



**NINCH COPYRIGHT TOWN MEETINGS  
2001-2002**

**DRAFT SUMMARY REPORT**

**COPYRIGHT & FAIR USE IN THE DIGITAL FUTURE**

**Version 1.2**



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## **1. INTRODUCTION & OVERVIEW**

The NINCH Copyright & Fair Use Town Meetings have been held across the country since 1997, bringing the basic facts about copyright law and recent copyright issues to wide and mixed audiences across the educational and cultural environment. Audiences range from around 60 to over 300 at conferences, universities and cultural institutions. The meetings have proved important not only in educating the community about a crucial component of contemporary culture, but also in providing a forum for sharing intellectual property concerns and problems with assembled experts. They also provide a platform for the expression of opinion and for the iterative creation of an agenda for the community to pursue.

For an account of the origins and early history of these meetings, see the published report on the 2000 Series: *The NINCH Copyright & Fair Use Town Meetings 2000 Report* (Washington, DC, 2001) available online at <<http://www.ninch.org/copyright/2000/2000report.pdf>>.

The 2001-2002 series of meetings opened March 3 at the annual conference of the College Art Association Conference with a double conference session examining licensing initiatives for scholars and teachers. It continued with a full-day session at Rice University, Houston (April 25) presenting perspectives on copyright issues (national and state legal perspectives, scientific responses to new control systems, museum, library and instructional voices on local concerns, pleas for legislative action, arguments for the right and ability to copy, commercial pleas for ensuring the availability of material in the public domain, and the voice of those whose everyday work it is to track down copyright owners). A half-day session at the University of Denver, Colorado, (June 28) focusing on the issues arising from digitizing primary source materials by museums and libraries was followed September 24 by a day-long meeting in the Bartos Forum of the New York Public Library on owner and user issues faced in dealing with multimedia material. The intellectual property dilemmas that museums face in the digital environment were surfaced in a three-hour session at the Museum Computer Network conference in Cincinnati (October 27), while the skills needed to analyze, repair and create institutional IP Policy at universities were

developed at an all-day meeting, including a hands-on workshop, at the University of Oregon, Eugene (November 19).

This topic was furthered, in an extension of this series into 2002 with a full-day meeting and practical workshop on “Creating IP Policy in Museums,” held at the Museum Computer Network conference in Toronto, (September 7). Other 2002 meetings included a double plenary session at the first joint conference of the Art Libraries Society of North America (ARLIS) and the Visual Resources Association (VRA) held in Saint Louis (March 23) on “The Information Commons Today,” and a full-day meeting at Georgia Tech on “Media Issues In The Digital Age: Copyright Strategies For Culture & Education” (September 30).

The chief themes that emerged from this series, were:

- **Licensing** (as the most popular form of distributing digital material) and its relationship to copyright law
- **The Public Domain** and ways for making it more robust and easily useable
- **Legislation** (mostly still analyzing the impacts of the 1998 Digital Millennium Copyright Act and Copyright Term Extension Act)
- **Owners and Users:** the different but related perspectives of owners and users of copyrighted material
- **Practical Experience** and advice from practitioners
- **Policymaking**
- **Vocabulary and language:** how we talk about copyright issues

## 2. THEMES AND PATTERNS

### **Licensing**

Licensing has quickly become copyright owners' most favored form of distributing material online, largely because it gives them clearer, more definite limits to how material can be accessed and used than fair use can. The benefits and drawbacks of licensing was one of the top subjects of the 2001 series. Specific issues included what licensing was and how it had evolved, what certain licensing ventures and their products had to offer, how useful they were and what the tensions were between licensing and fair use, and licensing and the public domain.

Mary Case gave the most succinct and useful overview of licensing in her St. Louis talk. She briefly reviewed its history, focusing on its recent rapid evolution, largely due to librarians, often in consortia, contesting terms and developing new model licenses. Licenses today more often acknowledge fair use and allow broader uses by broader sets of users than their predecessors. However, a big drawback, she noted, is the lack of guaranteed long-term availability of digital material. Access may be lost in annual contract renegotiations and if libraries do not own a local copy, many works may never reach the public domain because copyright terms are so long and it may not be economically feasible for content-owners to maintain works as their value declines. If content providers don't confront this issue and libraries do not own copies, long-term availability of much licensed digital content will be uncertain.

