

## Papers & Presentations by Christine L. Sundt

Digital Publishing:  
A Practical Guide to the Problem of  
Intellectual Property Rights  
in the Electronic Environment, for  
Artists, Museums, Authors, Publishers,  
Readers and Users

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### **Permission Denied... Questions Desperately Seeking Answers**

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The questions of **if** and **when** as well as **how** to seek permission to use someone else's creative work are not uncommon with most of us. [\[1\]](#) Whether a scholar, a curator, a teacher, a critic, a student, or an artist, we face the inevitable fact that permission is usually required if we want to incorporate someone else's protected creative expression into our own creative endeavor. This happens in preparing readings for our students, in putting up websites, in organizing exhibitions and writing catalogs, in completing job or course assignments, and certainly in preparing scholarly manuscripts for publication.

My paper today explores another **IF** -- what if we asked for permission to use something protected under copyright but our

request was denied? The negative response may have come from the author or artist, from heirs or assignees; it may have been in the form of prohibitively high permission fees or with conditions that could not or should not be met; it may have been the last hope before reaching what seems to be the absolute dead end.

How do we use the forbidden fruit without also losing Paradise in the process? What are the risks we face – where is the radar? – and how much can be gleaned from the law that governs and protects intellectual property? Are there other factors that might reverse the circumstances to our favor? These are but a few of the questions that I will raise today -- questions for which easy answers are more likely than not unavailable. Perhaps those who follow me in this session will be able to give us better direction for navigating through this very murky and often threatening region of the law that today seems to govern everything around us.

I will start with a premise that should be familiar if not obvious to all of us: Permission to quote or to reuse protected intellectual property is essentially the prerogative of the creator of the work who has been granted this privilege through legislation. In the US this right is granted to authors and inventors in Title 17, the Copyright Law, to exercise control over their creative expression for a 'limited time'. [\[2\]](#) Today this 'limited time' includes several generations of progeny although under earlier legislation, the period for protection had been short, as short as 14 years back in the good old days compared to today's term for individuals of life plus 70 years. [\[3\]](#)

The law also allows for certain exemptions or limitation to the rights holder's privileges under the law by way of the doctrine of fair use and the fact that after the time limit for protection expires, the work becomes available to all as the public domain.

[4] The public domain is also the repository for all works ineligible for protection because they do not meet the criteria mandated under the law. [5] In the most simplistic terms, these exemptions are factors that bring balance between the rights of the creator or owner (including heirs or assignees) and the needs of the user. This is the balance that the law purports to offer – ideally, that is.

For uses that will be realized in or as a publication, incorporating someone else's copyrighted property beyond what is permitted under fair use or the tradition of scholarly quotation often depends on receiving an affirmative response – permission to publish. [6] Publishers routinely require that authors obtain permissions and warranties for all protected work included in the submission before the new work can be published.

Exceptions to this rule are rare and indeed when publication includes the use of images, the author's workload for obtaining rights escalates as the wallet deflates. To those of us engaged in the practice and study of art, fair use in publishing seems to be less fair when art images are involved. In fact, some would argue that fair use does not apply at all and the public domain is more elusive than vaporware.

And yet, based on what we've learned in previous NINCH Copyright Town Meetings, [7] we should be able to proceed without always asking for permission and perhaps even after receiving a denial. So what's the issue? Why doesn't fair use automatically cover our needs – and here I am addressing the needs of the appropriation artist, of non-native scholars wanting to study indigenous art, of researchers who work in foreign countries, of museum curators trying to negotiate with an artist's estate or rights manager, and of teachers whose institution insist on strict compliance necessitating clearance for all protected materials in use? Apart from fair use, is there

anything else? What's in the public domain? And when does free speech give us a green light to proceed even though we find ourselves surrounded by ominous red lights at all four corners of a dangerous intersection? Must we always be so risk adverse?

If we take to heart advice offered to authors in the *Chicago Manual of Style* about obtaining permissions prior to publication, we might assume that all is not lost. In the 14<sup>th</sup> edition, section 4.58 though offered as "a word of practical caution" in a subsection entitled "Fair Use: Quoting Without Permission" we learn that:

...if a use appears to be fair, the author should probably *not* ask permission. The right of fair use is a valuable one to scholarship, and it should not be allowed to decay through the failure of scholars to employ it boldly. Furthermore, excessive caution can be dangerous if the copyright owner proves uncooperative. Far from establishing good faith and protecting the author from suit or unreasonable demands, a permission request establishes that the author feels permission is needed, and the tacit admission may be damaging to the author's defense. (p.148) [\[8\]](#)

This is indeed good advice, but how often have we been able to exercise it? Yes, we run the risk of losing a valuable asset in fair use if we don't practice it, but is the risk of legal action the bigger chill? To me this sounds like the classic case of being doomed if you do and damned if you don't!

