Patrick Tomlin introduced and framed the session. It is increasingly apparent that scholarly publishing in the arts is coming to a crossroads. Barriers to both production and consumption are bringing forth a radical shift, and alternative publishing practices are emerging. The three presenters at this session discussed the challenges within the present system, in particular the role of copyright and fair use.


*Nineteenth-Century Art Worldwide*, an electronic journal in its tenth year, grew out of a need expressed by the members of AHNCA. Initially it was planned for NCAW to be a traditional journal, but a last minute conflict with the conditions of the selected publisher prevented the deal from going through. This led to the decision to explore putting out an electronic journal. With the assistance of a CUNY grad student with e-journal experience, [http://www.19thc-artworldwide.org/](http://www.19thc-artworldwide.org/) was launched.

From the start, it was decided that NCAW would be an open access journal. Because of the complications of closing access and the infrequency of publication, it was decided it was not worth the extra effort to charge for the content.

Licensing the images for inclusion in the journal has been an obstacle. Images in the journal can be enlarged, but are not high-resolution. Most often, the images published are in the public domain. The need to license an image from a museum makes including images more complicated. Contractually, a license to publish an image in a print journal is infinite, but the license(s) to publish online is for a limited time. If the NCAW wants to archive its articles, the license(s) would require that the images be removed. To circumvent legal troubles (even though their images are small, non-commercial and should be covered by fair use), they have asked their authors to get images anywhere but from a museum, unless the museum agrees to an unlimited license. Dr. Chu feels strongly that we need to defend the public domain, and that particularly in our field, we should not be afraid to use images.
Dr. Chu discussed the advantages of electronic publishing. First, e-publishing is relatively low cost. The major expense is copy editing, which needs to be just as rigorous as with a paper journal. Web site design is another expense, but the cost for the hosting space is negligible. There are also no postage or paper costs. Another advantage to e-publishing is speed of production. The *NCAW*’s ability to get an article published faster is particularly popular with faculty coming up for tenure. Flexibility is another benefit to e-publishing. *NCAW* doesn’t need to limit the length of the articles or number of images. Storage of e-journals is easier, and more practical. E-journals are much more searchable. The size of their readership is also more substantial and widespread.

There are also challenges to publishing online. In the beginning, e-journals were viewed as not being on par with paper journals. Despite being peer reviewed, and having a small percentage of acceptances, e-journals were still viewed negatively, especially at the department level. But, Dr. Chu noted that there has been a change in perception in a relatively short time. Another area of concern is how to best archive the journal. They have been accepted with LOCKSS. Using persistent URLs or DOIs is not something they are presently doing, but it is on their radar. One of the journal’s greatest challenges has been how to finance an open access electronic journal. As part of the AHNCA, the *NCAW* receives part of the association’s membership dues. They also have donors, and some libraries have donated in lieu of a subscription fee. They do have a few ads. The cost to publish two issues a year is only about $15,000, but the constant fundraising can get tiresome.

Dr. Chu concluded by commenting that the *NCAW* still looks like paper journal, and that they have not taken advantages of all the possibilities online publishing has to offer. She wishes to increase their use of technology, but in a way that makes sense, and not just for its own sake. She believes that e-journals will increasingly become the preferred form of publishing, and that certain publications, such as catalogue raisonné, should be online so they can be continually updated. She feels that open access is the most democratic and sensible way to do e-publishing, and that it should use the same model as public radio and television. She also feels there needs to be a solution to the problem of licensing, and that museums and other owners of artwork in the public domain should abandon the licencing practice.

Finally, Dr. Chu asked for advice regarding whether the journal should work with ProQuest to increase their discoverability. *NCAW* is indexed through Art Index, Google, and Serial Solutions. Those in attendance felt strongly that there would be little benefit in working with ProQuest, and recommend she not pursue it.
Christine Kuan, Chief Content Officer & VP of External Affairs at ARTstor gave her presentation on Images for Academic Publishing (IAP)

Ms. Kuan has worked for Oxford University Press as part of Grove Online, and has worked at the Metropolitan Museum of Art. She is very familiar with licensing issues and recognizes that sometimes getting permission to use images can be more costly and time consuming than doing the research.

Things like exhibitions catalogs go out of print very fast and are not available digitally. As a researcher, how would you even know they ever existed? Books need to have a digital life and be searchable online. Institutions have not yet grasped that users want to discover things online. Even when progress is made, there are often still hurdles. For example, LACMA recently announced that they are making hi-resolution images of public domain available on their website for free. But, their user agreement prohibits publication.

