The Carrot vs. The Stick: can copyright enhance access to cultural heritage resources in the networked environment?

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Abstract

In using new media as a means for providing access to cultural heritage collections, it is inevitable that museums, as content providers and facilitators, face the copyright challenge. This is especially so, since copyright, is not apparent in the Internet environment. Copyright can act as a barrier, limiting electronic access to museum content due to conditions placed on the use of certain museum intellectual property. Copyright can, however, act as an enhancement, so that museum intellectual property, if properly cleared, can pave the way to electronic access for the largest possible audience. Two legal issues are paramount for museums to take advantage of copyright to enhance access to museum collections 1. Copyright on Databases: Museums accumulate knowledge and information in databases. Such databases may also include images. By providing the public access to these databases, museums increase public access to their collections. What is the copyright status on these databases and their underlying data? Does it enhance or preclude access? A general comparative presentation will be made looking at the development of the law in North America and in Europe; particularly the EC Database Directive as it compares to NAFTA provisions, using museum examples to place theory into practice. The presentation will also include issues affecting natural sciences museums. 2. The Status of Copyright on Images and Photographs: As part of the above issue, the decision in Bridgeman v Corel has alerted us to a weakness in copyright protection for museum intellectual property. The decision will be summarised and discussed in terms of its impact on museum databases that include images i.e. what impact it may have on the copyright protection of the photograph and digitized image and what impact may it have on the copyrightability of the database housing the images.

Introduction

The purpose of this paper is to illustrate how copyright, if used effectively, managed well and respected in business arrangements encourages and enhances access to copyrighted materials. With the advent of new technologies and the emergence of a knowledge based society, new ways of thinking are required in order to ensure that the internet remains a "place" where information can flow with few if any restrictions.

This paper will examine the modern museum in the context of the emerging knowledge based society and analyze two types of museum intellectual property, databases and photographs to determine whether copyright protection precludes or enhances access to them. Finally, the paper will briefly touch on new management models now emerging that are able to meet the needs of the users of copyrighted materials and the authors of copyright materials while still meeting key financial objectives of the organizations that host or provide content.

Before embarking on this discussion, an overview of the development of regional, national and international copyright law is necessary in order to place the discussion in context.

History and development of copyright

The origins of copyright law are founded in 15th and 16th century Europe, where publishers/printers of books were granted exclusive rights for certain manuscripts. The author did not figure prominently at that time. It is surmised by Ricketson (1987), that during these early years, publishers/printers were producing copies of classic texts or that authors wrote for aristocratic patrons and therefore were not paid based on the publication and distribution of their works.

Social and cultural changes took place over the next several centuries that changed significantly the importance of the author. The United Kingdom was the first country to recognize authors' rights with the *Act of Anne* in 1709 in response to the increasing publication of "common works" and exclusive author rights evolved through the enactment of different statutes. However, authors' rights

remained based in economics, ensuring that authors could write and publish their works for a living.

By contrast, in the United States, copyright laws evolved historically as a means of protecting the ability to disseminate works, i.e. as a means of preventing censorship. As a colony of Britain, the United States sought sanctuary from the strict censorship laws that prevented the publication and distribution of certain religious and political texts. (Zorich 1999). By the time UK censorship laws were relaxed and author's rights were adopted, copyright was perceived as significantly important enough to be included in the American Constitution. Article 1, Section 8, Clause 8 provides that copyright law must promote the sciences and useful arts by securing to the author of a work an exclusive right for a fixed amount of time.

As a result, in part, of such historic developments, American copyright law is based on the "social contract" theory where an author is given exclusive rights to their works for a fixed period of time in return for providing society with a "useful art". The social contract theory further provides that the public interest benefits from the production of the useful art and therefore, it is justifiable to reward the author with a limited exclusivity in order to encourage further creation. (Howell, 1998).