By now you must have a sense of why copyright questions especially in the arts are so numerous and why we continue to gather to discuss the issues. Perhaps we run the risk of asking too many questions and expecting simple and straightforward answers. For me this seems hardly the case. Perhaps the

problem is that we have yet to ask the right questions.

As promised at the outset of my presentation, I will conclude my remarks by raising more questions. Many of these are based on my own recent publishing experiences and some come from friends and colleagues. If my only accomplishment this afternoon will be to get these questions on record, I will consider my effort successful.

The Questions:

- If a work of art is clearly in the public domain – let's imagine for the moment a reasonably well-known (e.g., published) 17<sup>th</sup> century painting by an Italian artist – but the museum owing the canvas requires that a fee be paid before the work can be illustrated in a publication, could the author ignore the requirement and bypass the museum if she already possesses a good quality illustration without publication rights? In terms of case-law precedents, we have *Bridgeman v. Corel* that argues in favor of the non-copyrightability of reproductions of public-domain two-dimension artwork. [\[9\]](#) Should a publisher accept this argument for the absence of a copyright warranty (and here I stress the word "copyright")?
- Can an author believing that her use of an artwork in a publication is a fair use sign the copyright warranty? Should a publisher accept an author's warranty in place of a permission document? What liability does the publisher assume in accepting the author's warranty?
- Is the demand for payment of rights and reproduction fees for works that are clearly in the public domain a mechanism for trumping public or federal law in the US through the imposition of private law (state contract and/or license law)? Are there any penalties or consequences

- for using state law to override federal law (and denying the privileges granted there under)?
- If artwork in the public domain can be controlled by contract law, are there any 'fair use' provisions within that body of law? Are there mandated term-limits and expiration clauses as in copyright law? What happens if the contract holder goes out of business or is bought out by another corporation? How many layers of law or previous ownership claims can attach to a reproduction of an artwork? Are there any limits?
  - Is there a difference between a reproduction of an artwork that is merely a useful article (a faithful representation of a painting, for example) and an artful expression (a Steichen, a Steiglitz, or a Weston photograph)? [\[10\]](#) How much of the artfully expressive photograph would be covered under copyright if the underlying work illustrated is in the public domain? This question asks whether the Bridgeman analysis might also apply to three-dimensional art reproductions.
  - Can a museum control the way an art object in their collection is illustrated -- whether it is cropped or altered or colorized or manipulated? How much can it control and under which domain of the law is this power conveyed? Does that power carry greater weight than free speech, first amendment rights, or innate creativity in the US?
  - Technology has made it easier to keep track of rights so another new area of control is with artists' estates and the request for royalties in addition to permission grants. Should we assume that all artists' heirs have the right to claim royalties? What proof should we ask of them before agreeing to make payments or adhere to conditions? Depending on where the artist enjoyed domicile or citizenship, could an artist's moral right continue in perpetuity?

I have kept my promise of questions – probably more than you hoped to hear – and perhaps more biased toward user rights than some might want. In all fairness we *must* ask these questions because of recent legislation and decisions – DMCA and *Eldred v. Ashcroft* come to mind – that have been decided in favor of increased control for owners with fewer benefits for the common user. So in conclusion, I will repeat: have we been asking the right questions? I fear that if we don't ask, we surely won't get what we need. [\[11\]](#) However, I also fear that the farm may already be history – that after the dust settles and the corporate smoke clears there might not be much left to the concept of users' rights in the digital world. With this dark and gloomy image now etched in your psyche, I thank Robert Baron and David Green for giving me this opportunity to be part of today's panel.

(11 February 2003 draft version)

Eugene, Oregon

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[\[1\]](#) For background on image needs in arts education, publishing, and visual resources management, see Visual Resources Advocacy Statement – Parts I and II, by this author at *Copyright and Art Issues*, <http://darkwing.uoregon.edu/~csundt/copyweb/>. Part I (<http://darkwing.uoregon.edu/~csundt/copyweb/copyadv.htm>) covers traditional formats and practices in teaching and research, as used by teachers, their students and others (appropriation); Part II (<http://darkwing.uoregon.edu/~csundt/copyweb/copyadv2.htm>) considers new technologies and images in the transition from analog to digital with images in education and scholarship and the visual resources collection.

