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HEADLINE: REPORT: The Public Domain: Implied, Inferred and In Fact

Wednesday, April 5, 2000
 Visual Resources Association Conference
 San Francisco, CA

- **Overview of Public Domain Theory and Practice;** [Howard Besser](#), [Kathleen Butler](#)
- **Rights Management and the Public Domain;** [Robert Baron](#), [Dave Green](#), [Dakin Hart](#)
- [Questions and Discussion](#)

INTRODUCTION

The local organizers, Martha Winnacker, from the University of California and Maryly Snow, Architecture Slide Librarian, University of California, Berkeley, and representing the Visual Resources Association, welcomed the audience of more than 200. This was the second session in this series that focused on the Public Domain and reference was made to the earlier meeting at the Chicago Historical Society.

David Green also welcomed the participants and set the meeting in the context of the whole Town Meeting series. Martha Winnacker, acting as chair of the meeting, then introduced the first two speakers.

OVERVIEW OF PUBLIC DOMAIN THEORY AND PRACTICE

Howard Besser, "The Disappearing Public Domain: What is it, What's happening to it, and Why should we care?"

(See [PowerPoint](#) slides for this presentation)

Howard Besser reviewed what he saw as the demise of public space in public life - from the Greek agora, the medieval commons and the public spaces important for early 20th-century political organizers, to the rise of privately controlled pseudo public spaces (the shopping mall), the disappearing public bathroom and the proliferation of streetcams or surveillance cameras today. The recent history of broadcasting also demonstrates a similar demise of public space – from the 1924 Telecommunications Act that set aside the airwaves as a public code to the recent squabbling among factions to defeat the FCC’s proposal to establish local community radio using low-powered radio signals (see the March 31, 2000 New York Times editorial, “Static Over Low-Powered Radio.”).

What is it?

Besser sees the erosion of the public domain of intellectual property as one subset of the demise of public space. Simply described as “those resources freely available for all members of society to do with as they like - with no permissions or fees and no tracking of what is read or used,” the public domain has had several legal definitions and Besser outlined them:

- things in the public domain can be appropriated by anyone without liability for infringement (Black's Law Dictionary, 1996);
- the law's primary safeguard of the raw material that makes authorship possible (Litman, 1989);
- a commons that includes those aspects of copyrighted works which copyright does not protect (Litman, 1990);
- the ultimate source of all new works (because nothing is ever wholly new in and of itself) (Karjala, 1989);
- the converse of property rights in information where the government prohibits certain uses or communications of information to all people but the owner; the public domain is the range of uses privileged to all (Benkler, 1999)

Why does it matter?

He suggested the public domain was important for four reasons:

1. **Philosophical:** that it is part of our common heritage and that there should be free and unfettered access to classical work; Progress: that new knowledge incorporates old so it's important to have the access to the old;
2. **Creativity:** that derivative works depend on pre-existing works;
3. **Free Expression:** free access is necessary for active social commentary and free expression. Artistically it is important to be able to challenge cultural hegemony.

What is threatening it?

1. Term extension (Besser showed a list of works that should have entered the public domain but didn't and another of works that should have but won't because of H.R. 2589, the Sonny Bono Copyright Term Extension Act);
2. Returning out-of-copyright works to copyright (for example, the restoration by the Uruguay Round Agreements Act (URAA) of copyright protection of foreign works that had fallen out of copyright for various reasons);
3. Licensing and other forms of contract law that are now being extended to cover works normally in the public domain, giving them a pseudo-copyright protection. The biggest offender here is H.R. 354- the Collections of Information Antipiracy Act (introduced by Rep. Coble in January 1999). For an analysis of this bill see <http://web.archive.org/web/20041023083835/http://www.databasedata.org/>.

