Copyright
and
Fair Use

Town
Meetings
2000

The NINCH Copyright & Fair Use Town Meetings 2000 Report

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INTRODUCTION & OVERVIEW

The NINCH Copyright & Fair Use Town Meetings have been held across the country since 1997, bringing the basic facts about copyright law and recent copyright issues to wide and mixed audiences from across the educational and cultural communities. Audiences range in size from around 60 to over 250 at conferences, universities and cultural institutions. The meetings have proved important not only in educating the community, but also in providing a forum for sharing intellectual property concerns and problems with assembled experts. They also provide a platform for the expression of opinion and for the iterative creation of an agenda of issues for the community to pursue.

ORIGINS AND THE FIRST SERIES

The Town Meetings started in 1997 as a result of the engagement by many NINCH member organizations in the Conference on Fair Use (CONFU).

CONFU was a series of meetings convened by the Clinton administration's Information Infrastructure Task Force between September 1994 and May 1998. It brought together "copyright owner and user interests to develop guidelines for fair uses of copyrighted works by and in public libraries and schools."[1]

The CONFU process was not an easy one. In the words of the Final Report, it was "instructive, if

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not productive," as none of the guidelines drafted by the participants were finally approved.[2] However, in the process of consulting constituents for their opinions on the evolving guidelines, representatives at the CONFU meetings discovered, in the words of one executive, a "woeful, even willful ignorance" about the very basics of copyright and fair use and of how the Internet was likely to change and complicate them.

In response, NINCH assisted the College Art

Association and the American Council of Learned Societies in organizing a set of educational town meetings around the country on the issues of copyright and fair use in the digital age. This initiative was supported by a generous grant from the Samuel H. Kress Foundation.

The first series of meetings (February 1997-February 1998) opened at the College Art Association (CAA) conference in New York and was organized around the proposed CONFU Guidelines on Digital Images.[3] However, by the last meeting, at the CAA conference in Toronto, CONFU had become irrelevant. In Toronto, scholars, educators and artists focused instead on new legislative developments and new strategies for securing continued delivery of copyrighted images and other material, affordably and efficiently.

Notable themes of the first series included:

- an explanation of the basics of fair use;
- a delineation of what the application of fair use means in the daily life of those preparing educational material;
- a discussion of whether to accept or reject the CONFU Guidelines;
- consideration of the role of licensing copyrighted materials and how that intersects with fair use; and
- discussion of how the nonprofit educational world should engage with the commercial world.

A full report and a discussion of the themes of this series are available online.[4]

Participants in the town meetings include varied combinations of artists, faculty, administrators, librarians, publishers and curators from universities, museums, archives and contemporary arts groups. Overall, these participants are building scenarios for the future: scenarios that call for a greater working knowledge among all of those involved in the cultural community of the basics of

copyright law and of the fair use exemption. The scenarios also call for greater clarity about what constituents need in order to do their work and for consultation with legal counsel, who may themselves require some education on fair use.

In this initial period of intense debate about the CONFU guidelines and legislative proposals for

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revising copyright law, NINCH defined its own role in this arena. Our early hard-edged advocacy for fair use and for specific legislative solutions became problematic given NINCH's own membership. Some members are primarily users and some are primarily producers and owners of copyrighted material. In response, NINCH redefined advocacy as "education." The copyright town meetings, with their emphasis on basic information and the sharing of opinion, proved to be perfect vehicles for the framework that NINCH was building for this issue (as well as for others).

SECOND SERIES: BACKGROUND DEVELOPMENTS

The second series (January-May 2000) was more tightly organized than the first. A NINCH Working Group defined the issues and drew up overall guidelines for meetings that were coordinated on the ground by local committees.[5]

Since the first series, there were a remarkable number of external developments. Several proposed revisions to the copyright law had culminated in the Digital Millennium Copyright Act (DMCA, October 1998), described by many as "Talmudic" in its complexity.[6] Though, in principle, it endorsed the fair use exemption and its continuation in the digital age, it complicated the issue through one of its most contentious sections (section 1201), which prohibited the circumvention of copyright management software for even legal fair use of copyrighted material online. The only exceptions allowed libraries to preserve digital material.

Another problematic piece of legislation was the Sonny Bono Copyright Term Extension Act (October 1998), which severely limited the public domain by extending the term of copyright protection (in most cases to life plus 70 years). Other legislative issues still current include attempts to give close-to-copyright protection to databases and the effective replacement of copyright law by state contract law in the Uniform Computer Information Transaction Act (UCITA).[7]

Coinciding with NINCH's informal, extended series of educational meetings, in which new strategies were considered as well as basic facts, was the publication of *The Digital Dilemma: Intellectual Property in the Information Age* by the National Academy Press. This seminal report by the Computer Science and Telecommunications Board's Committee on Intellectual Property Rights and the Emerging Information Infrastructure is an interesting counterpoint to the 1995 Information Infrastructure Task Force (IITF) White Paper, *Intellectual Property And The National Information Infrastructure*.[8] While the IITF report focused on legislative solutions, *The Digital Dilemma* takes a longer-term look at the current issues, recommending a variety of approaches, including more research and the encouragement of a wide range of new business models, rather than quickly moving ahead with legislation about a

technology that is changing so rapidly. Believing that fundamental change is afoot, the report argues:

> Society needs to ask whether the existing mechanisms still work, and if not, what should be done. Test cases are now the stuff of daily news. . . However, this committee believes that society needs to look further out than today's crisis, try to understand the nature of the changes taking place, and determine as best it can what their consequences might be, what it would wish them to be, and how it might steer toward fulfilling the promise and avoiding the perils. Stimulating that long-range exploration has been the purpose of its report.[9]

Given the trajectory of developments within the intellectual property arena, the NINCH town meetings have added to their original agenda of relaying information and sharing solutions, a real interest in contributing to that "long-range exploration."

