

Visual Materials Session Review 2007

Session #: 107

Session title: Archival Extortion?

Number of VM Reporters contributing comments: 2

Reporter 1's VM experience level:

Archives Profession: 2-5 years

VM Specialization: Generalist

Reporters 2's VM experience level:

Archives Profession: 10+ years

VM Specialization: Major VM focus

Speakers:

Speakers: Mark Greene, Chair (University of Wyoming, American Heritage Center)

Susan Maxwell Bielstein (University of Chicago Press)

Cathy Henderson (Harry Ransom Center, University of Texas)

Robert Spoo (Howard, Rice, Nemerovski, Canady, Falk & Rabkin)

Description from program:

When and how should the physical or intellectual property owner of an unpublished work exert control over subsequent uses of that work? Should the rules change when a work is in the public domain? What is appropriate, and what is simply extortion? A user of archives and museums, an archivist, and a lawyer present three different perspectives on the limits of physical and copyright ownership.

Summary of session:

Panel format, 3 speakers, Q&A after speakers, no AV, handout only from Cathy Henderson which was a press release about a database created by HRC to help research firms out of business (FOB) copyright holders. See: <<http://www.fob-file.com>> FOB is a companion project to the WATCH (writers, artists and their copyright holders) files located at: <http://www.watch-file.com> that Cathy was a co-creator.

Spoo, a literature professor turned intellectual property lawyer connected with Stanford Center for Internet and Society spoke first and largely recounted his experience with the James Joyce estate based on his recent (and still open) case in which he is representing Stanford English professor Carol Shloss. This case was apparently profiled in the "New Yorker" magazine. His main points were that he sees a problem with holders of intellectual property (literary estates) creating a chilling effect on scholars and publishers pursuing permissions requests for publishing projects (in the Joyce case it was largely material in the public domain being denied for publication by Shloss). He commented on the ill-fitting machinery of copyright to address privacy concerns and the unfortunate situation that archives are in providing access to these freely available materials that are not always fully usable in scholarship. The case has not been fully resolved but Shloss has gotten more that she asked for in her lawsuit brought against the Joyce estate. See www.lucia-the-authors-cut.info for the details regarding Prof. Shloss' settlement details.

Bielstein spoke next from the perspective of a user/publisher of visual art material in museums. She is from the Univ. of Chicago Press and has a book out entitled: "Permissions, A Survival Guide: A Blunt Talk about Art as Intellectual Property".

Her main points were that slavish copying of 2-dimensional material in the public domain (e.g. scanning the Mona Lisa) does not warrant complex fee structures and use restrictions (above and beyond copyright) by the institution providing the image. She asked stewards of these materials to look at their permissions policies and processes with an eye for weeding out restrictions of conditions of use for materials that were in the public domain. She made the point that it is fine to increase fees- just don't lock down the use for public domain material. She also mentioned the issue of clarifying the difference between contract law and copyright law in the context of institutions creating permissions/licensing documents and how carefully researchers/publishers should read and negotiate terms of these agreements for materials that are in the public domain.

Cathy Henderson from HRC (exhibitions focus) represented the library/archives perspective and referred several time during her talk to her article in the journal "RBM" "Licensing the Use of Special Collections Material". Her key points were that it was ok for libraries to charge fees but that it was key to negotiate or be flexible with the process. She made it clear that the fees should be for services- value added services such as preservation/cataloging etc. not copyright fees especially when there is no copyright held by the library. She mentioned that clarification is needed between physical and intellectual ownership and that enforcement of permissions is sometimes problematic.

Session strengths:

Multiple perspectives helpful from the 3 panelists. Concrete cases from several panelists were not only interesting but helped illustrate some of the complexities of copyright law directly related to archival/memory institutions. Additional resources were provided by each of the panelists to follow-up on their work/writing in the arena of permissions.

Very knowledgeable and engaging speakers bringing a variety of perspectives to the topic. Thought-provoking and entertaining examples often given.

How effectively did the session address the topic as proposed in the program?

I thought the session participants did a fair job of addressing the topic of archival extortion. I would have liked some concrete examples in the form of handouts of sample agreements that represented both good and bad uses of contract/copyright law. A more practical exploration of the topic of permissions/licensing in archives is needed with a more in depth discussion of contract law as applied to permissions forms in archives (per haps a good future workshop).

Copyright dominated the discussion far more than the program description had implied. More discussion of controls asserted by owners of physical objects, not intellectual content, would have been more useful in my opinion, and was what I expected. I hoped for more discussion of the practice (and ethics) of binding users via contracts (licensing agreements) for material owned by institutions, even when in the public domain. This topic was broached by Peter Hirtle in his SAA presidential address and later American Archivist article, but has had little response or development in recent years.

Ms. Bielstein often framed her comments in the context of institutions attempting to assert copyright over copy images (to control further reproduction using copyright law), but I think museums and stock houses attempt to do this more than libraries and archives. More focus on contracts, less on copyright, would have better served to answer the questions proposed in the session description: "When and how should the physical or intellectual property owner of an unpublished work exert control over subsequent uses of that work? Should the rules change when a work is in the public domain?"

Toward what experience-level was session geared?

Managers/coordinators of permissions/licensing operations- not newbies.

What topics (broached or implied) merit further development in future sessions or articles?

As mentioned in “effectively” section above, further discussion about creating forms with regard to fair-use, contract law, physical property owners/intellectual property issues would be of benefit. I think a session including a representative from a “literary” estate would round out the discussion nicely. I think many institutions could benefit on a session or workshop on rights holder relations/donor relations to help clarify some of these issues surrounding permissions agreements and creating transparency here. It would also be helpful to discuss the copyrighting of specifically visual materials- is this process different than text? The issue was brought up that visual material copyright is fairly new territory (ca. 1950) what are the issues here- would like to know more- maybe with regard to privacy issues (e.g. photos).

Licensing of public domain works & contractual control of future use of reproductions, regardless of who owns intellectual property. The ethics and responsibilities of controlling, dictating, or profiting from any uses of our collections materials are another possible outgrowth of this discussion. Is it only the monetary side of exerting control over public domain works that some question? Or any attempts at limits on use?