Image research is an incredibly difficult task. Locating the copyright owner and clearing permission is time consuming. There are also fees for use of images. The burden on the independent scholar is huge. The timeline to clear images is particularly prohibitive, and has a negative impact on scholarship. Often, scholars will choose alternate images because obtaining permission to use them is easier.

Ms. Kuan introduced Images for Academic Publishing (IAP), a free service from ARTstor. Institutions contributing images to ARTstor can opt to include them in IAP, making them available for scholarly publication. This service is automated; there is simply a web form to fill out. IAP provides a known time to get images to scholars, and also helps the institutions by allowing them to offload the burden of distributing images to scholars. Museums are looking at what their role is in the fostering of scholarly knowledge and are committed to moving forward, enabling print and web publication. Participation in IAP does not impact or limit commercial licensing by the image holder. IAP is only for scholarly licensing, which typically costs museums more to administer than they recoup.

Niels Schauman, Professor of law and Vice Dean of faculty at William Mitchell College of Law presented “Copyright & Visual Art”

Dr. Schauman began with a brief overview of copyright, which has its beginnings in censorship and monopoly. The idea of copyright originated in the Church as a means
to control the dissemination of heresy and sedition. The government, church and guild of publishers heavily censored what could be reproduced. In 1709, the first copyright law, the “Statute of Anne,” was enacted in the UK. According to Dr. Schauman, this also marked the beginning of publishers using artists strategically to keep rights. In the US, copyright laws first appeared to protect engravers, and it was many years later before other art forms were protected.

The motivation for copyright laws differs between the UK and US. The UK’s view of copyright is that of natural law, that the work is the child of the artist. However in the US, it is utilitarian, to provide an economic incentive to create and disseminate. There is no constitutional basis for copyright in US other than economic rational.

Keeping up with technology has always been a challenge for modern copyright. Attempts to revise the law have historically failed because industry argues that change will destroy them. The solution has been to let the industry write the law. Public choice legislation, entirely captive to special interest, has held, with only two exceptions (software and rights of small businesses to use music and television broadcasted on their premises) since 1909.

The requirements for copyright are that the work needs to be original to the author and fixed in tangible medium of expression. Copyright entitles the owner to economic rights, such as those of reproduction, adaptation, reproduction, publication, and public display. It also grants moral rights—the right to have one’s work attributed to them or have their name taken off the work. It also protects the integrity of the work against modification by others. Dr. Schauman cited the ruling that repainting an Alexander Calder mobile with the Pittsburg Steelers colors would be defamatory to the Calder estate as an example of this.

There are limitations to copyright. Ideas are not copyrightable, only the expression of the idea. There is also a limitation on the duration of copyright. The Right of First sale allows the owner of a copy to lend, rent or sell it. Certain situations such as commentary and criticism or teaching and scholarship are excepted from copyright by the Fair use Doctrine. Fair use is determined by a four-factor test: the nature of work, amount of work used, purpose for which the use is being used, and most importantly the impact on market for work that has been copied (not only for current market, but for future markets.) Dr. Schauman explained that a potential difficulty arguing fair use is that it is impossible to not have a protectable market. Also, each case is completely fact specific. No previous case can be used to argue new case, and this favors the person who brings suit. Defending fair use costs an average of $300,000. University legal
departments are increasingly reluctant to allow the “oops” defense. Dr. Schauman asked, if you don’t have money to defend, does fair use exist?

Works that are in the public domain are not protected by copyright. Public domain includes all that is not copyrightable because they are not proper subject matter (such as the scent of perfume in the US), have copyrights that have expired, or copyrights that have been forfeited (almost impossible these days.) Zombie copyright is a copyright that has been resurrected after having been in the public domain (Golan v. Holder.)

Property Rights in a Copy is not copyright. Even if a work is in the public domain, the work is still someone’s property and they can restrict who can take pictures and what can be done with images. This is the basis for museum licensing of images in the public domain. The transaction cost to license images is high, both monetarily if you need a lawyer, and in the time it takes to negotiate rights. Purchasing a work does not allow you to reproduce that work. The copyright stays with the artist. This is why you must often clear permissions with both the museum and artist. Usually this is mediated through a contract.