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SECOND SERIES: THEMES & PATTERNS

INTRODUCTION & OVERVIEW

The second series opened at the Chicago Historical Society (January 11, 2000) with a full-day session on the public domain. It continued with a full-day session at Syracuse University (February 4) on copyright and access, followed by a double conference session at the College Art Association's annual meeting in New York (February 26) on ownership and access issues, especially in light of distance education developments. That theme was taken up in an original and stimulating format, including a role-playing panel, presented in Chapel Hill by the Triangle Research Library Network (March 7). In San Francisco (April 5), the public domain was again the central focus at a double session of the annual conference of the Visual Resources Association. The series ended at the annual conference of the American Association of Museums with a meeting on new resources and guidelines being developed for different subsets of our community.

Chief themes of this second series included:

- The Digital Millennium Copyright Act and how it affects this community
- The Public Domain, its diminution and what, if anything, can be done about it
- Access to and Ownership of Copyrighted Material Online
- Distance Education
- Practical Resources and the Creation of Institutional Policies and Principles.

In **New York**, Christine Sundt (University of Oregon) gave a telling overview of the communi-ty's history and progress in intellectual property affairs since CONFU, and how the town meetings had mapped that progress.

Most important for Sundt was our increasing awareness of the complex bundle of intellectual property issues and our ability to affect their outcome. CONFU, for example, failed in not producing consensus guidelines, but taught the nonprofit participants that fair use was still a robust set of exemptions, though "exercising fair use requires knowledge and work." In reaching for something in between the "Four Factors" given in

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the 1976 law and the CONFU Guidelines, she said, many were seeing the practical value of developing institutional principles and policies, such as the National Humanities Alliance's "Basic Principles for Managing Intellectual Property in the Digital Environment"[10] against which to measure new legislation or other intellectual property developments.

Throughout these meetings, Sundt was also a clear advocate for the need for more case law and for working closely with institutional legal counsels. In **San Francisco**, she commented that as a community we have little (or no) case law; and that, especially in a field such as education that changes quickly, it is important to find a way to protect academic rights and practice and to make case law that will insure the ground. The issue is how we can orchestrate case law or

develop test cases that we can call our own.

Howard Besser (University of California, Los Angeles) agreed. From his perspective, lobbyists and the content industry make the laws, and case law might prove to be a better ground on which to hold the public good.

In **New York**, Sundt advised the community not only to consult with legal counsel on these issues, but also to take the time to do some advance homework. Very often, in her experience, this community knows as much as the legal counsels, very few of whom have expertise in the rapidly shifting ground of copyright. Our mission, she said, is to know what we want and then to move ahead to

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find ways of getting it. Kenneth Crews (Indiana University), who in **Syracuse** encouraged the entire community to become engaged with copyright issues, reiterated this message, saying "the law invites us to be creative in our efforts to advance research and knowledge."

THE DMCA & COPYRIGHT LAW

Each meeting presented the law and recent legal developments differently. In **Syracuse**, Kenneth Crews conducted a three-hour workshop on copyright basics for university faculty and staff, stressing the many ways faculty and students could

be good stewards of their own work as well as respectful and legal users of the works of others.

In **Chicago**, law professor Tyler Ochoa (Whittier Law School) presented his view of recent legislation as the result of a "concerted three-pronged

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attack" on the balance of copyright law by large copyright owners through: 1) term extension, 2) restriction of access through technical means, and 3) changing the "copyright bargain" by trying to replace copyright law with contract law. Ochoa focused on the Digital Millennium Copyright Act and section 1201, which he called the "thou shalt not hack" anticircumvention provision. Also in Chicago, Richard Weisgrau (American Society Of Media Photographers) agreed with Ochoa, especially in his concern over the impact of the DMCA on individuals. In a popular analogy he figured individuals as plankton attempting to survive in

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Weisgrau believes strongly that the DMCA is bad legislation that soon will be replaced by new law.

He argues that the whales went for quick protection in their fear of piracy, rather than re-thinking their business models, which a new environment requires.

In **Chapel Hill**, Peggy Hoon (North Carolina State University) presented the basics of copyright law before moving quickly into the provisions for distance education (section 110), the subject of that meeting. She reviewed the provisions of the

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DMCA and the highlights of the *Copyright Office Report on Distance Education*[11] mandated by section 403.

In **New York**, the meeting quickly got to its core topic of faculty ownership of online material, with Columbia Law School professor Jane Ginsburg focusing on the case law developing on this issue. Similarly, in **San Francisco**, law professor Kathleen Butler (Thomas Cooley School of Law, Lansing) focused on the case law around owners' attempts to control the use of reproductions of public domain works.

In the final meeting, in **Baltimore**, Barry Szczesny (Government Affairs Counsel, American Association of Museums) reviewed legal developments in each of the broad issues announced by the poster for this series. On Fair Use, he emphasized museums' strong continued interest, focusing (as many in this series did) on the DMCA's anticircumvention provision and referencing AAM's concise comment lodged with the Copyright Office. On the Public Domain, he said we should all be doing a better job of making the case for a more robust "intellectual commons." On Distance Education, he commended the *Copyright*

Office Report on Distance Education. And on Ownership and Access issues Szczesny focused on the *Bridgeman Art Library v. Corel case,*[12] emphasizing AAM's refusal to join the *amicus* brief because it was important for museums to be seen to be serving the public good. Szczesny said that *Bridgeman* was a good illustration of the value for institutions and associations such as AAM of developing Intellectual Property Policies and Principles that could guide their practice in such cases.

PUBLIC DOMAIN

The **Chicago** meeting opened with a sharp, practical explanation by Diane Zorich (information management consultant) of what the public domain is, what it currently contains and what its

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enduring value is. She described its relationship to the domain of copyrighted material as that of a feedback loop, incorporating creators' needs for economic return and society's need for free exchange of information. In an environment in which economic factors are receiving increased emphasis at the expense of the public good, that feedback system is now threatened and the public domain is eroding. As she put it, "works are not going in as fast nor as often, and more frighteningly, some public domain works are actually falling back into copyright." Zorich concluded by

enumerating six ways in which the public domain has been and is continuing to be diminished:

- term extensions in general;

- the latest term extension, effectively placing a 20-year moratorium on works entering the public domain;

- unpublished historical documents;

- the Uruguay Round Agreements Act (URAA) restoring copyright protection to foreign works that had fallen out of copyright;

- the increasing commodification of culture with wide economic ramifications; and

- the increasing use of trademark and patent to protect phrases, processes, and even ideas assumed to be in the public domain.