These were all wholly economic moves and contract laws were beginning to preempt longstanding common-law or constitutional rights. Examples include:

- Attempts to end the “first sale” exemption and to control all use; (see [section 104](#) of the DMCA and attempts to keep 'first sale' alive)
- The extension of the newly proposed and rapidly adopted [Uniform Computer Information Transactions Act](#) (UCITA) giving priority to “shrink-wrap” (or click-wrap) licensing over copyright, eliminating negotiating power and ending fair use;

- Licensing replacing ownership (with invasions of personal privacy by owners to ensure licensing compliance).

What are the implications?

The closure of the public domain has a chilling effect on the production of derivative works: who can afford to perform and produce works for which permission has to be obtained? Postmodern culture in particular revels in the manipulation of earlier achievements. The diminishment of the public domain also diminishes exploration and experimentation and can dampen public discourse, satire and critique. One example proffered was Ariel Dorfman's "How to Read Donald Duck," banned from importation in 1975 because it violated Disney's copyright to the comic character. [How to Read Donald Duck: Imperialist Ideology in the Disney Comic. <http://web.archive.org/web/20041023083835/http://www.sp.uconn.edu/~epk93002/ComicsScholarship/Entries/dorfman.html>]

In sum, Besser sees the public domain as a critical public space containing the raw material for future cultural expression. He called for broad involvement in preventing some of the cited legislative developments from moving ahead.

Resources and Recent Coverage at <http://web.archive.org/web/20041023083835/http://www.gseis.ucla.edu/~howard/Copyright/publicdomain.html>

Kathleen Butler, "The Originality Requirement: Preventing the Copy Photography End-Run Around the Public Domain"

([Complete paper](#))

As Besser argued for the importance of stemming the demise of the public domain, Kathleen Butler discussed the methods some museums use to control the use of reproductions of public domain works in their collections.

Butler pointed out an essential difference in the use of literary and visual works in the public domain. In theory, once a work enters the public domain the public may freely reproduce, adapt, distribute, perform, and display it. But, because of the physical uniqueness of much visual work, museums and galleries, as "guardians and protectors of original visual work," can put constraints on public domain intellectual property. Museums can limit access to an image of a public domain work and have claimed copyright in their own reproductions of that work. By controlling access to the original artwork so that the public cannot make its own direct copies, and also asserting a copyright in the only usable photographic reproductions of a public-domain image, the museum manages to control the public's ability to exercise its rights in a public-domain work. Are they making an end-run around the public domain?

Following the lead of museums, digitizers like Corbis have applied for and been granted copyrights to their digital reproductions. But the question is whether photographic and digital reproductions are truly copyrightable? The issue revolves around whether photographic works are original enough to secure copyright protection that both the constitution and the copyright act limit to "original works of authorship."

Artistic originality and substantial variation

Copyright protection of art reproductions is known as "thin copyright" as it applies only to the elements of the reproduction that are not copied from the underlying work. Cases cited have

depended on two characteristics: one is the degree of distinguishable variation between the reproduction and the original work (see *Alfred Bell v. Catalda Fine Arts*, in which courts awarded copyright protection due to the substantial difference they found in the handling of Bell's lithographic copies of various public domain works). Courts therefore would need to see "substantial variation" in the artistic rendering of another work.

In *Bridgeman v. Corel*, where the Bridgeman Art Library sued Corel for allegedly infringing its copyrights in transparencies of public-domain artworks, Bridgeman defended the originality of its transparencies by arguing that its transformation of the paintings to the photographic medium "established sufficient variation from the underlying works to support originality." The courts disagreed, pointing out that any translation to a new medium would necessarily include trivial variations not worthy of copyright protection. The Bridgeman case then, in Butler's words, "reaffirms generally that translation to a new medium does not automatically establish originality and states specifically that the changes in a photographic reproduction that are inherent to the change of medium do not constitute originality."

True artistic skill

A second test can also apply, although it has proved very difficult to uphold. This is if a court finds that a copy of a work is original because of the reproducer's "own skill, labor, and judgment without directly copying or evasively imitating the work of another." Subsequent case law has refined the definition to require "true artistic skill" and not simply the use of "great effort and time."

