



37th Annual Conference Indianapolis, Indiana, April 16-21, 2009

Session/Meeting Name: Image Copyright in a Digital World

Date, Time: April 19, 2009, 2:00-3:30pm

Moderators: Marilyn Russell and Roger Lawson

Recorder: Carmen Orth-Alfie

Speakers:

Madelyn Wessel, Associate General Counsel, University of Virginia

Todd Joyce, Professional Photographer, Todd Joyce Photography and national president, American Society of Media Photographers (ASMP)

Ruth Roberts, Rights & Reproductions Coordinator, Indianapolis Museum of Art

Session Abstract from Program

How does current copyright law apply to visual works and works (such as most art publications) that contain both visual and textual material? How should copyright apply to digital images?

For more than ten years, impassioned voices from stakeholders in the copyright arena have proposed major revisions to current copyright law that would significantly alter the landscape of image copyright - from "orphan works" legislation to changes of the section 108 of the U.S.

Copyright Act that specifies exemptions allowing for libraries, museums and archives to make copies of protected works. As the U.S. Congress continues to examine the proposals, the needs and wishes of libraries, museums and archives must be weighed against the rights of creators and owners of protected works. At the same time, the movement to provide "open access" to scholarly materials has given rise to initiatives such as the Scholarly Publishing and Academic Resources Coalition (SPARC). How can the competing needs for control and dissemination - particularly with regard to visual materials -- be reconciled in the current copyright environment?

As art information specialists, we must be aware of the ways these changes could affect our institutions' policies and services. This panel session continues the ARLIS/NA Public Policy Committee's examination of major aspects of copyright in the digital age by focusing on issues specific to copyright and use of visual materials. Representatives from the creative arts, museum, and academic research communities will have a chance to express their own views on image copyright and to suggest ways in which art information specialists can work with existing laws.

Summary of Session

Introduction

"A Thousand Words: Image Copyright in the Digital World" focused on several recent events and issues associated with intellectual property and with copyright specifically. This topic proved to be of great interest to the ARLIS/NA community, with approximately 120 members in attendance. During the introduction Mr. Lawson noted that the speakers were invited to address six talking points written by the committee. (Note: these talking points were distributed to the speakers prior to the session and are attached as appendix A). Each speaker was asked to address these or other copyright issues from their varied

perspectives: Madelyn Wessel as legal counsel at the major university; Todd Joyce as creator and copyright holder; and Ruth Roberts as coordinator of intellectual property rights management at a museum. Additional information about each speaker is provided in appendix B.

Madelyn Wessel Presentation

Madelyn Wessel briefly reviewed her career as a lawyer working with copyright at a university. She noted that people working in libraries deal with copyright issues on a daily basis yet there is only limited comprehension on the detail of copyright law. Ms. Wessel advocates for librarians to educate their institution's general counsel on the intellectual property rights that impact libraries. Ms. Wessel chose to address each of the talking points that were provided, some in more depth.

To put the recent law suits related to the Shepard Fairey's use of the Associated Press photo of Barack Obama into perspective, Ms. Wessel discussed other cases and showed images in her presentation that illustrated that fair use defense is situational and that the four factors of the fair use doctrine must be analyzed case by case. The cases reviewed as part of this discussion included *Campbell v. Acuff-Rose Music*, a successful fair use defense case where the band 2 Live Crew parodied the Roy Orbison recording of "Pretty Woman;" and, two cases involving appropriation by artist Jeff Koons. *Blanch v. Koons* successfully used the fair use defense for a transformative use of the Gucci sandals advertisement, while the *Rogers v. Koons* decision was found to infringe the copyrights of photographer, Art Rogers, when Koons appropriated Rogers' image "Puppies" to create a three dimensional reproduction. Ms. Wessel noted that Koons may not be the most appropriate "poster child" for fair use because Koons has objected to other artists appropriating his images. Ms. Wessel noted that the *Fairey v. AP* case was not the best case to set precedence on fair use, concluding that "hard cases can make bad law."