This portrait was dramatically amplified in **San Francisco** by Howard Besser, who saw the "disappearing public domain" as further evidence, and another component, of the demise of public space in public life. Besser, reviewing an interesting range of recent legal definitions of the public domain (including, for example, "the ultimate source of all new works," and "the converse of property rights"), emphasized why it is important and itemized how it is being threatened. To Zorich's list of threats he added licensing and the extension of contract law (UCITA, for example) and other protections of unoriginal, compiled databases (as in the proposed H.R. 354—the Collections of Information Antipiracy Act). Like Zorich, he saw the overriding reason for the disappearing public domain as the growing emphasis on the economic valuation of knowledge and contract law replacing longstanding common-law or constitutional rights.

For Besser, the implications include a chilling effect on the production of derivative works, the diminishment of exploration and experimentation and the dampening of public discourse, satire and critique. He called for broad involvement in halt-

ing other legislation, beyond the Term Extension Act, which would further the diminishment of the public domain.

Eric Eldred is actively opposing the diminution of the public domain through a suit against the government, E*ldred v. Reno,* which claims that the Sonny Bono Copyright Term Extension Act is unconstitutional. Eldred believes that copyright should be truly an incentive to living creators, rather than a reward given retrospectively to current holders of the copyright. He argued for some incentives to bolster the public domain—something like an Intellectual Property Conservancy, along the lines of the Nature Conservancy.

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Richard Weisgrau asked if there were a statutory regulation for copyright holders to give their works to the public domain, what kind of provisions would need to be in it? Zorich replied that there would need to be a provision for how work could formally be donated, with a provision/limit on whether the copyright owner could rescind/remove the work from the public domain after it had been donated. Brad Nugent (Art Institute of Chicago) agreed that we need a public domain distribution system operated with government and foundation funding.[13]

In **San Francisco**, Kathleen Butler spoke about the methods employed by some museums to control the use of reproductions of public domain works in their collections. She argued that visual works are at a decided disadvantage compared to printed works, when it comes to having an active life in the public domain. Museums, as "guardians and

protectors of original visual work," can put constraints on public domain intellectual property. By controlling access to the original artwork so that the public cannot make its own direct copies, and also asserting a copyright in the only usable photographic reproductions of a public domain image, the museum manages to control the public's ability to exercise its rights in a public-domain work. Are museums making an end-run around the public domain? Whether photographic or digital reproductions are copyrightable currently depends upon whether such work is "original" enough to claim copyright protection (at least in US and UK courts). She cited two court cases: *Alfred Bell v. Catalda Fine Arts* and the recent *Bridgeman v. Corel.*

The discussion around *Bridgeman* emphasized the US -UK limitation on the originality test for copyright ownership and the fact that Bridgeman was still a local decision and had not reached District Court level, let alone the Supreme Court.

ACCESS & OWNERSHIP

ACCESS

It quickly became evident, especially in San Francisco and Chicago, that there is a strong connection between the health of the public domain and the ability of the public to gain access to both public domain and copyrighted material.

In **Chicago**, Peter Hirtle (Cornell Institute for Digital Collections) described himself as an unavowed access maximalist, who would tip the balance in copyright law in the opposite direction from which it appeared to be going. He declared that the public good is, for him, the primary reason for copyright. He was bothered by so-called "educational campaigns" by large corporate copyright owners that had the effect of encouraging users to forget their rights, implying that any unau-

thorized copying of published material is illegal. He noted that though it is a criminal violation to remove copyright information from material, it is not illegal to post false copyright information.

Hirtle did not object to an institution's recapturing the costs of making materials available online, but argued that it becomes problematic when the institution then tries to limit further re-use. He shared Zorich's concern about the growing number of non-copyright methods developed to control access to material, especially the rise of the concept and practice of licensing. Licensing agreements tend to supplant federal rights and spawn several worrisome questions, such as whether access to material stops with the termination of a licensing agreement. Licenses, Hirtle noted, are even now being used with public domain material.

The Art Institute's Brad Nugent defended rather more strongly an institution's need to recover costs. Cost recovery, he said, should include licensing material in the public domain, because the institution invests a great deal in processing, conserving, adding value to and providing access to material. While a work's content may be in the public domain, copyright, patent, trademark or property rights may control the specific form or treatment.

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More specifically, in the discussion period Nugent responded to the question of whether an individual could post to the Web a 1920s photograph in the public domain from the Art Institute's collection. Nugent replied that it would depend on a variety of factors. Was it a unique image or did other

repositories also have it? What was its condition? Had the Institute spent funds restoring it? Were they public funds? How would the individual be using the image?

An audience member in Chicago made the point that the discussion was, in fact, not about access but rather about the ability to copy, or to re-use material. How closely tied were the issues of the right to access and the right to copy? In the past, access was rarely the issue; but, with its focus on electronic control of content, the DMCA emphasized that access had increasingly become the issue.

In this often heated debate, two staffers from the Smithsonian Institution spoke out about the way museums were being characterized. In **San Francisco**, the National Gallery's Ira Bartfield strongly disagreed that most museums were engaged in a cynical end-run around the public domain. Most stress their educational mission, he said, and are committed to a broad distribution of their images, even though there are often substantial expenses in doing so, especially now that for a variety of reasons, both scholars and the general public are interested in a wider array of works.