The French revolution in 1793 was the turning point for continental Europe where its revolutionary laws recognized the exclusive performing and reproduction rights of authors, dramatists, composers and artists. (Ricketson, 1987). As a result, these new found rights were spread throughout continental Europe.

The Canadian approach to copyright differs from the American and European approaches due, in part, yet again to historical development. Canada adopted the United Kingdom Copyright Act of 1911 in 1924. Although Canada's constitution references copyright, it does so only to confirm that the Federal government retains jurisdiction over it. Notwithstanding the adoption of a United Kingdom statute, Canada's approach to copyright law differs because of the influence of civil law. Quebec's laws are based on the civil code and Federal law must take into account both the common and civil law approaches. In other words, Canada takes a hybrid approach to copyright law. As stated earlier by this author, (Pantalony, 1999) Canada's approach is based on a balancing of interests of all the parties while keeping the public interest in mind.

Therefore, it is not surprising that copyright law differs in continental Europe from the law in the United Kingdom, Canada or the United States. During the French Revolution, authors' rights were addressed in the same breath as basic human rights. Civil law commonly recognizes authors' rights as fundamental, whereas in common law countries, such as the United Kingdom, Canada and the United States, copyright comprises a bundle of economic rights.

The international perspective

Although copyright may have developed differently from country to country, the development of international copyright law has laid down certain tenets that are consistent despite border changes and historic development. In 1887, the Berne Convention, an international treaty embodying the basics of copyright protection, the rights of authors and existing bilateral treaties was negotiated and agreed to by a majority of European nations. The Berne Convention includes provisions for the types of works protected; duration of protection; types of rights recognized; formalities to obtain recognition of protection; and cross-border piracy provisions. (Ricketson, 1987). Canada became a member of the Berne Convention in 1928 and the United States in 1989. To date, 140 states are members of the Berne Convention.

Finally, despite all the differences in the development of copyright law, one issue is certain: in all copyright legal systems, it is to the benefit of the author and in the interest of the public to ensure that copyrighted works are disseminated as broadly as possible.

Legal systems that significantly preclude distribution and publication of copyrighted works run contrary to the very purpose for which they were intended.

The state of the world and placement of the modern museum in context

The most significant rupture in copyright development has come with the advent of new technologies. Reproduction, adaptation and communication/distribution techniques have changed dramatically and rapidly and such changes have placed extreme pressures on countries and world organizations to adapt and modify their laws. Consequently, institutions whose mandates include education and the dissemination of information have

also been grappling with the results of such changes.

A knowledge based society is demanding that people change their way of thinking about issues such as intellectual property. Furthermore, the global nature of current dissemination/distribution technologies forces us to acknowledge the laws of other jurisdictions. The internet and e-commerce, depending on certain circumstances, places museums in the position of educators and disseminators of information to all places and all people whom are "hooked up to the net".

Traditionally, museums were viewed as "users of copyright material". Museums viewed copyright as a barrier to obtaining and disseminating information about collections and precluded the automatic right for a museum to create images of their collections. Moreover, museums did not recognize the intangible value of their collections and the information they housed about them. In a knowledge based society, intellectual property is the "value added to the knowledge traded" and visual communication has become paramount. Museum research and knowledge and museum images have taken on a separate value from that of the collection.

In order to carry out their educational missions, museums also hold a responsibility to ensure that their collections and the information surrounding them are used in a credible way. In countries with moral rights provisions in their copyright law, such as Canada, the right of association is a key component of rights associated with copyright. The right to associate or not ensures that the integrity of the work is not diluted or that the work is not misrepresented.

Museums also hold a fiduciary role. Publicly funded museums hold collections for the benefit of the general public. Whether privately funded or not, all museums hold fiduciary obligations towards artists, in certain cases, the descendents of artists and donors of the work in question. Therefore, unlike other types of educational institutions, museums are placed in a delicate position of balancing the interests of all the parties involved: the public, the donors, the artist and their heirs, while at the same time trying to meet their educational missions.