Ms. Wessel stated that the Google settlement does not include use of "images" and therefore images would not be displayed. She also commented that the Google settlement would not resolve the orphan works problems and does not eliminate the need for additional legislation or other agreements. Ms. Wessel briefly described the historical context for the concept of "orphan works," noting exhaustive CONFU meetings and the resulting legislation and guidelines. The recent negotiations among the stakeholders about the proposed legislation have not resolved the orphan works issues. One example of a contentious issue preventing enactment of proposed legislation is institutional sovereign immunity: libraries want to be protected from expensive litigation and publishers want the payoff to enable the expense of legal action.

Ms. Wessel briefly discussed the Georgia State e-reserves case and students' infringing activities on campuses. She noted several questionable practices on the part of the university, including allowing unrestricted access to reserve materials instead of providing password access to the class exclusively. Ms. Wessel also noted ways to provide lawful access to copyright works for educational uses. One suggested solution relevant to ARLIS/NA is ARTstor. Instead of discussing the public domain of foreign works question posed in the talking points, Ms. Wessel reviewed *Twin Books v. Disney*, due to the fact the case more directly relates to the libraries and museums. The copyright duration case involved the creation of the Bambi character originally published in Germany, later copyrighted in the United States and licensed to Disney. It illustrates the complexity of determining when a work moves into the public domain.

Todd Joyce Presentation

Mr. Joyce began his presentation by showing appreciation for the opportunity to speak with the ARLIS members about copyright issues. As a full time commercial photographer he is a very strong advocate for protecting the intellectual property rights of commercial photographers. His passion for the topic has provided him the honor of serving

as the current national president of the ASMP. During the presentation Mr. Joyce spoke briefly about the structure and purpose of the organization. The organization provides resources and education for members such as copyright information, standard license forms, and other business related activities. There are 39 chapters and a national office lobbying Congress to meet the needs of the approximately 7400 members. Mr. Joyce stressed that the members are working commercial photographers who are well trained and plan out their work carefully. The results are not "happy accidents." They make profits by licensing specific uses of their images. Mr. Joyce noted the value of these works and the need to be vigilant in protecting the right to control uses so the photographer can gain a profit from the work. He noted that the average photographer makes only \$21,000 a year, and the ASMP is working as an advocate to increase photographers' profits. Mr. Joyce observed, "Profit is not a bad word, it makes the world go round."

During the presentation Mr. Joyce displayed examples of his work and proudly noted that he works full time as a commercial photographer and manages his intellectual property closely. By licensing instead of selling his work, he is able to maximize his profits and repurpose images. Mr. Joyce will also "lend" his work for charities he personally supports. Mr. Joyce paraphrased the artist moral rights statute which gives the artist the power to decide and grant rights on how and when to use a work.

After setting up the realities faced by the commercial photographer, Mr. Joyce addressed the issues surrounding the recent *Fairey v. AP* cases. From the perspective of the commercial photographer, the expectation of the Associated Press to demand payment for permission to use is standard practice. If *Fairey* had paid a standard fee for his own use, this case would likely have been moot. However, *Fairey* has a history of infringing on intellectual property rights. This case highlights moral rights concerns as much as those of financial compensation. Mr. Joyce cited examples of rock songs being used in recent presidential campaigns and noted that the artist controlled which candidates were allowed to use the song in a public performance and which campaigns were asked to cease use.

Orphan works issues, especially as they relate to images, are very important to commercial photographers. Mr. Joyce indicated that photographers know and understand orphan works, defining the concept as works for which "the owner cannot be located." Mr. Joyce prompted the audience to think about the internet in reference to images. He noted that Facebook strips the metadata from millions of images as they are loaded into the program, leaving the image as "orphans" now subject to the unknown effects of potential legislation. Mr. Joyce stated that the ASMP supported the US House of Representatives' version of the orphan works legislation during the 2008 session. The association felt that the Senate version did not provide full enough protection, however. Mr. Joyce indicated that the ASMP is also very interested in following the impact of the Google book settlement, noting that it is setting a precedence that could hurt libraries.