In **New York**, Tom Bower, of the Smithsonian's National Museum of American History, reported that the Smithsonian is trying to be proactive in supporting fair use. The National Museum of American History, for example, is adding a statement to its Website advising patrons on the language to employ when seeking permission to reproduce material (that there would be no commercial use; that there would be limited distribution, etc). The Museum is doing its best to train those working in rights and permissions on the complexities of some of these issues, but because volunteers are often deployed, applicants themselves must be clear about their intended use and the exceptions that apply.

Uniting the two themes of the Public Domain and Access was a particularly interesting account by

Robert Baron (independent art historian and consultant) of the issues involved in implementing and distributing a public domain collection. One of his intentions was to dispel any notion that "using the public domain and using donated rights amounts to a free ride to the land of universal image access."

In assembling such a collection, he emphasized that determining whether or not an object was in the public domain is no simple task. Laura Gasaway's valuable chart "When Works Pass Into the Public Domain,"[14] was a good starting point, but there is often much investigation and risk assessment to be done.

Baron stressed that access is not a given: "Everything is owned by someone or some entity. Does one pay the library a fee to enable access or to license use of the work? Or does the library provide the resource *gratis* as part of its mission? Will library fees be prohibitive?"

Even though Baron stressed the practical and policy problems of assembling, implementing and distributing such a public domain database, he still found the model "irresistible" and noted that the Academic Image Cooperative is in fact built upon a revolutionary notion that art historian Gary Schwartz articulated at the Toronto Copyright Town Meeting in 1998: "By collecting faculty photography, by taking images from the public domain and by acquiring other free-to-use sources to be distributed to educators for free or for the cost of maintaining the service, financial pressure will be placed upon conventional for-profit image vendors who charge what the art historical community feels are exorbitant fees for image use and for publication rights."

At the all-day **Syracuse University** town meeting, access issues dominated. After Professor Crews's workshop on copyright basics, the meeting proceeded with two panels presenting several on-the-ground perspectives of using copyrighted

material in a university setting (almost all of them at Syracuse). These included a professor who had assembled a successful online course on the Syracuse campus with no thought of copyright issues, but who was now interested in a wider audience. Another panelist argued he was a significantly better teacher because of his use of the Internet, but was impatient with the "Gutenberg principle" of applying print rules to a more fluid environment. An instructional materials designer tried to find ways to deal with faculty who were impatient with what could and could not be used online and worried more about the questions she did not hear than by those she did. An IT faculty member and corporate Web designer worried most about security issues. And a university counsel and IT policy advisor at Cornell whose attempts to move faculty and staff beyond the all-embracing notion that "information wants to be free" led her to the conviction that clear policy, guidelines and education, rather than law itself, was the key to the way forward.

In summing up for the day, Kenneth Crews made three observations:

- There is clearly tension between the full deployment of Web technology on campus and the legislative world in which Congress, in making and remaking law, is making access more restrictive.
- Economic issues are working against the full, open deployment of the technology, especially given industry's vision of a pay-per-view world.
- Many wonder whether the same intellectual property regime should apply to both the entertainment industry and nonprofit educational institutions.

OWNERSHIP

The **New York City** meeting, at the College Art Association conference (February 26), focused on "The Tug of War among Faculty, Universities, and Publishers for Rights to the Products of Contemporary Education." While the moderator, Robert Baron, was worried about the impact on

> Do professors own their lectures? Or do their university employers? Who may profit from these ventures? Who, if anyone, can prevent them?

the education ecology of faculty and university administrators dreaming of reaping untold financial windfalls from distance education classes, he noted others who are encouraging the community intelligently to unbundle the intellectual property rights as they are needed in order to make the "tug of war" among faculty, universities and publishers a working partnership in which all benefit.[15]

Jane Ginsburg (Columbia Law School) focused on two court cases that tested how much control professors could exert over the dissemination of their classroom performances. Unauthorized note-taking services posed one challenge, and professorial moonlighting for distance education enterprises presented the other. "As a matter of copyright law," she asked, "do professors own their lectures? Or do their university employers? Who may profit from these ventures? Who, if anyone, can prevent them?" The lure of profit is now making universities re-evaluate earlier practices, in which faculty were allowed to keep their rights. How would copyright policy direct future practice?

Sanford Thatcher, director of the Pennsylvania State University Press and member of the

Pennsylvania State University's Intellectual Property Task Force, which until the recent interest in copyright and distance education had been almost solely concerned with patents and trademarks, led the audience through the process by which the task force developed its own policy on distance education issues.

Thatcher's subcommittee on "Copyright, Software and Databases," taking its cue from statements by the Association of American Universities (AAU) and the American Association of University Professors (AAUP), developed guiding principles based on:

- The recognition that the university is a "collective enterprise"
- The recognition of prevailing academic practice
- The question of whether a project makes "significant use" of university resources
- The recognition of special circumstances that require university investment
- The importance of early disclosure
- The need to be flexible because of the rate of change

The Task Force began by accepting the "academic tradition," in which faculty own the rights to their

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academic production, and then outlined the special circumstances that require university investment and in which the university deserves to begin

sharing rights. These circumstances were broken down into two models: one, in which the university initiates a project to create "commissioned" teaching materials, providing staff and facilities; the other, in which faculty initiates a project that later requires substantial university investment. Penn State uses the request for assistance to initiate university ownership interest. The university also recognizes its own residual ownership interest in professors' course material, requiring a non-exclusive royalty-free license to use that material when a faculty member has moved on.

Rodney Petersen, Director of Policy and Planning in the Office of Information Technology, University of Maryland, has been instrumental in many policy-making situations and has built several invaluable resources on Maryland's CopyOwn Website, which includes a compilation of existing university intellectual property policies.[16] Petersen's first key point was that intellectual property policies often existed on campuses and institutions—mostly in the form of accepted practices—but are rarely written down. His second point was that in negotiating over rights, parties should consider their practical needs and interests, rather than insisting on "who owns the copyright." Interests that he believes are important to faculty include: academic freedom ("what to teach, how to teach it, and when to teach it") and the portability of an academic's research agenda and teaching material, should he or she move to a different institution. As for universities, they need to protect their reputation and trademark. They are likely to want to recoup some of their investment in costly technology-intensive projects, and to want to promote access and use of material developed through their investments.

