Delivering Content to Users: Balancing rights of organizations, creators, rights holders, and users

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Overview

- Perspectives and Points of View
- Legal Issues
  - Copyright
  - Privacy and publicity rights
- Legal Risk Assessment
- User and Institutional Use Policies
- Practical Approaches
- Rights Metadata
Perspectives and Points of View

• Institutions
  – Utopia: Share without conditions and without liability
  – Reality: Share with conditions and with some liability
    • Some conditions are imposed by ourselves and some are imposed by external factors such as law, contracts, technology

• Creators/Rights Holders
  – Want recognition, remuneration, and the right to approve access and any and all uses forever (with some variations)

• Users
  – Want digital access right here, right now, without conditions and without liability
Copyright Basics: A Quick Review

• National Treatment
  – Law of the country where the alleged infringement took place applies regardless of country of origin for the work or nationality of creator.
  – World Wide Web complicates application of the national treatment rule.
  – For practical purposes, apply U.S. law UNLESS the digital reproduction and distribution takes place outside the U.S. or the service focuses on non-U.S. distribution.
Copyright Basics: A Quick Review

• Berne Convention covers most countries
• Copyright Term: Life of the author + 70 years
• Copyright Exceptions:
  – Fair Use applies only in the U.S.; other countries have some similar exceptions with variations on coverage.
  – Library and Archives exception (§108) allows copies for users of primarily text works; musical works, pictorial, graphic or sculptural works, or motion pictures or other audiovisual works other than news are excluded unless “adjunct” to text work.
Copyright Basics: A Quick Review

• “Publication Status”
  – Impacts copyright analysis
    • Calculation of term; publication without compliance with formalities could lead to U.S. works entering the public domain.
  – Means distribution of copies offered to the public by sale or other transfer, or by rental, lease, or lending.
  – Restrictions on “offer to the public” may negate “publication.”
  – Public performance or public display by themselves do not constitute “publication.”
  – Copyright law recognizes creators’ right to make decision about publication; reproducing and distributing unpublished works carries greater legal risks than doing so with published materials.
Copyright Basics: A Quick Review

• **Bridgeman Art Library v. Corel** (1998 and 1999)
  – No copyright in a “slavish reproduction” of a two-dimensional, public domain work
  – U.S. court decision; most foreign jurisdictions, including the European countries, do not accept
  – Institutional position?

• **Orphan Works**
  – No law has been passed in U.S.
  – SAA recently released “Orphan Works: Statement of Best Practices”; see:
    http://www.archivists.org/standards/
Privacy and Publicity Rights

• Governed by state laws
• Privacy rights apply to living persons and only cover information that has been kept private
  – Previous public disclosures of private information negate claims of privacy violations
• In California and a number of other states, publicity rights apply to “public” people for up to 70 years after death
  – Post mortem rights
  – Apply primarily when use is commercial
Legal Risk Assessment

• Providing copies of copyright-protected works or works that include living people to users involves some legal uncertainty
• If you want or need 100% certainty that sharing digital surrogates of legally protected works will not violate anyone’s rights, then you need permission from all potential claimants
• Such certainty and obtaining permission for every use are NOT possible
  – Some legal risk will attach to institutional actions
User Policies

• Can institutions minimize potential legal liability for making available a digital surrogate of a work by imposing conditions on the user? The Web site?
  – Are notices of such conditions and limitations enough?
    • Is it necessary to have agreement to terms and conditions in writing? Click-through license?
    • Password protections?
    • Other technological considerations?
Technology Considerations

• Hi-res or low-res?
  – Quality of the digital surrogate
• Watermarks?
• Click-through licenses?
• Distribution format: PDF, streaming?
• Technological Protection Measures?
• Use of thumbnail-size images?
  – 80 to 192 pixels
Permission for Publication

• When providing a hi-res digital surrogate, can the institution rely on user representations that permission has been or will be obtained in order to minimize legal liability?
• Should it require something more?
  – Copy of the permission?
  – Name and contact information of granting entity?
  – What if user says the use is a fair use or the work is an orphan work?
• Can the institution automate the permissions’ process or does it need to mediate most requests?
  – Check acquisition agreements to see what rights the institution has
  – Conduct further rights research
Practical Approaches

• Follow the IP golden rule
• Contact living artists before publication even if just to notify them about fair uses of their works
• Include descriptive and rights metadata with the digital surrogate and try to connect digitally the metadata with the digital surrogate
  – One digital file or two?
  – Develop a rights metadata policy
Rights Metadata Dictionary

- Provide users with intellectual property information about a work including copyright, trademarks, and privacy and publicity rights
- Continuing confusion about terminology and definitions for fields and data values within a single institution
  - Dictionary will not tell the user whether the use is a fair use or requires permission, it should provide information for the user to make a reasoned determination of the copyright status of the work
More Practical Approaches

- The more famous and/or litigious, the more cautious
- Always document your actions in a contemporaneous writing, particularly if you are using an orphan work or making and distributing the digital surrogate of a copyright-protected work under a legal exception
  - Following a published institutional policy is fine
And, More Practical Approaches

• Publicize policies relating to use of digital surrogates and include them in notices to make them CLEAR to users

• Distribute digital surrogates of copyright-protected works in low resolutions
  — Providing hi-res (commercial quality) digital files carries greater risk of further copying and distribution of the work and thus, may require more review
Balance?????

• Law: Seems to favor rights holders over users
  – No Orphan Works legislation
  – No expansion of section 108 exceptions
  – Passage in 2008 of copyright enforcement law
Balance?????

• Creators and Rights holders: More opportunities to “police” users and more opportunities to “share” content
  – Rights societies seek take-downs and challenge fair uses
  – Creative Commons licenses and open access projects allow greater use of materials
  – Scholarly communications publishing/IAP
  – Digital cameras and scanners allowed in libraries
Balance?????

- Courts: Seem to be hitting correct balance among rights holders and users (in my opinion)
  - Kelly and Perfect 10 cases find that thumbnail-size images may qualify as fair uses
  - Bill Graham Archives challenge failed; print use was fair use
  - Wildflower Works holds that “site-specific” works do not qualify for VARA
  - Harry Potter lexicon is NOT fair use and court decides in favor of author, J.K. Rawlings
  - J.D. Salinger filed an infringement claim against an author for “60 Years Later: Coming Through the Rye” and the court issued an injunction prohibiting publication in the U.S.; ACRL joins amicus brief because decision implicates free speech rights of authors
Balance???

• Institutions: Conflicted and Changing
  – No unified support for Bridgeman
  – Increasingly justifying use of low-res images as fair use
  – Continue to require permission and charge users for hi-res
  – Web and New Media Strategy, Smithsonian Institution, Version 1.0, 7/30/2009
Balance?????

• Google Book Settlement
  – If approved by the court, it will change the balance
  – We just don’t know how the changes will manifest themselves, how quickly they will happen, and in whose favor (besides Google’s) the changes will impact?