Finally, what about the self-interest of the museum?

Herein lies the dilemma. While museums continue to advocate their traditional position as educational institutions, as users and disseminators of copyrighted material, museums are also becoming much more aware of their own position as holders of intellectual property. Their fiduciary obligations towards all the above mentioned parties would surely demand that a museum to take care of its assets. Such care may include a return on investment. Given that museum intellectual property is now considered an asset, how does one reconcile such competing demands?

As it has been stated already by Keshet (Keshet 1997)

> Indeed, to the outside world, the idea of a museum operating on a business basis (including the administration of "bothersome" copyright transactions) has often elicited strong reactions. In truth, we are very much a business, as I believe many museums are, or must soon become in order to survive. And, if we do business, for the sake of our public, we must do it well."

Two types of museum intellectual property provide the most complex legal issues:

Copyright on databases

For quite some time, industrialized nations have grappled with this issue. The World Intellectual Property Organization tried to introduce provisions in international treaties addressing digital compilations of factual and/or non-factual information. Museums are increasingly participating in the compilation of digital collections that are made available through the Internet, or are placing their own digital compilations on their respective web sites. In either case, museums are in these ways allowing public or restricted access to conservation and curatorial research.

Since the 1991 American court decision in *Feist Publications Inc.* v. *Rural Telephone Services Co.* and the 1998 Canadian court decision in *Tele-Direct Publications Inc. v. American Business Information Inc.*, North America has denied copyright protection to compilations of factual information, particularly in the form of databases. In both cases the courts determined that compilations of names, addresses and telephone numbers, e.g. the White Pages, lacked sufficient originality in content to be copyrightable. In both cases the courts determined that in order for a work to meet the standards for originality the work must be an intellectual creation. Since compilations of factual material do not require creative input, just labor, judgement and skill (such components are known as "sweat of the

brow" test), they are not intellectual creations and are, therefore, not protected by copyright.

As a final note, the European Union recently passed a directive providing for a new type of intellectual property protection for factual databases. European countries have been busy over the last two years implementing the Directive into domestic law. The duration of protection is less than traditional copyright protection, (only 15 years from the year of its completion) and the extent of protection is less, giving the maker of the database exclusive rights over the re-utilization and extraction of data from the database. Finally, the European Union Directive states that only countries that provide similar protection for databases will enjoy protection of their databases in the European Union. (Rees, 1998)

As for the United States, two Bills were steaming their way through Congress at the time this paper was drafted. The Collections of Information Antipiracy Act (H.R. 354), (the Coble Bill) prohibits anyone from making available or extracting all or a substantial part of a collection of information that was gathered as a result of financial investment so as to cause harm to the maker's market share. The Consumer and Investor Access to Information Act (H.R. 1858) prohibits the sale of distribution of a database that is a duplicate of another or is sold or distributed in competition with another database. (Sandburg, 1999). The Coble Bill provides a greater degree of protection, if put another way, a far more restrictive approach. It remains to be seen which Bill will be passed by Congress and then signed into law. In Canada, the Federal government is tackling the issue in its overall attempt to deal with many intellectual property issues it faces as a result of the technology explosion.

What impact do these decisions have on the modern museum? In both Feist and Tele-Direct, it may have been the courts' underlying wish to ensure the free flow of information. These decisions, in the opinion of this author, have had the opposite effect.

Information laid out in a museum database concerning a collection that is not interpretative but just descriptive is most likely factual. Furthermore, according to the decision in *Bridgeman Art Library Ltd.* v. *Corel Corporation*, a recent decision of the Southern District of New York, photographic reproductions of public domain artworks are not copyrightable. This leaves only the interpretative information set down in the digital compilation, i.e. curatorial notes, information regarding an artwork's history, as copyright protected.