Peterson's point about considering one's practical needs and interests in negotiating rights was also at the heart of Kenny Crews' presentation at **Syracuse**, where he emphasized the importance of understanding how rights to a particular

project can be assigned and negotiated by contract. He recommended that parties unbundle rights, and articulate their specific needs rather than fight over gross ownership.

Petersen explained two valuable resources at the University of Maryland: the CopyOwn Website and Project NEThics. CopyOwn was developed jointly by the University of Maryland and the Association of Research Libraries (ARL) as a central resource for those struggling with conflicts

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over copyright ownership within the higher education community. Its current central resource is a collection of policies from ARL and AAU-member institutions, although it is also collecting other resources and developing a tutorial series. Project NEThics focuses on developing policy and ethical frameworks within which individual decisions can be made. Staff encourages faculty to manage their own intellectual property, enabling them to deal with questions such as how to obtain (and give) permissions and how to know what are the parameters of fair use. While legal counsel are always available for consultation, their mandate is usually quite conservative, as they must protect the University's liability. This is clearly not akin to the proactive "envelope-pushing" of Mr. Petersen's office that seeks ways to enable faculty to do what they want to do in a legal and responsible manner.

Questions widened this discussion to the territory of museums. When it came to the question of a

museum curator's ownership of research materials, Ginsburg thought the answer would depend on whether the accepted practice of the "teacher exemption" of work-for-hire applied to other contexts, such as museums, where the motivation is the same.

Finally, we should note the almost simultaneous gathering in Miami (February 17-18, 2000) of a small group of higher education leaders in an invitational symposium, "Who Owns Online Courses and Course Materials?" organized by the Pew Learning and Technology Program at Rensselaer Polytechnic Institute's Center for Academic Transformation.[17] Rodney Petersen was one of the participants there also. That meeting concluded that all institutions need to have a framework for thinking through these issues although that need not imply the need for elaborate policies. Participants recommended that institutions find ways to provide support to faculty, addressing the issue of who owns course material as one of process rather than one of intellectual property.

DISTANCE EDUCATION

Although it included some of the ownership issues discussed in New York, the town meeting hosted in **Chapel Hill** by the Triangle Research Library Network focused solely on the intellectual property issues of distance education.

Peggy Hoon gave the legislative background and stressed the main points of the *Copyright Office Report on Distance Education,* published in May 1999. Charged with "how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works," the report stressed:

- that the law should authorize reproduction of copyrighted material to the extent necessary to transmit it for teaching;
- that there should be an emphasis on the concept of mediated instruction;
- that the law should eliminate the require-ment of a physical classroom;
- that safeguards should be put in place to counteract new risks to copyright.

The report recommended that the laws expand the scope of works permitted under Section 110 (2) of copyright law and that Congress confirm that fair use applies in the digital environment. Hoon noted, however, that database-licensing issues, online reserves and other library services, and the produc-tion and use of "coursepacks" were not covered by the report.

In **New York**, Sandy Thatcher noted that the Association of American University Presses is concerned about the possible digital equivalent of coursepacks put together without permission and distributed over the Web. In the digital environ-ment, there is no easy way to distinguish between on-campus instruction and "distance" learning, because Web-based teaching uses the same means of communication in both instances. Robert Baron cited the College Art Association's position, which emphasizes the distinction between the use of copyrighted materials in a mediated environment, such as a face-to-face course, and one in which there is no mediation.[18] For Jane Ginsburg, the principle problem is trying to assess what kinds of distance education are in the spirit of the 1976 Copyright Act, and its exemptions for closed-circuit television and classroom-bound learning, and what is a new commercial market in which authors should have their share.

Back in **Chapel Hill**, James Boyle, Professor of Law at American University, opened a spirited "dia-logue" with the audience about the nature of and prospects for distance education. A $600-billion-

dollar activity, education is the second largest segment of the US economy. Higher education costs rose from 9% of a typical family's budget in 1980 to 15% in 1997. Distance education can enable institutions to increase their programs at a lower cost than traditional bricks-and-mortar campus expansions and can also allow them to reach all segments of the population. But will dis-tance education reach for its democratic potential or will it focus on making higher education a more "efficient" machine by applying corporate business models? Will institutions define their own specialties and find their own niches in the new marketplace?

With the entry of for-profits into what is perceived as a rewarding marketplace, and their support of heavily protected, privately owned digitized content, the Chapel Hill audience responded

> Will distance education reach for its democratic potential or will it focus on making higher education a more "effi-cient" machine by applying corporate business models?

strongly that both the public domain and "safe harbors" for fair use in the digital environment must be expanded and that it is critical for all types of academics to create and articulate a defen-sible position for fair use in this new environment.

Boyle raised the issue (also raised in New York) of faculty developing their own, possibly competing, materials for for-profit ventures. Taking a devil's advocate position, Boyle posited that a no-fair-use, profit-driven environment would introduce innova-tion and dynamism into the education market by stimulating the production of better material. Fair use, he argued, is viable because of the high trans-

action costs involved in granting permission; but with lower costs wouldn't a pay-per-view future be more efficient? The audience responded that such a system would inevitably affect the reading and

> A for-profit environment also might mean that certain material would never be available online because it would not be cost efficient to produce for a small readership.

study preferences of students, researchers and teachers. A for-profit environment also might mean that certain material would never be available online because it would not be cost efficient to produce for a small readership.

Boyle then challenged the audience to be more proactive in its involvement in copyright issues. He suggested they challenge university legal counsels to create clear, understandable guidelines on distance education, that they become as familiar with copyright issues as with other intellectual property matters and, indeed, become advocates for the public domain along with faculty and librarians.

The audience then deduced three general principles for the development of online distance education:

- You should be able to do anything in distance education that can be done in the classroom.
- You should pay one time for copyrighted material, but be able to use it liberally in teaching.
- Students who are physically distant from the campus should get the same services as students on campus.