[\[2\]](#) *Copyright Law of the United States of America (Title 17) [hereinafter The Act]*, is available online from the U.S. Copyright Office at <http://www.copyright.gov/title17/> as well as from the Legal Information

Institute at Cornell University at <http://www4.law.cornell.edu/uscode/17/index.html> . Copyright is granted by the U.S. Constitution, Article 1, Section 8 "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries".

[3] The duration of copyright is set out in Chapter 3 of Title 17. The current term limits were extended with the [Sonny Bono Copyright Term Extension Act.](#), title I of Pub. L. No. 105-298, 112 Stat. 2827 enacted October 27, 1998. On January 15, 2003, the Supreme Court issued its opinion in the *Eldred v. Ashcroft* case, a constitutional challenge to the 20-year extension of copyright term in the Sonny Bono Copyright Term Extension Act. In an opinion by Justice Ruth Bader Ginsburg, the Court concluded that Congress's extension of the terms of existing copyrights did not exceed Congress's power under the Copyright Clause and did not violate the First Amendment. Justices Stevens and Breyer dissented. (cited from <http://www.copyright.gov/pr/eldred.html>).

[4] Fair use is defined in Chapter 1, Subject Matter and Scope of Copyright, in section 107 ([Limitations on exclusive rights: Fair use](#)). The public domain is mentioned in Section 303 of The Act and also at the Copyright Office website <http://www.copyright.gov/pr/pdomain.html> in a January 13, 2003, notice regarding the expiration of protection for certain unpublished and unregistered works on January 1, 2003. For a useful chart delineating the schedule of works entering the public domain under current and previous copyright legislation in the U.S., see <http://www.unc.edu/~uncInlg/public-d.htm> "When Works Pass Into the Public Domain," by Professor Lolly Gassaway (University of North Carolina, Chapel Hill).

[5] Section 102 of The Act specifies these criteria: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Protection is not granted to certain classes of works: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

[6] Precedents do exist for 'quoting' previously published illustrations in art historical publications. See, for example, the article, "Likeness of No One: (Re)presenting the First Emperor's Army," by Ladislav Kesner, *Art Bulletin*, LXXVII: 1 (March 1995), where all of the

illustrations derive from other sources, including one comparative illustration of Queen Nefertiti, "from *The Egyptian Museum in Berlin*, Berlin, 1990, 97." While these precedents can be found, they are usually considered the exceptions, not the rule, in using source illustrations.

[7] See the NINCH [National Initiative for a Networked Cultural Heritage] website at <http://www.ninch.org/copyright/> for summaries of past Town Hall meetings and copyright programs.

[8] Chicago Editorial Staff, *The Chicago Manual of Style*. 14th edition. x, 923 p. 1993.

[9] Bridgeman Art Library, Ltd. V. Corel Corp., 36 F. Supp. 2d 191 (S. D.N.Y. 1999). see transcript at [http://www.law.cornell.edu/copyright/cases/36\\_FSupp2d\\_191.htm](http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm).

[10] Useful articles are discussed in section 113 of The Act: Scope of exclusive rights in pictorial, graphic, and sculptural works. See <http://www.copyright.gov/title17/92chap1.html#113> especially subsection 113(c): In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

A recent appellate court decision, *Bond v. Blum*, No. 02-1139 (4<sup>th</sup> Cir. Jan. 24, 2003) <http://pacer.ca4.uscourts.gov/opinion.pdf/021139.P.pdf> comes close to supporting my contention that art images used in the classroom should be considered as something useful, as evidence necessary for conveying information about the topic under discussion. In this decision, "the appellate court emphasized that the copyrighted material was offered solely for its evidentiary value; there was a significant societal benefit of having all information made available during judicial proceedings; the copyrighted material was to be used not for its expressive content, but for its facts, in order to obtain admissions of fact against interest of the author; and this usage would have no adverse affect on the potential market value of this unpublished work-ironically, if anything, it would increase, not decrease, any potential market value. The appellate court upheld the (small) awards of attorney fees to prevailing individual defendants, and remanded for determination of attorneys fees to law firm

defendants." (Alan Kabat ([AlanKabat@aol.com](mailto:AlanKabat@aol.com)) in an email message sent to CNI-Copyright, February 11, 2003, with the subject heading "fair use and courtroom exhibits."

[11] Perhaps our approach has been too passive. J.P. Morgan's directive, "I don't want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do." (from "Webster's Electronic Quotebase," ed. Keith Mohler, 1994; also included in the *2003 Lawyers Calendar* (Andrews McMeel Publishing, 2002) for Monday, 3 November), suggests another pathway that could result in answers or solutions to our tough questions.

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