As the point of making photographic reproductions of work is to make them as faithful as possible, museums and digitizers have little chance of arguing substantial variation and are more likely to argue that they deserve copyright protection because of their skill, labor, and judgment. However plaintiffs would rarely get that far. In *Bridgeman* the court wrote: "The point of the exercise was to reproduce the underlying works with absolute fidelity." This made them "slavish copies," undeserving of copyright.

Given the ease of the digital scanning process, digitizers will probably emphasize the technical expertise and creativity involved in making adjustments to pattern, brightness, contrast, and color after the scan is made. This, though, is a routinized process, and the technician's greatest contribution is time. But case law tells us that great effort and time are not enough; true artistic skill is required. A court would not likely find sufficient originality in digital image capture to support originality.

In sum, Butler said, "Under either test, photographic and digital reproductions are not original and therefore not copyrightable. When these copyrights fall, the quasi-copyrights in the public domain works they reproduce also fall, and the public domain is safeguarded."

RIGHTS MANAGEMENT AND THE PUBLIC DOMAIN

In the second part of the session we heard from several pioneer custodians of the public domain.

Robert Baron, "Making the Public Domain Public"

([Complete paper](#))

Introduction: the Academic Image Cooperative

Robert Baron delivered remarks taken from the second of a two-part paper, "Making the Public Domain Public," available on his website. The first part of the paper, "The Public Domain Perceived," deals with the theory of the public domain, while the second part, "The Public Domain Received," considers its practical use. Baron, at this time project manager for the Academic Image Cooperative, delivered the paper from the perspective of organizing a public domain collection. The Academic Image Cooperative (AIC), developed as a project of the Digital Library Federation (DLF), is now under consideration by the Mellon Foundation as a component of an ArtSTOR image delivery service. DLF and Mellon are currently "develop[ing] circumscribed, strategically identified image collections that respond to widespread teaching and other specialist scholarly needs. It is envisaged that these collections, including the one developed by the AIC, will be incorporated into the evolving ArtSTOR service." [[See DLF Website for further information.](#)]

Baron focused on the issues and practical difficulties of delivering public domain images, intent on dispelling any notion that "using the public domain and using donated rights amounts to a free ride to the land of universal image access."

He stressed that public domain materials were often very valuable in their own right and were in no way merely surrogates for commercial resources. Dover Publications was a good example of compiling and making available public domain material. Dover reserves its rights to the compilation and to the protection of its archive, but clearly announces that the "individual items in the book are copyright-free, and may be used ... without further payment, permission or acknowledgment. You purchase such rights when you buy the book."

In or Out?

Determining whether an item lies within the public domain can be quite problematic. What is the status of, for example, photographs of public domain works published by the Smithsonian Museums, documentary photographs of two-dimensional public domain art works, a print from a photographic negative in the public domain, a unique unpublished work, unpublished works created before copyright existed? There is no single registry and detailed legal analysis can be prohibitively expensive.

Baron pointed to Laura Gasaway's useful chart, "[When Works Pass Into the Public Domain](#)," and as Baron paraphrased it: "works published between 1923 and 1963 when published with copyright notice would have had a copyright period of 28 years, but, if renewed, the period would be extended by 47 years, which now is extended again by 20 years because of the Term Extension Act. If they were not so renewed they would lose copyright and would be in the public domain. However, if they were never published with notice, they'd be in the public domain from the moment they first appeared and couldn't be renewed or extended. The reality is even more complex, but this gives you an idea of how it goes." Actually determining the date of a photograph is often difficult: many works in photograph archives are undated, their dates are difficult to find or confirm, or their ownership and copyright registration status difficult to ascertain.

Baron cited the importance of community good will. Many images among the thousands collected since 1852 by the [Alinari](#) Brothers for their commercial image collection, used extensively in higher education, were now clearly in the public domain. However, any scholarly database, such as the AIC might not wish to challenge such a valuable resource as the Alinaris'.

