Where are we, now?

- More digital content and publishing and distribution opportunities for art historians exist today than ever before and more will become available in the years to come.
- More institutions are making public domain images available to scholars for online publishing for free or minimal handling fees.
- Shared rights metadata should increase with time resulting, hopefully, in better ways to communicate with rights holders.

Same Old, Same Old . . .

- A lot of online digital content is not of sufficient quality or resolution to be acceptable for digital art history projects and publishing.
- Need to find high-quality digital files; triggers permissions.
- Copyright law – rights and exceptions – and, to a lesser extent, privacy and publicity laws, are not understood or applied easily.
- Rights holders do not keep their contact information up-to-date, so they are difficult to find.
- Permission can be expensive to obtain even if we know what rights we need.
- How do we define our online needs?
- Complex and wide-ranging digital technology choices.

The Ever Persistent Copyright Issues

- Copyright law does not provide an easily understood or applied exception for scholarly uses.
- All scholarly uses of copyrighted materials are NOT fair use.
- And even if they were, must consider long-term relationships and traditional publishing business practices.
- Fair use is a U.S. exception that is not followed by many other countries of the world, although, many countries do have exceptions for educational, library, and scholarly uses.
- No Orphan Works exception has been passed by Congress.
- Widespread repudiation of the Bridgeman decision.

Reproductions of Public Domain Art

- Slavish reproduction of a two-dimensional public domain work of art is not sufficiently original to qualify for copyright protection.
- Highly controversial case among fine arts photographers and museums that claim copyright in their reproductions of public domain works of art.
- Reproductions of three-dimensional public domain works of art qualify for copyright protection.
Finding Rights Holders

Oh where oh where
Have the rights holders gone?
Oh where oh where can they be?
With their businesses sold
And their addresses lost
Oh where, oh where can they be?

Derived from the lyrics for Der Deitcher’s Dog by Septimus Winner

Formalities

- Registering copyrights and keeping that information up-to-date
  - Berne Convention removed ability to require formalities in return for copyright protections
  - U.S. has minimal requirements for formalities
  - U.S. Copyright Office is seeking funding for upgrades to improve electronic registrations and digitization of pre-1978 registration records
  - Rights holders need to be encouraged to update ownership claims and contact information

Orphan Works

- Still no U.S. legislation modifying remedies for copyright infringement involving an orphan work
- An orphan work is a work presumed to be protected by copyright but for which the user cannot identify or locate the rights holder
- In 2013, the Copyright Office sought additional comments on orphan works experiences and proposed solutions
- UK passed orphan works copyright legislation in late April 2013
- When implemented, it will require payment of a compulsory license and/or some form of registration
- Details will emerge on implementation in the next few months

Rights Metadata

- Are we collecting it in an organized manner?
- Are we sharing it publicly?
- Are there privacy concerns with sharing it?
- Social media sites collect a lot of rights data
- What do we want to know?
  - Rights holder’s contact information
  - Sometimes multiple rights holders
  - Enough information about the work to make a decision about copyright status and privacy concerns

Fair Use

- Using a copyrighted image without permission for purposes identified in the law after weighing the impact of the proposed use(s) under the four-factors as further defined in case law and concluding that the balance favors fair use
- Requires good faith which may include attribution to the original creators and a copyright notice for the current rights holder

Two legal choices I did face,
And confused me beyond my ken
Even though I knew the basics, long I considered my options
And weighed those factors as best as I could
To where I wondered, should I seek permission?
Then decided to take the other, as just as fair,
And having perhaps the better claim,
Because it was legal and wanted wear.

Derived from The Road Not Taken by Robert Frost

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Recent Cases

- **Hathi Trust (on appeal)**
  - Mass digitization is a transformative use as long as content is used for searching and for use by the print-disabled
  - Full-texts cannot be made available
  - Publishers argue that going beyond the §108 exceptions “should weigh heavily against a finding of fair use”

- **Georgia State University (on appeal)**
  - E-reserves: Fair use or permission?
  - Publishers argue e-reserves are the same as course packs and law is settled that course packs require permission

Creative Work/Appropriation Art

- **Cariou v. Prince** (U.S. District Court, Southern District of N.Y.)
  - March 2011, Judge ruled that Richard Prince’s use of Patrick Cariou’s photographs was NOT fair use
  - April 25, 2013, the U.S. Court of Appeals for the Second Circuit issued its opinion
    - Fair use does not require that the commentary be about the works being copied
    - 25 works qualify for fair use defense because they are “transformative”, amount changed from the original work
    - 5 works need to be reviewed by the District Court in light of Court of Appeals legal explanation of the fair use defense

Commercial Fair Use of Video Clip

- The U.S. Court of Appeals for the Ninth Circuit concluded that the use by a musical production company in Jersey Boys of a seven-second clip from The Ed Sullivan Show was protected as fair use.
- Sola Entertainment Inc. v. Dodger Productions Inc., 9th Cir., No. 10-56535 (9th Cir., Mar. 11, 2013) (Trott, J.)
  - Clip use was transformative
  - Clip was used for historical and biographical significance
  - Clip was not used for its own entertainment value