This meeting concluded with an instructive and entertaining role-playing exercise that displayed the complex interwoven fabric of rights issues at a

university, nicely illustrating Rodney Petersen's point that each party should clearly define its own interests and needs. In this scenario, a university's president, its legal counsel, a faculty member, a librarian, and publisher represent their own interests and concerns. A faculty member is asked by the university to develop a popular interdisciplinary course, using a wide range of multi-media material, for a distance education program created by the university. Before an agreement is signed, the professor thinks through the possible benefits

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that could accrue to himself and his department from this effort. The library, though keen to broaden its digital offerings, has some serious questions about some of the class materials it has been asked to mount on its server, and the publisher has heard of the unauthorized use of many of its copyrighted items by the university.

RESOURCES, POLICY, RISK MANAGEMENT & EDUCATION

RESOURCES

As Christine Sundt had intimated at the New York meeting, the community learned a great deal after CONFU and is doing a reasonably good job in

creating its own guidelines, policies, principles and other resources. In the final meeting of this series, in **Baltimore**, three complementary guides were presented: *The Museum Guide to Copyright & Trademark; The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections;* and the *CAA Q&A Guide to Copyright for Academics.*

The Museum Guide was the work of a partnership between the American Association of Museums (AAM) and the Getty Trust, initiated and funded by the Pew Charitable Trusts. The project team with its two advisory boards, wanted both broad community input from all disciplines, and all sizes and types of museums as well as in-depth discussion of the issues. The team also insisted on a practical tool. Project Manager Diane Zorich walked the audience through the Guide and the issues the project team confronted. Important early decisions included limiting the scope to copyright and trademark issues only, keeping a balance between presentation of the law and practical solutions, and realizing that a narrative presentation could deal with the complexities of issues that a legal treatise, a compilation of useful resources, or question-and-answer format could not.[19]

Zorich outlined what she thought were the most interesting characteristics of the *Guide:* that it considers international issues, digital questions and licensing in some depth; that there are numerous hypothetical and real scenarios introduced to make points more lively; and that the *Guide* is replete with practical information, including the steps to register copyright; tips for addressing publicity, privacy, or moral rights issues; and details about making copyright infringement claims.

Although it would be used as a reference work, the *Guide's* real potential was as a legal framework for museums making their own policy decisions about intellectual property use and ownership, and integrating those decisions into the institutions' current procedures.

Still needed were a complementary museum guide to patents and trade secrets; more extended consideration of ethical questions (such as the use of the intellectual property of indigenous peoples that fall outside Western intellectual property law); more imaginative continuing education; more specific materials for various segments of the museum profession (registrars, curators, directors, boards); and finally advice on intellectual property decisions made on the basis of non-legal issues, such as donor considerations, and sensitivity of collections.

Following the presentation of the *Museum Guide,* Kathe Albrecht spoke of a guide for visual resource professionals on the educational use of museum material: *The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections.* Albrecht commented that for her a benefit of CONFU was an intensified understanding of the different perspectives of museum and academic participants. For example, it seems obvious to visual resource professionals that educational use of materials is not a commercial use and does not threaten the integrity of original museum-held objects. However, the CONFU conversations brought a clearer understanding of museums' concerns over digital distribution. These include the importance of password protection, conditions of use, and other techniques to ensure proper use of electronic information, as well as concern over downstream distribution and the limitation of access to legitimate users.

Simple, short and practical, the *Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections,* has four sections—covering Acquisition, Attribution, Display of Visual Information and Responsibility—each of which would be helpful in reviewing an institution's collection management policies. It is noteworthy that under Acquisition, the recently controversial practice of copyphotography[20] was clearly described and the justification for it clarified (suitable images are not readily available at

reasonable cost from vendors) That section also explains how the images should be used (only for nonprofit, educational purposes and not shared with other institutions). The Visual Resources Association is currently developing a table to

> Academics need quick, inexpensive access to material but confront complex layers of rights in which it is often impossible to get a clear answer, so they use what they can.

clarify for the photographer the layers of rights inherent in images.

It should be noted here that one of the questions raised in **New York** was whether copyphotography is legal. Christine Sundt's reply was that for 26 years, as a visual resource curator, she had shared the fear that "copystand photography" is a copyright infringement. Although there is no case law, many practitioners believe this is a fair practice resting on academic tradition that goes back to the turn of the last century, when slide libraries assembled material from many sources. She said that slide librarians should always legally acquire commercial slides when available. It is when material is not easily available that there is a problem. The same issues clearly occur in the digital world, because we have never solved the problem in the first case. She referred to Macie Hall's article, "Fair Use or Foul Play? The Digital Debate for Visual Resources Collections," that includes a good in-the-trenches account of the daily challenges faced by a slide curator, and Sundt's own paper on the process of acquiring permissions, "The CONFU Digital Image and Multimedia Guidelines: The Consequences for Libraries and Educators." [21]

There is a need for greater understanding between this community's academic needs and the desire

of publishers to control their products. Academics need quick, inexpensive access but confront complex layers of rights in which it is often impossible to get a clear answer, so they use what they can. There is now the added frustration of working with images that are licensed, and that could evaporate at the end of a semester.

Albrecht reiterated that these guidelines would help ensure that the piece of the digital realm overseen by visual resources professionals functions well. Members might use the VRA guidelines for questions about the fair use of images, and then might use the *Museum Guide* for the perspective of the content providers. It is this compendium of perspectives that we need.

Robert Baron, representing scholars in this assemblage, presented the work-in-progress of the College Art Association's *CAA Q&A Guide to Copyright for Academics.* Part of CAA's strategy, adopted in 1999, to guide artists, teachers and scholars through the intricacies of copyright, was to assemble a guide based on the most frequently asked questions. A call was put out to membership and the resulting 460 questions were gathered into a database and indexed to create some 500 terms and concepts that linked the questions. The questions will next be reduced to a number of key scenarios and issues, some of which Baron itemized. Answers, provided by interns and thoroughly reviewed by counsel, will be one part of a guide that Baron expects will include a practical, self-help tool-kit (including forms for accomplishing specific tasks), a guide to issues and advocacy, and a collection of resources and links to statute law databases.