So, any advice might be to be conservative, to conduct risk analysis and to always keep documentation of one's research. The policy issue, in creating a public domain database is in determining the level of acceptable risk. "If we [take] a work under copyright, even accidentally, will we ever be challenged for having done so? Will we gain a reputation for

sloppiness. Will anyone ever notice?" As Baron put it, "attempts to use the public domain can be riskier than contracting to use materials whose rights are clearly identified."

Access to Public Domain Works

Access is a separate issue: "Everything is owned by someone or some entity. Does one pay the library a fee to enable access or to license use of the work? Or does the library provide the resource gratis as part of its mission. Will library fees be prohibitive?" Solutions are comparatively easy if a single work is to be reproduced, especially if multiple sources are available. "Access to public domain works that exist in unique copies can be much more complex. Works may be in the public domain, but gaining access may be a consequence of negotiation." Then the problem of assembling multitudes of works from multiple sources, as in a collection such as the AIC can be remarkable.

Risk Analysis

Baron then turned to his experiences as project manager of AIC. As AIC's future was being re-assessed and as Baron's tenure was coming to an end, he made clear that his remarks were his own and should not be taken as an official statement about AIC and its future. The point was to focus on the practical problems of gathering and administering such a collection. A good database, Baron noted, has to be as well edited as a good scholarly paper; it was essential to have full documentation of sources. This is especially important when dealing with photo archives and early art historical printing, as the older data, if it exists at all, may no longer represent modern standards or opinions. Few can afford to research each accessioned image so for an operation like AIC the practical solution appeared to acknowledge that knowledge is mutable, to record what is available and to expect someone to notice that additional cataloging might be appropriate.

This approach is helped by the strong response from the community. Answering AIC's initial call for images, teachers, scholars and the public responded with 400,000 images, many of professional quality. The expectation was also that the community would volunteer its expertise: scholars could become specialist editors (this work counting as professional service).

Perhaps one of the most surprising issues in constructing a public domain database arises from the need to protect oneself from errors arising from using donated works, problems not so common when working with license agreements governing copyrighted works provided by institutions. How would a database protect itself from suits arising from the misuse of works that were incorrectly given: if the donors did not own the copyright of images donated or had no right to distribute them? The database could become its own 501(c)(3); it could insure itself against such risks; it could develop its own risk analysis policy when accepting donations. But here were some examples of how, as Baron put it, "The roads through the public domain are not as well marked as they are through the domain of copyright and private property transactions."

An Irresistible Model?

Finally, Baron noted that the AIC was built upon a revolutionary notion that art historian Gary Schwartz had articulated at the Toronto Copyright Town Meeting in 1998, some time before the AIC was formed: "By collecting faculty photography, by taking images from the public domain and by acquiring other free-to-use sources to be distributed to educators for free or for the cost of maintaining the service, financial pressure will be placed upon conventional for-profit image vendors who charge what the art historical community feels are exorbitant fees for image use and for publication rights."

Baron felt that the economic model behind the Academic Image Cooperative was so

persuasive, meeting so many crucial needs of education in an atmosphere of dwindling fair use, that ultimately, in one form or another, it could not fail.

Dave Green, "As if Public Domain Were Not Enough: The Challenge of Managing and Exploiting a Public Domain Collection"

[Corbis](#) has control over 65 million images, 2 million of which are available online in digital form. Dave Green, from the Corbis Legal Department, reasserted that when managing a collection of material that includes underlying subject matter in the public domain, we were talking both about legal constructs to enable access as well as the appropriate tools to exercise control over the use of one's images.