Google Books

- Litigation started in 2005
- Photographers File Class Action Suit in April 2010
- Proposed settlement was rejected in March 2011
- Court granted class certification in May 2012
  - Settlement not subject to court approval because it does not apply to a class of unnamed individuals
  - Google asked court to decertify the class in November 2012

VRA Statement on Fair Use on Images for Teaching, Research, and Study (2012)

- Provides guidance to users as to what may be fair use for:
  - Preservation of images (slides to digital)
  - Use of images for teaching purposes
  - If it was fair use in print, it should be fair use online
  - Adaptations of copyrighted images for study, teaching, and research
  - Sharing images used for fair use purposes among institutions, should be a fair use, too
  - If images in theses and dissertations qualify for fair use, digital copies and online distribution of these materials should be fair use

CAA’s Fair Use Project

- Goal is to develop best practices for the use of copyrighted works in creative work and scholarly publishing in the visual arts based on assessments of common situations and current and emergent practices
- Project involves surveys and interviews with stakeholders, identification of common situations and practices, discussion/focus groups, drafting best practices standards, legal review to ensure compliance with law, adoption of the Code, and publicity and dissemination of it
Why aren’t images used in scholarly publishing fair uses?

- Image uses are “transformative”
- While images tend to be creative works, scholarly publications are not “picture books”
- Scholarly publications in art history provide context and commentary on works of art
- Scholarly publications may include a copy of the entire work or a detail
- Images in scholarly publications are not substitutes for the original works and should not negatively impact the market for that original work

Going Back to the VRA Guidelines

- If the use of the image in print is a fair use, it should also be a fair use for online publications
- But, publishing entities, including museum and university presses, never endorsed a broadly applied viewpoint that image uses in scholarly publications in art history were fair uses
- Why?
  - Relationships with artists and rights holders
  - Access to images
  - Revenue: “You pay me and I’ll pay you”
  - Control of uses

Going Forward

- Can we break with past practices and establish a legally-acceptable fair use position that uses of images in scholarly publishing – print and electronic – are fair uses?
  - Still have to consider other reasons for current business practices
  - Have to recognize that digital technologies do offer greater opportunities for images to be acquired and used for non-fair use purposes
  - Need to evaluate how such a change could impact Google uses of images????

Digital Technologies

- What is a book? That which we call a book by any other name would still convey knowledge.
  - So the object of such knowledge would, were it not a book call’d.
  - Retain those same dear characteristics which it sees
  - Without that title, Ruin’d, left by name;
  - And for that name, which is no part of thee,
  - Take all my knowledge.

I take thee at thy word:
Call me an online scholarly publication and I’ll be new published;
Henceforth I never will be confused.

What is a book? That which we call a book by any other name would still convey knowledge.

Derived from: Romeo and Juliet by William Shakespeare

What are we talking about?

- What are scholars’ expectations for online publications and how do they differ from print?
- Are these expectations reasonable? Sustainable?
  - Not everything is “evergreen”
- Do publishers agree that scholars’ expectations are reasonable?
- Given this confusion, how can we be specific about what rights we need?
- How would rights holders prove actual damages for infringements?

Limitations on Term

- Can we accept that online publications may have a limited “shelf-life”?
  - Justification for grant of limited term licenses for online uses
  - Where does it say that all online projects must be maintained forever and migrated for access via new technologies and formats?
  - Where do we put online publications for future access?
  - Who is responsible for maintaining the publication?
Permission Fees & Other Terms

- Does image size matter? Resolution?
- What about “read only,” “download,” “print on demand,” and “only excerpts accessible”?
  - Aggregation?
  - Subscriptions?
- If rights holders need revenue from image licenses, then how do we determine what is a reasonable license fee?

Art History Scholars

- Improve understanding of legal landscape
- Teach how to negotiate rights permissions for print and online uses
  - Create model licenses
  - Create Reference Guides and FAQs about scholarly publishing and rights needed
  - Best Practices Guidelines
- Work with museums and libraries to identify and publicize sources for free or low cost images

Museum Publishers

- Help authors understand what rights are needed and how to obtain them
- Suggest image options and licensing strategies to authors
- Assume image rights clearances
- Negotiate blanket license deals with rights holders

Librarians

- Collect and share rights metadata
- Create and maintain Intellectual Property Reference Guides
- Encourage library users to become more knowledgeable about rights issues
- Keep doing the wonderful things that librarians do!

Copyright Law Changes?

- Maria Pallante, U.S. Register of Copyrights, is pushing for significant copyright reform
- One suggestion: Require renewals for last 20 years of copyright term
- Create incentives for rights holders to keep contact information up to date
- Polarized constituencies make consensus difficult