POLICY

Much of the discussion at the **New York** town meeting revolved around the creation of institu-

tional policies and principles. As in other cases, although knowing the law is crucial, often the way out of a difficult situation comes down to managing relationships and negotiating mutually satisfactory solutions. In many situations that are perceived to be about copyright there are often other laws, other issues and interests to be taken into account.

As far as museums go, Barry Szczesny recommended not only that museums adopt intellectual property use and management policies, but also that these institutions emphasize and proactively

> Although knowing the law is crucial, often the way out of a difficult situation comes down to managing relationships and negotiating mutually satisfactory solutions.

involve themselves in the educational community and educational issues. Museums are as much, if not more, about education as about warehousing cultural artifacts.

RISK MANAGEMENT

Several speakers also advised that intellectual property policy be part of a wider set of policies that would cover the range of custodial interests: Digital Asset Management Policies. Risk Management is an area needing more focused thought. Zorich called for guidelines or a checklist to help define what the risks are in a given situation and to develop some means of helping an institution determine how much of a risk taker it wants to be.

In **Chicago**, Peter Hirtle from Cornell and Brad

Nugent of the Chicago Art Institute answered the question of whether either of their institutions had any serious claims made against them for copyright infringement. Neither had, but both agreed that

> One of the unexpected impacts of the Web has been the focus on clarifying the rights landscape of institutions' holdings.

risk management was increasingly a large part of what they did and that one of the unexpected impacts of the Web has been the focus on clarifying the rights landscape of institutions' holdings. Copyright records are usually poor in most institutions. As one commentator put it, "now that more of us are becoming our publications, clarity on rights matters has become very important."

EDUCATION

Throughout, many participants pointed to the need for more copyright education and in more creative forms. In **Chicago**, Richard Weisgrau argued that "we teach children not to steal the book but don't teach them not to steal the I.P." He gave several examples of art directors with whom he had worked, who had no understanding of copyright whatsoever. He reported that many major rights holders had recently established the Copyright Heritage Society to promote copyright education, but some worried that the education would be rather one-sided.

With respect to the public domain, a commentator in Chicago pointed out that the audience at the town meeting represented mostly those working in libraries, museums, archives and universities, rather than the "real public." While panelists

agreed that the public did not understand the value of the diminishing public domain, Diane Zorich suggested the issue be reframed. The term "the public domain" could be used more actively in association with "the public good," a concept the public understands when it donates papers to cultural institutions, trusting they will be maintained for posterity and made available for public use.

> Crews reiterated how important copyright education is, and how it should be seen as part of general education rather than as a legal curiosity.

Finally, the tireless Professor Kenneth Crews in his copyright workshop at **Syracuse**, while testifying to the difficulty in educating faculty about the basics of copyright and ownership issues, reiterated how crucial copyright education is, and how it should be seen as part of general education rather than as a legal curiosity.

CONCLUSION

The NINCH Copyright & Fair Use Town Meetings stemmed from an urgent need to educate and give voice to a constituency in the middle of the difficult CONFU conversations. As CONFU dissolved, the town meetings remain an invaluable forum for exchanging information on digital copyright issues and for sharing solutions to intellectual property problems—both old and new. As intellectual property legislation proliferates, as the essential balance in copyright law changes, and as international corporate trade concerns weigh more heavily on intel-

lectual property law (through globalization and international "harmonization" of copyright laws), the copyright town meetings have taken on a new and important function—that of talking through new solutions and new scenarios for managing and using intellectual property online. This new function moves beyond the legislative arena and pushes into new research, new business models and new practices in the use of intellectual property.

The value of these meetings is multifold. As they address the needs of mixed audiences on this cluster of issues, the meetings reflect NINCH's mandate to cross institutional and sectoral boundaries. As they provide a forum for information sharing and problem solving, they also create an ideal space for thinking out new solutions for the future. As they evolve into an ongoing series, they reflect the history of the community in its engagement with these issues and reveal its growing confidence and determination to make solutions that work in everyday practical situations.

NOTES

1. Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Intellectual Property and The National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (Washington, DC, United States Patent and Trademark Office, 1994), p. 134. Available at http://www.uspto.gov/web/offices/com/doc/ipnii/index.html.

2. Bruce A. Lehman, *The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use,* (Washington, DC, United States Patent and Trademark Office, 1998), p. 18.

3. For all the proposed CONFU guidelines and comments from the community, see Bruce A. Lehman, *The Conference On Fair Use: Report To The Commissioner On The Conclusion Of The First Phase Of The Conference On Fair Use*, (Washington, DC, United States Patent and Trademark Office, 1997). Also available at http://www.uspto.gov/web/offices/dcom/olia/confu/concltoc.html.

4. David Green, *Copyright And Fair Use Town Meetings 1997-98: Final Report,* http://www.ninch.org/copyright/townmeetings99/FinalReport.html.

5. See Appendix 2 for names of the members of the working group.

6. For text of U.S. Copyright Law (including DMCA and other amendments), see http://lcweb.loc.gov/copyright/title17/. For two useful commentaries, see **Jonathan Band,** "Digital Millennium Copyright Act" (October 20, 1998), prepared for the Association of Research Libraries, http://www.arl.org/info/frn/copy/band.html; and **Kenneth Crews**, "New Copyright Legislation Directly Affects Teaching and Research. Congress Enacts the Digital Millennium Copyright Act" (December 21, 1998) http://www.iupui.edu/~copyinfo/dmcamemo.html.