In the late-80's Corbis was conceived in part because of the proliferation of electronic publishing technologies that brought new communication tools to a mass audience, and, inspired, according to Green, by Bill Gates' vision of enabling private citizens and corporations to easily and affordably view and use images from around the globe. Green recalled his own experience with digital publishing software at the time and found himself with powerful digital tools but little "content". In 1989, the company began to license content from a variety of sources, including museums. Early on, Corbis had some difficulties negotiating with museums over the licensing of museums' images because of the uncertainty over issues such as rights and control. Now, the company clearly understands museums' issues as fellow image holders. The main concern of all image aggregators, he said, was that their investment would be de-valued, or even lost, so all want to protect themselves from asset loss, and from potential asset loss.

Having a collection of public domain images clearly doesn't mean that images can be free or free to use; there are a host of access and legal issues connected with the use of images. In terms of recouping costs, Green estimated that Corbis spent, on average, more than \$45 to process each of its digital images.

Green felt that industry had so far failed to offer a product/service that meets the needs of education. This was beginning to be a major market, especially with the rise of for-profit education. Corbis is working on a range of such products and services for higher education

Green stated that he saw the following as the chief legal concerns in using public domain material:

- the technology that comes with an image (it's just not the image);
- trademark issues: the content might itself have trademark and other rights;
- publicity rights that surpass the period of copyright;
- artistic and moral rights over the use of material copyright of the compilation of elements in the digital file (Green clearly believed that the selection and arrangement in the compilation, as well as the "artistry" involved in Corbis' image enhancement processes, met the originality requirements of copyright law.

Dakin Hart, "Pragmatic Idealism and Intellectual Property at the Fine Arts Museums of San Francisco"

Dakin Hart told of how he, an English teacher with an arts background, was hired in 1995 to critique the on-line production of the [Fine Arts Museums of San Francisco](#) (FAMSF)¹. At the time, he was inspired by Esther Dyson's now-landmark essay in the July 1995 issue of

Wired Magazine on [Intellectual Value](#). With its call for new business/operating models and new ways for compensating authors and artists, this piece, Hart felt, was not only a wake-up call to the software industry but also to the museum world. What were its implications for what a museum was and how it operated with its public in the 21st century?

Hart summarized what he thought were the key elements of Dyson's essay:

- that what can be copied will be copied
- that content visibility in the future will be key (how easy is it to find?)
- that performers, such as the Grateful Dead, made more money from performances and encouraged bootlegged recordings
- that intellectual property is like real estate in that you need to actively invest in (add value to) it
- that added services rather than content alone is key
- that content is an ad for other services
- that people will pay for a good source
- that although content is replicable, a unique understanding of it is worth something
- that one should manage one's business as if the content is free
- that people will pay for what is perceived as scarce.

Hart liked some of her predictions also; chiefly:

- that there will be a few leaders with free content;
- that companies will become more transparent;
- that more companies will increasingly become partners rather than competitors
- that people will pay to be insiders
- that assets will depreciate while processes appreciate

At FAMSF, Hart was asked to help re-write the museum's mission statement, stressing the need to be more like a library and less like a bank. There was a push not only to catalog all prints and drawings but also to connect the data with images. When the public saw the new database at work in the galleries, there was a great demand to make it available online. The mantra of the museums then became "access, access, access." Now named [The Thinker](#), the image database has over 75,000 zoomable images of the collection.

While there was immense support from the public, the museum waited to see whether any artists were angry to find their work online. Instead they heard from artists angry that their work was not online yet. Hart felt that museums would get the benefit of the doubt when trying to do the altruistic thing, in a way that Corbis would not. Concessions were made by the Picasso, Matisse and O'Keeffe Estates to enable works by those artists to be displayed.

Hart then spoke of the value of belonging to the [Art Museum Image Consortium](#) (AMICO). There was clearly value in creating a much larger library than any one museum could have. There was also the value of a consortium that is able to make broad licensing agreements, such as the recent one with the Artists Rights Society. [That agreement](#) was a big step in providing a mechanism for making contemporary art available without having to negotiate with each rights holder. Any artist represented by ARS can now be represented in AMICO. How an individual museum's interests relate to those of the consortium as a whole, Hart wouldn't venture to say, other than to say that in a time of such rapid change one should be open to a variety of new arrangements.