Ruth Roberts Presentation

Ms. Roberts began her presentation by noting the importance of artists and their relationship to the art museum, stating that artists are critical to the institutions' mission. Ms. Roberts' role is to manage the rights associated with the works in the museum. She works out the details associated with someone's desire to use an image of a work. Understanding the delicate balance of specific rights can be complicated. It is a challenge to educate herself and the staff, noting that in many cases the rights are held by the artist, not the museum. Ms. Roberts remarked that "new technologies have made her work infinitely more interesting." She proceeded to list and briefly comment on some of these technologies: books on Kindle, Google, iPods and iPhones, TiVo, YouTube, ArtBabble, and others. Ms. Roberts was proud of the role the Indianapolis Museum of Art played in cooperation with museums across the country in the creation of ArtBabble, which was launched in April 2009. While the tools and projects are exciting, Ms. Roberts admits it is confusing to manage the intellectual property rights. She listed several things she has learned: there is not one answer; some rights conflict with the correct answer; the answer

may be wrong; sometimes there is no answer; there are times when you need to contact a lawyer; when they don't know you end up winging it; and finally, that artists' concerns about copyright are no less than those of the librarian, visual resource specialist, or researcher.

Changes in the copyright law and related developments in the last twenty years have profoundly impacted her work in the museum. Ms. Roberts specifically noted the Visual Artist Right Act of 1990 (VARA) and the Creative Commons licenses. Ms. Roberts related her experience of tracking down and contacting artists to determine the uses the museum may make of the work. The reality is that rights to the work may have been held by several people before being donated to or purchased by the museum. In the meantime, the artist may not be locatable, heirs may be upset to learn that the work in the museum, or the rights have been willed or donated to another foundation. There are several tools that Ms. Roberts noted as helpful in tracking down the essential information about copyright and making decisions about the use of the work or images of it: internet search engines such as Google; WATCH (Writers Artists and Their Copyright Holders) which is a database of copyright contracts; RARIN Wiki (Rights and Reproduction Information Network); ARS (Artists Rights Society); VAGA (Visual Arts and Galleries Association); and the Copyright Management Center. Ms. Roberts indicated that this investigative work is worth the effort and that she enjoys making the call to inform an artist that the museum now has the work. The artist is usually happily surprised and delighted to know where the work is now located.

Appendix A:

Talking Points (March 31, 2009) Prepared by the Public Policy Committee

1. In *Shepard Fairey v Associated Press*, artist Shepard Fairey produced a Barack Obama "Hope" campaign poster based on a copyrighted photo taken in April 2006 by Mannie Garcia while on assignment for the Associated Press. Garcia was not credited in Fairey's work. AP filed a lawsuit against Fairey asking for credit and compensation; Fairey countersued the Associated Press seeking to declare that he is protected from copyright infringement claims in his fair use of a news photograph. Garcia feels that he owns the copyright of the photograph. *Who holds the copyright on the original photograph, AP or Garcia or both? Is Fairey's use fair? What might the consequences be for the use of protected images if the courts find that it is or is not?*
2. *Has the Google Book Settlement (January 2009) significantly affected image copyright? If so, what are the new considerations?*
3. Several attempts to address the issue of "orphan works" – works eligible for copyright protection under the US Copyright Act of 1976 but for which the copyright holder is unknown – have been introduced in Congress since 2003, but to date, none has been passed into law. In 2008, Sen. Patrick Leahy introduced the Shawn Bentley Orphan Works Act (S. 2913) which calls for the creation of a database of pictorial, graphic, and sculptural work. The proposed legislation has garnered support from the library and academic communities, but it has also met strong opposition from artists' licensing groups. *What are the main positions taken by the stakeholders and what do you feel are the prospects for revisiting the legislation in the current Congress?*
4. Instruction and scholarly publishing have been profoundly affected by recent copyright developments. In April, 2008 a group of publishers (including Cambridge and Oxford University Presses) filed a lawsuit against Georgia State University claiming that the university infringed on copyright by making electronic copies of course readings available to students without collecting royalty fees; the defendants have claimed both sovereignty immunity and fair use. The 2009 ALA Midwinter conference featured a forum hosted by the Scholarly Publishing and Academic Resources Coalition (SPARC) and the