For natural science museums there is a greater impetus to ensure the dissemination of information. The academic community, particularly in the sciences, is extremely concerned that any protection of compilations of factual information will stymie the exchange of information to such an extent that research and development will be impeded (Maurer, 1999). However, when the Canadian Heritage Information Network held an informal consultation on the issue in 1997, professionals working in natural science museums were of the opinion that it was still important to control the way in which their information and research was going to be used.

At the Canadian Heritage Information Network, we rely more upon contract law than copyright to try and control the use of the information in our databases. In certain circumstances, we are using the site-license, via IP address, to permit restricted access. We are also in the process of developing Rules of Use for our web site that will require the visitor to acknowledge terms and conditions of use prior to accessing our "publicly accessible" databases.

The use of contract law complicates access to databases. It will be more difficult to establish a "special relationship" between the visitor of a web site and the owners of the web site and/or the databases. A "special relationship" is needed in contract law as proof of the existence of a bone fide contract. Case law has still not clarified the enforceability of click-on agreements and the minimum requirements needed to establish an on-line "special relationship". If copyright or any form of intellectual property protected factual databases, strict and sometimes onerous contractual provisions would not be as necessary.

Copyright on museum images

This issue very clearly illustrates the duality of the museum's position regarding copyright.

For quite some time, there have been rumblings in and out of the museum community that it's control of images of artworks in the public domain may not be as sound as previously thought. Copyright on the photograph of the artwork was seen as a means of justifying the payment of fees for photographic services, whether for cost-recovery purposes or not. As stated previously by Walsh (1997), copyright also provided museums a way of "acting as aesthetic guardians for what they consider cultural artifacts...usually seek[ing] to control the way the works in their collection are published.". Museums generally place limitations on what can

be done with the image, whether it can be manipulated and with what it can be associated.A recent decision of the Southern District of New York, *Bridgeman Art Library Ltd.* v. *Corel Corporation,* questioned museum practices and their claim to copyright on photographs of public domain artworks. Corel Corporation, a Canadian company, developed and distributed a CD-ROM containing about 700 digital reproductions of European masters including a large number for which the Bridgeman Art Library, a British institution, claimed copyright. Bridgeman sued in New York for copyright infringement. Corel claimed that there was insufficient originality in the "slavish" copy of a public domain work thereby undermining Bridgeman's claim in copyright.

At trial, the Court determined that substantially exact photographic reproductions of two-dimensional public domain artworks are not copyrightable because they lack sufficient originality first under United Kingdom law and upon reconsideration under United States copyright law. The Court compared such photographs to photocopies. The Court applied the reasoning in the *Feist* decision, that judgement, skill and effort were not sufficient to prove originality. The Court further stated that in this instance the photograph lacked independent creation and did not hold a distinguishable variation from the pre-existing work to warrant copyright protection. (AVISO, 1999).

Therefore, in order for American museums to continue to maintain their control over the use of their photographs of public domain artworks, they will have to rely on contract law, i.e. the provisions of a licensing agreement and not just statutory law, such as copyright. In the internet environment, the application of contract law is in its infancy and is particularly cumbersome. While the judge in the Bridgeman case sought to maintain the free-flow and dissemination of public domain artworks, the result may be just the opposite. Museums may be more reticent to place images on the internet, knowing that little protection will be afforded to their "intellectual property" unless on-line contracts between the museum and its virtual visitor are established. By maintaining a modicum of copyright protection on these images, the court would have provided museums with the comfort zone they require to continue disseminating their images using new technologies, knowing that statute based law provided a greater measure of protection.

Is this good law?

It remains debatable whether the Bridgeman decision is good law. Copyright lawyers both in the United States and abroad question the court's analogy between photographing a public domain two-dimensional artwork and photocopying it.

Whether a photographic reproduction of a public domain painting should be treated differently is debatable and can only be determined after a careful examination of the nature of creativity in photography. Without such an analysis, it cannot blithely be assumed that Feist's "sweat-of-the-brow" approach to alphabetic telephone White Pages can easily be extended to photography or other more creative arts" (Bernstein, 1999).