Note

1. The Fine Arts Museums of San Francisco (FAMSF) is San Francisco's largest public arts institution. Comprised of the M.H. de Young Memorial Museum and the California Palace of

the Legion of Honor, FAMSF is also the City's most successful public/private partnership. Although a designated City department, most of the Museum's operational funding and all funding for art acquisitions and exhibitions are raised privately.

Panel Reponses

Panel members were invited to make brief responses to other presentations, or simply some words in summation.

Hart said that FAMSF had solicited and received a legal opinion from its counsel, but generally had been driven by the firm belief that they were pursuing a moral course, though, in line with technological developments and with a belief that law would follow good practice.

Besser and Butler both wanted to add their take to the history of Corbis presented by Dave Green. Twelve years ago, Besser recalled, museums were asked to join an "Interactive Home" service giving exclusive distribution rights to an entire collection and many felt this to be an early attempt to "corner the market."

Besser said market forces were tending to make materials more available and we didn't need stronger copyright protection to make that happen. The clear precedent is the 1984 [Sony v. Universal Studios](#) case in which Universal sued Sony for intruding on its copyrights through the VCR. Although Universal lost the case, it's quite clear that the current market has made winners out of all the film studios. Besser asserted that the key to the future was in finding new business models (along the lines Esther Dyson had laid out) rather than stronger copyright laws that intruded on the commons. Baron commented that market forces may indeed increase accessibility to *some* materials but that there was a real fear of losing accessibility to things with no commercial interest or values.

Hart added that while Corbis had a 'cherrypicking' model, in which it collects only the most marketable materials, museums surely needed to operate with a different model.

Mr. Green came back to say that he had no big disagreement with what had been said. Corbis has had to utilize copyright laws because of the range of relationship with partners and suppliers, who have demanded that their material be protected.

The Corbis collection consisted mostly of editorial news images; Corbis currently had a comparatively small number of historic museum images. And at a cost of \$45/image to process they had to cherrypick. He agreed that it was vital for us to have a public space but other business models were important to support other kinds of activity: there should be room for all.

QUESTIONS & DISCUSSION

Louis Marchesano, a Getty Research Library curator, agreed with Dakin Hart's position but wanted to point out a situation at the Getty that had a collection of some 7,000 photographs documenting tapestries: half of them from a single French archive with images from the 1920s to the 1960s. In this case copyright law surely prohibited the online display at a high resolution of the other half by the Getty.

Moral Considerations

One questioner asked whether his institution could rightfully display Alinari images of objects in its collection on its webpage. Butler said it was key to know whether the underlying object was in the public domain. Also, Bridgeman was a local decision and had not reached the District or Supreme Court, so it was worth while protecting copyright. Besser recommended talking such a case over with Alinari. Using Alinari's images because you think you can, without making an effort to talk to them, falls into such a moral realm; one should at least talk and try to work things out.

A questioner asked to what extent institutions like FAMSF, could influence the law. Could we show Alinari images in low resolution? If we work through the moral questions, could we still pro-actively influence the law in education and research?

Bridgeman

Baron responded that if we assumed that the Bridgeman decision will live, then the entire web would be flooded with low-quality images which perhaps museums would want to replace with their own high-quality images.

Green asserted that the Bridgeman case was misleading. The facts of the case were bad and were mishandled and the result he felt had only a narrow holding. The case did give greater freedom to use public domain images in the US; but we still had to remember global copyright law. Baron added that Bridgeman is based on originality, which is only a test recognized in the US and UK.

Dave Green said that there was a clear danger when lawyers started talking about art and that the courts were quite clear that they didn't want to encroach on what type of art meets the threshold of originality. Courts and the public together have to draw the line between the utilitarian and the artistic. But the danger of Bridgeman is that the same type of artistry and selection do take place regardless of the subject.