Association of College and Research Libraries (ACRL) on “the transformative potential of open educational resources (OER).” Panelists discussed the principles behind the movement and highlighted how different constituencies are promoting OER in their communities over the full range of publishing enterprises, including course materials, textbooks, streaming videos, and software. *Are there significant differences in application between teaching resources that are image-based and those that are textual? How does current copyright protection hinder the ability to provide open access to instructional materials, particularly those that include images? Has this issue been explored and handled definitively by art history faculty? What promising new partnerships may emerge in as a result of recent regulations?*

5. Some consider “fair use” of copyrighted works to be diminished in recent years due to new technologies which can control access, restrictive interpretations of “fair use” presented in guidelines that define limits, and the increase in “licensed” instead of “owned” content. Some associations and groups are drafting “best practices” to educate users in applying the four factors of the “fair use” doctrine. For example, the Center for Social Media explores “fair use” as it relates to “media literacy,” noting that the “code of best practices does not tell you the limits of fair use rights. Instead, it describes how those rights should apply in certain recurrent situations.” *What advantage and disadvantages are there when relying on “best practices” instead of “guidelines” for determining a user’s “fair use” of visual works? How are “best practices” developed and written in ways that make them distinct from “guidelines”? What “best practices” resources specifically with regard to fair use of images are available to the library and visual resources communities?*

6. *Societe Civile Succession Richard Guino v Jean-Emmanuel Renoir* centers on eleven sculptures produced by Pierre Auguste Renoir and an assistant, Richard Guino, prior to 1917. In 1973, the French Supreme Court determined that Guino was co-author of certain works; in 1974, the Guino family and some members of Renoir’s family agreed that the Guino family had exclusive rights to reproduce those works from plaster casts of the originals, and a trust (Societe Civile) was formed to implement these rights. In 1984, the Societe registered the works with the US Copyright Office. In 2003, Jean-Emmanuel Renoir sold some of the works and molds of them to a gallery in Scottsdale, Arizona, and in July 2003 the Societe filed a complaint against Renoir and the gallery alleging Federal copyright infringement. Renoir claimed that the works were in the public domain. In 2006 the Maricopa County (Arizona) circuit court ruled that the defendant’s actions infringed the Societe’s copyrights on the works, and in December 2008 the US Court of Appeals for the Ninth Circuit affirmed the ruling. *Both the U.S. Congress and the U.S. courts have consistently and significantly expanded the length of copyright protections since the 1970s, and in Eldred v. Ashcroft (2003) the U.S. Supreme Court laid the groundwork for effectively perpetual copyright extension by Congress. What might the impact of perpetual copyright protection be on libraries and the arts?*

Appendix B:

Speaker Bios

Madelyn Wessel

Ms. Wessel is Associate General Counsel at the University of Virginia, focusing on intellectual property, copyright, licensing, and special issues arising in the area of digital scholarship. She has lectured on copyright, digital responsibilities, legal and policy frameworks for sustaining digital scholarship, fair use and censorship in recent years to groups as diverse as the National Association of College and University Attorneys, the Society for Scholarly Publishing, Art Libraries Society of North America, College and University Auditors, Digital Library Federation, Music Library Association, Educause, and the

Visual Resources Association. Ms. Wessel teaches the seminar in Legal Issues in Higher Education at the University of Virginia's Graduate School of Education. She has been admitted to practice in Virginia, Massachusetts, New Hampshire, and Oregon. Ms. Wessel holds a BA from Swarthmore College and a J.D. from Boston University.

Todd Joyce

Since 1990, Todd Joyce of Joyce Photography has specialized in photographing people for a wide range of advertising clients including Pampers, Kodak Professional, General Electric and Johnson & Johnson. His work has received numerous awards including local, regional and national Addy awards. View his work at www.joycephotography.com. Todd is the national president of the American Society of Media Photographers, the premier trade organization of publication photographers.

Ruth Roberts

Ruth Roberts has served as Rights & Reproductions Coordinator for the Indianapolis Museum of Art for the past nineteen years. During that time she has seen many changes in rights management and technology. Ruth authored a nationwide survey of rights and reproductions procedures and fees; worked to create the IMA policy on intellectual property; and, created and presently edits a wiki for rights and reproductions professionals in museums.