The licensing ventures and their products that were presented included AMICO (Chicago, Cincinnati), ArtSTOR (Cincinnati, New York), RLG's Cultural Materials (St. Louis), Saskia (Chicago) and Questia (Chicago, Houston).

Speaking in Denver from the perspective of a cultural institution that licensed material, Bernard Reilly offered a critique of the simple "cash" for "content" model of most current licensing schemes. He described an alternate model developed at the Chicago Historical Society where content was redefined as all of the institution's physical and intangible assets (including material and expertise) and "cash" was redefined as

services and other intangibles that could be the subject for barter (visibility, expertise, community goodwill).

The tension between licensing and copyright law on the one hand and the public domain and copyright on the other was the central focus of the meeting at St. Louis. There we heard, in addition to Mary Case's history of licensing, a history of the public domain followed by implementation examples of both: the licensing of RLG's Cultural Materials and the development of a cluster of public domain services, such as the Image Exchange project of the Society of Architectural Historians.

### **Public Domain**

The Public Domain, the threat posed to it by the Copyright Term Extension Act (CTEA) and ideas for making it more robust and more easily useable were present throughout the series. In St. Louis, Michael Shapiro gave a masterful summary of the concept of the public domain from the nineteenth century, when it was negatively defined as that which was unworthy of protection, to the last two decades when it has been seen in more positive terms. Modern theorists have seen it as a potentially rich resource threatened by overly strong publicity rights and as a device allowing the overall system to work by leaving the raw material of authorship available for others to use. Today, Shapiro pointed to a renewed burst of activity, especially in the wake of the Copyright Term Extension Act (CTEA) and other legislation. Much of this activity is carried out under the banner of broad environmental metaphors, continuing the "property" language commented on by many in this series. James Boyle and Lawrence Lessig in particular have called for an intellectual/creative commons that would spur the development of the public domain as an active and positive entity.

Jeffrey Cohen complemented Shapiro's history with his practical work in creating a free, shared online space of images from the public domain for teaching architectural history. He envisioned a landscape of images that was free and freely available and that could complement copyrighted and licensed images. He called for active contributions to such a landscape and for a robust public domain. Free shared teaching resources such as the "Image Exchange" project that Cohen had organized for the Society of Architectural Historians, would expand access, avoid duplication, be defined by

teaching requirements, rather than by the accidental availability of images, and be unfettered by particular narrative structures.

In New York, Howard Besser gave a well received talk on the current state and fate of the public domain, focusing on what he described as the shift from information as a commons to information as a commodity, marked especially by the Digital Millennium Copyright Act and the Copyright Term Extension Act that emphasized protection and restriction of access. He declared that over-protection was bad for creators and users as both make wide use of old content while needing the widest possible distribution of new material. Besser made the case that neither creators nor practitioners were well served by the content industry and called for an alliance of creators, users and librarians. Besser maintained that an information commons was a key element for public discourse and that, mirroring the erosion of public spaces, it was being constantly diminished.

E. Jane White followed Besser in New York with a description of various projects at the Internet Archive: over 43 terabytes of information collected from public websites that also included a Moving Image Archive, election archives and a new International Children's Digital Library. She saw the Internet Archive as one example of putting the public domain into practice and suggested that the public domain, as information commons, be administered like the National Park Service as a national treasure.

This idea was taken a step further in St. Louis, by Jennifer Trant from the audience, suggesting the conservancy model. This would consider intellectual property in terms of its mutual values to provider and practitioner. A legal framework could be created that would enable intellectual property owners to donate material to the conservancy that would possess sufficient resources to maintain it.

Another take was offered at Rice University in Ross Reedstrom's unique presentation on the free software movement, an interesting model for the development and distribution of intellectual property. It raised the question of whether the Open Source model for software development can be adapted for humanities uses.

