

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 - Copyright law recognizes creators’ right to make decision about publication; reproducing and distributing unpublished works carries greater legal risks than doing so with published materials .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
- “Developing a Rights Metadata Dictionary for Digital Surrogates,” *Journal of Library Metadata*, 9:15-35, 2009

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?