in different copyright systems, e.g. in the Anglo-Saxon law the threshold for originality is low while in most European countries the threshold is higher (Defries 1998).

This concept has consequences for museum images. In general photographs are original works of authorship and attract copyright. But substantially exact photographic reproductions of artworks are, as a rule, not copyrightable because they lack sufficient originality. Although the photographer may need judgement, skill, and effort to take the photograph, this is not sufficient for originality (Pantalony 1999, 229; Walsh 1997, 367). According to Walsh (1997, 369), it is the dilemma of museums that museum photographers try to make photographs with

absolute verisimilitude and at the same time diminish the copyright of their photographs since they are only factual and not creative. This makes most American museums rely on contract law to maintain control over the use of photographs in the public domain. Access by contract only might restrict on-line access to intellectual property as will be shown later.

A similar problem might exist for museum databases. As collections of digitized information and images, museum databases contain a lot of factual information and often include digitized images whose sole purposes are to record facts or to add information for analysis (Pantalony 1998). Therefore the originality of museum databases is in question at a moment when museums are increasingly participate in the compilation of digital collections and make them available through the Internet (Pantalony 1999, 227). The crucial point is whether the information laid out in a museum database is just descriptive and therefore most likely factual or if it is interpretative and copyrightable.

U.S. and Canadian courts have denied copyright protection to compilations of factual information, particularly in the form of databases (Walsh 1997, 367). The reason is that they lack sufficient originality in content to be copyrightable (Pantalony 1999, 227-228). Only if the information is interpretative, e.g. curatorial notes, it is copyrightable. Currently the U.S. copyright law is in a state of flux as far as the protection of databases and their content are concerned, new laws might disallow to extract or distribute essential parts (Pantalony 1999, 228).

There were international efforts to protect databases by the Berne Convention. Initially, databases were categorized as compilations of literary works and therefore protected by the Convention (Pantalony 1998). Later it was recognized that databases might be entirely new creations that might require special protection by an entirely new sort of intellectual property protection referred to as sui generis protection. The efforts to establish sui generis protection, however, were not fruitful (Pantalony 1998).

The European Union passed a directive that follows the ideas of the Berne Convention. Databases attract copyright protection if they have a certain degree of originality and creativity. Additionally, a new type of intellectual property protection for factual databases was created, a sui generis protection that covers databases that do not meet the standards of originality and creativity (Pantalony 1998). This sui generis protection runs for 15 years from the year of compilation and grants an exclusive right that disallows re-utilization and extraction of data from the database (Pantalony 1999, 228). Only European Union members can take advantage of sui generis protection.

2.4.4 Moral Problems and Intellectual Property Rights

Apart from legal problems, there are also moral problems involved: quality control, integrity, and paternity (Rees 1995, 54). Quality control means that a museum has to guarantee high quality reproductions of artworks, e.g. image resolution and color authenticity, topics that are highly debatable. The problem of integrity means, for example, that the museum has to prevent users from messing around with images. This is a concern that has to be taken seriously, especially if one considers the ease of digital manipulation that can easily

undermined the integrity of the original work of art, a nightmare to artists, museums, and photographers (Akiyama 1997, 261, 264). Another interesting point is that at some stage, a digital image, when manipulated, might lose its identity as such and dissolve into a generic artistic work (Pantalony 1998). Paternity means that images are identified properly and that credit is given to the artist and the museum, a subject that is very touchy for museums and artists.

2.4.5 Special Copyright Problems on the World Wide Web

There are special copyright problems that refer specifically to the World Wide Web. First of all, it is a myth that everything on the Web is not protected by copyright (Cornish 1999, 217). Nevertheless museums are concerned because the concept of "fair use" and "educational use" are increasingly abused in Web publishing (Keshet 1997, 286). So museums worry especially about content they make available on the Web.

According to the legislation of the European Union, Web sites are probably equivalent to databases and might attract the same protection (Cornish 1999, 219). In accordance with U.S. copyright the situation is more complicated because museums have to rely on contract law to ensure control on how their data is used (Pantalony 1998). This is a crucial point because in contract law for the Web it is difficult to establish a "special relationship" that is needed in contract law as a proof of the existence of a bona fide contract (Pantalony 1999, 228). Case law has still not clarified if click-on agreements are enforceable and what the minimum requirements for an on-line "special relationship" are.

Other crucial points are that a Web site may be owned by the company or organization that sets it up while the content may be owned by the content provider (Cornish 1999, 219) or that a Web site links to content owned by another person or organization. Links are not always built with knowledge and permission of the owner of a Web site to which they are connected and might not even give credit to the creator but make the visitor believe that it is content set up by the link provider. Such a case of passing off has recently happened in the British newspaper business (Cornish 1999, 220).

Another interesting point is the state of temporary changes and interactivity of Web sites (Cornish 1999, 219). Once a work is fixed, it can attract copyright. But what is the case with interactive Web sites that change permanently so that they are never fixed? This question is important for interactive Web art where the artist allows the virtual visitor to interact with the work.

2.5 The Growing Importance of Intellectual Property Issues

The topics discussed above were only a limited selection of issues dealing with museum intellectual property. However, they show that it is important for museums to give some serious thoughts to copyright issues in order to protect their rights and safeguard the interests of their visitors and the public. This includes the question what kind of access museums do want to provide to the public (Rees 1995, 54).