7. Peter Jaszi has usefully labeled these new protections "quasi-copyright" (new database protections); "para-copyright" (encryption technology negating Fair Use); and "super-copyright" (contract law pre-empting federal copyright). For further information on the Uniform Computer Information Transactions Act (UCITA), see the website of Americans for Fair Electronic Commerce Transactions (AFFECT), a "broad-based national coalition of industry leaders, libraries and consumer organizations dedicated to educating the public and policy makers about the dangers of UCITA," http://www.4CITE.org/.

8. See note 1 above.

9. Computer Science and Telecommunications Board, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, (Washington, DC, National Academy Press, 2000), p. 3. Available online at http://www.cstb.org.

10. See http://www.ninch.org/ISSUES/COPYRIGHT/PRINCI-PLES/NHA_Complete.html.

11. See http://www.loc.gov/copyright/disted/.

12. In this case, the New York court held that faithfully reproduced images of paintings and drawings (but not three-dimensional sculptures) are not eligible for copyright reproduction because they are not sufficiently original. See discussion in Public Domain section of this report. *Bridgeman Art Library, Ltd. v. Corel Corp.,* 25 F. Supp. 2d 421 (S.D.N.Y. 1998), *on reconsideration*, 36 F. Supp. 2d 191 (S.D.N.Y. 1998).

13. Note that as of February 2001 there are plans for a cooperative to be formed between Harvard University Law School's "Creative Commons" and Carnegie Mellon's "Knowledge Conservancy." Information on the latter is available at http://yen.ecom.cmu.edu/kc/about.shtml. Also see the argument that a new public domain is being created online: Paul Starr, "The Electronic Commons," *The American Prospect* 11:10 (March 27-April 10, 2000), http://www.prospect.org/print/V11/10/starr-p.html.

14. See http://www.unc.edu/~unclng/public-d.htm.

15. Jacques Steinberg with Edward Wyatt, "Boola, Boola: E-Commerce Comes to the Quad," *The New York Times (Week in Review),* (Feb. 13, 2000). Gail S. Chambers, "Toward Shared Control of Distance Education," *The Chronicle of Higher Education,* (Nov. 19, 1999), pp. B8-9.

16. See http://www.inform.umd.edu/CompRes/NEThics/copyown/

17. See Carol A. Twigg, *Who Owns Online Courses and Course Materials? Intellectual Property Policies for a New Learning Environment,* (Troy, NY: The Pew Learning and Technology Program, 2000). Available at http://www.center.rpi.edu/PewSym/mono2.html.

18. See the CAA written comments at http://www.loc.gov/copyright/disted/comments/INIT018.PDF.

19. For the table of contents of *The Museum Guide*, see http://www.aam-us.org/museum-guide-toc.htm

20. The practice of making transparencies from illustrations in books.

21. Macie Hall, "Fair Use or Foul Play? The Digital Debate for Visual Resources Collections," *Wired and Wary: Legal Issues for Librarians in the Digital World, Association of College and Research Libraries, New England Chapter Conference,* Boston, MA, November 7, 1997. Christine L.Sundt, "The CONFU Digital Image and Multimedia Guidelines: The Consequences for Libraries and Educators." Version of the paper presented at *Fair Use, Education, and Libraries: A Town Meeting to Examine the Conference on Fair Use,* Indianapolis, Indiana, April 4, 1997.

APPENDICES

1. INDIVIDUAL MEETING REPORTS AND PAPERS.

Individual meeting reports may be obtained on the NINCH Website http://www.ninch.org/copyright/townmeetings/2000.html

Papers may be obtained at the following urls:

CHICAGO (JANUARY 11, 2000)
http://www.ninch.org/copyright/townmeetings/chicago.html

Diane M. Zorich, "Why the Public Domain Is Not Just a Mickey Mouse Issue."
http://www.ninch.org/copyright/townmeetings/chicagozorich.html

NEW YORK (FEBRUARY 26, 2000)
http://www.ninch.org/copyright/townmeetings/nyc.html

Robert Baron, "Welcome and Introduction."
http://www.ninch.org/copyright/townmeetings/nycbaron.html

Christine Sundt, "BEEN THERE, DONE THAT! The State of the Question Regarding Copyright, Fair Use and Intellectual Property in the Arts."
http://www.ninch.org/copyright/townmeetings/nycsundt.html,
also http://libweb.uoregon.edu/aaa/vrc/CAAcls.htm

SAN FRANCISCO (APRIL 5, 2000)
http://www.ninch.org/copyright/townmeetings/sf.html

Robert Baron, "Making the Public Domain Public."
http://rabaron.home.pipeline.com/VRA-TM-SF-PublicDomain.htm

Howard Besser, "The Disappearing Public Domain: What Is It, What's Happening To It, And Why Should We Care?"
http://www.gseis.ucla.edu/~howard/Copyright/Publicdomain00/

Kathleen Butler, "The Originality Requirement: Preventing the Copy Photography End-Run around the Public Domain."
http://www.ninch.org/copyright/townmeetings/sf.butler.html

BALTIMORE (MAY 18, 2000)
http://www.ninch.org/copyright/townmeetings/aam.html

Kathe Albrecht, "VRA's Image Collection Guidelines."
http://www.ninch.org/copyright/townmeetings/aam.albrechtpaper.html

Robert Baron, "The College Art Association's *Q&A Guide to Copyright for Academics*: *A Work In Progress.*"
http://www.ninch.org/copyright/townmeetings/aam.baronpaper.html

Diane Zorich, "An Overview of *A Museum Guide to Copyright and Trademark.*"
http://www.ninch.org/copyright/townmeetings/aam.zorichpaper.html

2. MEMBERS OF NINCH COPYRIGHT TOWN MEETINGS WORKING GROUP:

Kathe Albrecht, *American University* and *Visual Resources Association*
Robert Baron, *Independent Scholar* and *College Art Association*
Mary Case, *Association of Research Libraries*
Katie Hollander, *College Art Association*
Christine Sundt, *University of Oregon* and *Visual Resources Association*
Barry Szczesny, *American Association of Museums*
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Copyright and Fair Use

Town Meetings 2000

The NINCH Copyright & Fair Use Town Meetings 2000 Report

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