Allan Burn from the Berkeley Public Library objected to this. Speaking as one involved in the transition from analog to digital photography, he testified that the digitization process rarely involved elements of craft.

Besser made the point that with Shakespeare editions it's the footnotes and apparatus that are copyrighted not the core text; so with an art work it is the apparatus, the added features and functionality. Green emphasized that Corbis spent a great deal on re-processing and preparing images for release: images couldn't go out in the raw state in which they were often received.

Elisa Lanzi needed clarification about whether Bridgeman would apply to reproductions of sculpture. Butler said that indeed there were more factors to consider in three-dimensional work and that Bridgeman was specifically about flat art-work.

Trudy Levy from the private sector asked what the difference was between protecting digital images as a product rather than a copyright? Green replied that in the case of Corbis that doesn't own most of its underlying content but licenses it from others, it maintains a copyright in the compilation contained in the digital product. In areas where there is an example of clear theft, Corbis would want as much protection as possible from charges of stealing the image. One can use property and contract law but they are weaker. The Corbis product is essentially a visual image and Corbis licenses that image to the public. Short of contract and property law, Corbis' primary device is copyright law.

In Defense of Museums

Ira Bartfield, from the National Gallery of Art, led a ringing defense of museums. He commented that the majority of people around the world will see art images only online and in books and museums of course had a crucial role to play - a role that was rapidly changing. He objected to the characterization of museums as engaged in a thoroughly cynical end-run around the public domain, gouging the poor graduate student. The mission of the National Gallery, for example, was to faithfully reproduce and disseminate work as broadly as possible. Most museums, he said, think of themselves as altruistic and stress their educational mission.

Bartfield joyfully accepted the National Gallery's responsibility, and that of the museum community as a whole, to get the images out to a broad audience in the best way possible. However, it is difficult to photograph works of art; there is real expense in using the best light and best film in constructing images for dissemination; for a variety of reasons it is important to keep the rights museums already have. Art history and art museums are surely organically connected; works at the National Gallery are being re-analyzed and curatorial perceptions and opinions are changing. The Gallery (at <http://www.nga.gov>) accepts its role as working in a dynamic world. It disseminates its holdings to a much broader public than it did just a few years ago; there is now a much broader range of images out in the world and his staff sees this in researchers being much more active in a much broader range of works. Who knows what the future will bring, but someone has got to try to get this thing done as well and faithfully as possible.

Kathleen Butler responded that of course we want the best possible images and that the museum is the guardian of the work; controlling the image was originally about safeguarding the image. However, in an image-hungry society there is potential profit in every image and that is where the questions begin and the reasons for such discussion as we were having. The Bridgeman case was important as it is the only case law we have because to date infringements were minor. Increasing the value of the work online will increase the concern over infringements.

To the question whether a commercial enterprise would have the same mandate to preserve the absolute integrity of an image the way that a scholarly enterprise would, Green answered that they wouldn't have the same mandate but that they would be prevented from materially altering images both on credibility grounds (with say the Bettmann Archive) and on moral rights grounds. Rephrasing the question, Baron offered two possible methodologies: one makes the scan as accurate as possible; the other looks at the result and makes it as "good" as it can. Green replied that Corbis staff would make a change to make a more accurate display but they have a clear charge not to "materially alter the fundamental image." It was noted that SKIRA photographed at high illumination to reveal the underlayers of some paintings.

Case Law

Christine Sundt made the comment that one of the weaknesses was that we had little (or no) caselaw; and that, especially in a field like education that changes a lot, it would seem important to find a way to protect the rights (or practices) we've had as academics and to get caselaw that can insure the ground. The issue was how we could orchestrate caselaw: testcases that we can call our own.

Besser agreed that caselaw was probably a better ground on which to hold the public good than the legislative arena. From his perspective, laws were made by lobbyists and the content industry and it might be through caselaw that we have a fighting chance to hold onto what we have.



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