3 New Forms of Access to Museum Intellectual Property

3.1 The Necessity for new Forms of Access

There is an increasing demand, especially for images of artworks, by commercial users who want to use museum intellectual property in advertisements, Web pages, multimedia presentations and in other promotional material (Pantalony 1998; Sorkow 1997, 169). But increasing demand for images means that more rights have to be traded on a market for digital publications that has only started to develop (Bearman/Trant 1997, 270). At the same time there are severe obstacles for marketing museum intellectual property successfully. One problem is to find museum information because there are only a few databases and even fewer imagebases that describe museum collections. Therefore, sophisticated expertise is necessary to locate appropriate content. Once located, copyright for information and images is the next problem. Often various layers of intellectual property rights are involved, e.g. rights to reproduction, distribution, and creation of derivative works, and these rights are often disassociated from one another (Bearman/Trant 1997, 272). Therefore the process of managing individual intellectual property is time-consuming and cost-intensive for museums because it might include dealing with requests, costs of researching images and rights, negotiating rights and image quality, collecting license fees, and monitoring use (Bearman/Trant 1997, 272; Sorkow 1997, 168). This process is too expensive for customers from the multimedia industry for two reasons. Firstly, in the market for digital publications and Web publishing, despite tremendous hype, little money is made. Therefore multimedia companies cannot afford to pay the standard book-use rate and museums have to give away images at a lower price (Bearman/Trant 1997, 370; Keshet 1997, 288). Secondly, multimedia companies require large volumes of images and information and a single image has relative little significance. Therefore current management models are inefficient because they focus on individual images (Sorkow 1997). That means that museums have to look for new forms of access to and protection of intellectual property.

3.2 New Models for Managing Access and Intellectual Property Issues

There are several new approaches for efficient management of museum intellectual property (Bearman/Trant 1997, 275):

- Companies who serve as information brokers provide information about museum intellectual property and give customers easy access while museums still do the licensing.
- Commercial partners offer to re-license museum images for an up-front payment and royalties, in exchange museums assign the rights either exclusively or non-exclusively to their partners.
- Museums form collectives to manage and maintain control over access to intellectual property.

The first model is not very helpful because museums still have to deal with the licensing process. Therefore only the second and the third model make sense for museums.

For the second model museums need a partner who takes over the administration of the licensing process. This could be, for example, the Bill Gates-owned company Corbis, one of the leading suppliers of images on the Internet. Corbis Corporation was founded in 1989 with the mission of becoming the premier provider of high-quality digital content. According to Karen Akiyama (1997, 261), who is with the legal department of Corbis, the company wants "to build a comprehensive digital library of visual materials as a source for consumers and commercial users in their homes, businesses, schools, and libraries." Focusing on creating a comprehensive archive of content, Corbis has bought digital image rights to major museum collections around the world and has also started a collection of works of art to assure long-term access and control to sufficient intellectual content (Gerrard 1996). Corbis uses various models for managing image rights (Akiyama 1997, 262-263):

- non-exclusive license agreements where the image providers can also license their photographs to the public,
- purchase agreements where the owner sells the entire collection, including all copyrights,
- the Commissioned Photography Program where photographers take pictures for Corbis who owns the copyright to all images,
- public domain images where Corbis sends researchers to archives looking for images in public domain.

The images collected in one of these ways are licensed to customers. The fee is based on a number of factors, including the type of image and the use for which it is intended, because Corbis never licenses images for unlimited use. This allows Corbis to keep control over the images and give a compensation of the image providers (Akiyama 1997, 265).

The third model for museums is to join up and form consortia for the management of their intellectual properties. Examples for such initiatives are the Museum Educational Site License (MESL) and the Art Museum Image Consortium (AMICO) (Schweibenz 1999). MESL was a pilot project for educational site licensing for museum images and information that run from January 1995 through June 1996. Many museum professionals regarded the project as a first step towards a solution of intellectual property management (Keshet 1997, 289; Sorkow 1997, 166), especially because it offered museums an alternative to cooperating with private companies like Corbis (Bearman/Trant 1999). MESL was followed by AMICO, a consortium of 23 North American art museums that was founded in 1997, today it has 28 members. The basic framework for the AMICO model includes the creation and collecting of content, the clearance of rights, the distribution of content to subscribers and the access of end users through tools provided by subscribers (Bearman/Trant 1999). The member institutions contribute images and accompanying text. The consortium collects and edits the data, produces a digital library containing catalog records, image files and image metadata records, gives technical support to both members and users, and collects the license fees. The fees pay the costs of collating, validating, editing, indexing, and authoring the content. Based on a calculation of an annual fee of 25 cents per student of each participating university, 10 cents

per student of each participating school and 1 cent per card holder of each participating library, AMICO is supposed to become self-sufficient within five years if 10% of the educational target market subscribe. The AMICO model is attractive to both museums and subscribers because the museums provide content as a part of their ongoing educational efforts, the subscribers bear the moderate cost of access and the consortium takes over the responsibility for handling content and access.

4 Conclusion

Considering the increasing interest in museum intellectual property, museums have to look for new ways to deal with access and intellectual property issues. The two models presented above give museums the possibility to protect their own rights and at the same time make their intellectual property accessible. If managed effectively, especially site licensing models like AMICO can help to enhance public access to museum information on the Internet.

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