It is interesting to note that the same debate about the copyrightability of a photograph raged over 110 years ago when the Berne Convention was being negotiated. During a round of negotiations of the Berne Convention, Germany opposed full copyright protection for photographs because,

> "With photographic works, the skill required to produce the final picture may only be the simple manual operation of operating a shutter or pushing a button. On the other hand, there may be considerable elements of skill involved in relation to such matters as choice and arrangement of subject, lighting, perspective and so on." (Ricketson, 1987).

As an interim measure, member countries decided that the only photographs to receive copyright protection were those works which were authorized photographs of "protected works of art", such as photographs of paintings, drawings or sculpture. The reasoning was quite simple: a photograph would therefore classify as a derivative work and consequently any unauthorized photographs would become evidence of copyright infringement of the original work of art.

In 1896 during another round of negotiations, all member countries recognized that the above compromise was unsatisfactory. Further interim measures were introduced and the commission expressed the hope that all member countries would extend copyright protection to photographs. By 1908, the Berne Convention was amended so that all countries that were members were obliged to protect photographs in some fashion.

It was not until 1948 that the issue was revisited in full. An amendment was proposed to the Convention that photographic works or works realized by analogous process to photography which constitute intellectual creations receive copyright protection. The Sub-Committee, the final determinators

of amendments to the Convention found the qualifying statement " which constitute intellectual creations" inexact and that it was anomalous to apply to one particular category of work a criterion which applied to all productions dealt with by the Convention. (Ricketson, 1987). The entire qualifier was therefore dropped and photographs now enjoy full copyright protection under the Berne Convention regardless of artistic quality, or whether the subject matter that is being photographed is protected by copyright.

The Bridgeman case re-opened a tiresome and old debate. Given that, since 1911, the United Kingdom extended copyright protection to all photographs regardless of subject matter or artistic quality, the Court's decision in the Bridgeman case under United Kingdom laws is at best suspect. If the Bridgeman case represents precedent to be followed in American law regarding photographs of public domain artworks, then one can only conclude that the state of copyright law respecting photographs in the United States runs contrary to the Berne Convention.

What do we do now? Start thinking "outside the box"

The answer may lie in a shift of basic assumptions about copyright, and the management model used to control museum intellectual property. New management models are emerging slowly but surely that ensure, and even guarantee, public uninhibited access to copyrighted works. In order for these models to work, however, we must assume that these works are protected by copyright or hold a value added for which compensation of the copyright holder is necessary. The second assumption, proven by a company called IdeaMarket that went bankrupt trying to license access to all types of content, is that "people don't want to pay for content" (Kornblum, 1999).

The below paragraphs describe three models. In the first, a distributor of copyrighted works is able to leverage its collection of licensed works to sell key advertising space on the internet. The second example is more traditional, where a university library is able to leverage the intellectual property, i.e. the value added in its collection as a whole, to gain financial investment for its project. The third describes an information partnership where the intellectual property provided by both partners allows each uninhibited access to copyrighted materials. In all three models, the copyright holder is compensated and the end-users gain free uninhibited access to copyrighted works. This author is not advocating that the museum community adopts any of these models. However, they provide interesting points of departure for further dialogue on this issue.

MP3.com

In the music industry, MP3.com has provided a very interesting new management model. MP3 technology is technology in a file format that stores audio files on a computer so that the file size is comparatively small, but the quality is almost perfect.

MP3.com distributes to the public free high quality music and audio books that can be downloaded off its web site. MP3.com licenses the right to have web site visitors download music for free from the copyright holders. MP3.com is able to generate revenue because has developed a very sophisticated way of selling advertising space for key niche markets.

MP3.com allows any member of the public to download music and audiotapes for their own personal use. It appears that the only use unavailable to the end-user is the right to redistribute the music for commercial purposes. Finally, in order to gain a measure of control and exclusivity over the use of the downloaded audio files, MP3.com developed new technology that is required to play such audio files – the MP3 Player and you are required to purchase the MP3 Player from MP3.com.

In this model, the copyright holder is compensated; the owner of the web site - i.e. the distributor, generates profit through advertising sales and the public accesses music and audiotapes for free.

California Digital Library

In the academic world, the California Digital Library is also built upon the principle that the end-user should not have to pay to access its collections on-line. This model also provides for the compensation of the copyright holder. The mission of the Library is to "advance scholarship and science, foster excellence in teaching and learning, and promote service to the public through: developing, preserving and providing access to shared collections; and applying appropriate digital technologies to influence support innovations in scholarly communication." (California Digital Library, 1999).

In this case, the Libraryís goal is to provide uninhibited access by University of California delegated users to its collections on-line. The public also gains access to a skinny version of their holdings. It is able to do so by imposing business considerations

upon its parent institution the university - that encourages financial stability. The business considerations require, for example, that the terms of any business relationship relevant to the project must be financially sustainable and that they meet the needs of the Library's relevant users. Finally, the university, on behalf of the Library, must work with publishers to explore new and innovative business relationships that add value on issues such as pricing.

The Library also imposes guidelines for the licensing of digital content from the copyright holders that must ensure public access. The guidelines for licensing digital content state that: the license agreement must recognize and not restrict the rights of the university's users as permitted under copyright law. The Guidelines also provide that the university must also ensure that the license provides for printing, downloading and copying information so that its relevant end-user's needs academics, researchers and students are provided uninhibited access.

Finally, as a measure of control over the use of the copyrighted material, the university, acting on behalf of the Library, must be willing to undertake reasonable efforts to enforce access terms to a licensed resource. (California Digital Library, 1999).

The National Atlas/Canadian Community Atlas Project

In this project, students across Canada logging onto SchoolNet, an Industry Canada web site, are able to download portions of maps produced by Natural Resources Canada. (In Canada, the Federal government holds copyright on its own works and such copyrighted materials are referenced as Crown intellectual property). In return, students are encouraged to post their own research, data, maps, and photographs. The content is then made available to the general public on the SchoolNet web site free of charge.

This interactive project results from a partnership between Federal government organizations, and national teachers' organizations. Start-up funding and the infrastructure to support the project, such as the required databases etc., is supplied by the Federal government with ongoing support from teachers, schools with access to computers and modems and students. (House of Commons Canada, June 1999).

While this project is in its infancy, and works with K-12 content, it illustrates how information in a knowledge based society holds a value added so that it can be bartered between partnered institutions without the necessity of either partner and in this case, the end-user paying for access to copyrighted materials. The Copyright holder, in this case the Crown, benefits from the intellectual property provided by the students and researchers using the site.

Some Last Words of Caution

As new management models emerge, cost benefit analyses must be undertaken to ensure that new projects based on such models are financially sustainable. In the case of MP3.com the business model is compelling. However, in the museum community, revenue generation from aggressive advertising provided on-line or off-line has always been a delicate issue. In the case of the California Digital Library and the National Atlas project, the overall start-up costs have been considerable so that institutions willing to take on this model will require significant capital investment. Finally, museums will have to address the issue of control over the use of its intellectual property due to their fiduciary obligations, as discussed previously.

No matter what the constraints, the fact that innovators are willing to think outside traditional management models is enlightening, exciting and provides "food for thought" for the museum community.

Is copyright a carrot or a stick? In traditional ways, copyright can be perceived as limiting access. However, new technologies, and the emergence of a new knowledge based society has turned traditional thinking on its end. Copyright, if managed effectively and respected, greatly enhances access to content. Indeed, as discussed in this paper, by denying copyright protection to key types of intellectual property, access to copyrighted materials becomes cumbersome and ineffective.

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