## **Digital Millennium Copyright Act**

The DMCA was of course present in some form or another throughout this series. It was foregrounded at Rice University, in Tyler Ochoa's eloquent depiction of the Act as the latest iteration in what he called the historic cycle of controls: from copy control to access control to device control and over. Ochoa focused on the 1201 Anticircumvention clause of the Act, which was also the subject of an exciting and historic talk by Dan Wallach, a Rice University computer scientist implicated in the "Hack SDMI" Challenge – a challenge issued by the Recording Industry Association of America (RIAA) to penetrate software designed to protect online music from being copied. Wallach asserted that technological control would never work – that only new economic models, whether licensing or not – would work in removing the incentive to cheat and pirate.

## **Practical Experience**

This series did well in presenting, alongside nationally known copyright experts, those practitioners in the trenches who have to deal with copyright issues as part of their day-to-day work. At Rice University, Geraldine Armanda addressed the i.p. management issues faced at The Menil Collection while Rhoda Goldberg, Assistant Library Director of the Harris County Public Library, spoke of how copyright runs to the core of the librarian's mission: access for all. Marshall Scott, Director of Educational Technology and Outreach at the University of Houston, spoke of the distance education revolution effected by the Internet and how it was transforming the problems he had had with television transmission. Finally, Lee Hillier, Rice's Interlibrary Loan Librarian, gave the audience a good practical guide to when and how to seek permission for using material in the library and classroom. (In conversation, the issue of enforcement and leakage of copyright control took central stage).

Meanwhile in Denver, we heard from James Williams, Librarian at the University of Colorado, Denver on how copyright was a part of his plans for developing a state-of-the-art digital library and from Kevin Anderson on his experience at the Casper College Library in Wyoming. While Williams focused on the broad strategic view in which he made connections between the local experiment and national policy, Anderson was eloquent and persuasive on the critical function of "giving credit" for the use of material, especially online.

The most extended piece of practical advice was the keynote address at the New York meeting given by Linda Tadic, Manager of the HBO Library, outlining in useful detail the steps of the permissions process. Centered on media, it nonetheless covered all formats. Pointing out that by putting a work online, you were acting as a distributor, Tadic commented that as new distribution models thrive, nonprofit and commercial organizations will find they have more rights issues in common than they may think.

## **6. Owners and Users**

The management perspective developed by Bernard Reilly and others, in which intellectual property assets are carefully defined and managed, was counterpoised in Denver and New York by Peter Jaszi. In both locations, Jaszi took the rhetorical strategy of taking asset management to its extreme. Museums, he said, like other proprietors, are finding that their rights are limited by various traditional doctrines that exist to encourage information sharing and the creation of new knowledge out of old. He noted that whatever one thought of the Bridgman decision (in brief that a photograph of a painting had insufficient originality to qualify for its own copyright protection), it gave a warning that application of traditional principles in the new environment might not always favor would-be copyright proprietors. However, the new legislation was clearly more favorable to copyright owners and in this new environment, there were many areas where museums might move to strengthen their hold over their assets, and he itemized them. He ended his Denver presentation by declaring that these were very hard questions and that organizations were in a cultural, political and economic dilemma. But they were questions the community had to face and what was important is that they find the means to have the discussions within the community and decide what is the best way forward.

The examination of the interests of owners and users continued under the rubric of “New Contexts: New Strategies,” as the group assembled in Cincinnati endeavored to break new ground. In a very useful introductory double presentation by Amalyah Keshet and Suzanne Quigley that ran through the gamut of intellectual property issues facing museums, Keshet pleaded for more time to strategize for the future rather than being overwhelmed by daily practical emergencies. But the paradox Jaszi seized upon

was much discussed here: museums need earned income and good shepherding and management of their assets and this had to be balanced against responsibility to public access and the public good.

The public forum at the Cincinnati meeting was particularly compelling. Jennifer Trant noted the importance for institutions to engage upon an audit of their intellectual property. This can give an institution a confident sense of what it owns and what it can do with it and is key as the community moves ahead in thinking through distributing digital documentation in different contexts and different ways. Trant also declared from her recent experience that the intellectual property system will not work if there's not mutual respect by provider and practitioner alike for the rights of the other: the challenge is for both parties (or both sides of the same institution) to behave responsibly and acknowledge their joint role in the system. Trant warned that rhetoric employed in these debates can quickly become divisive and counter-productive, which in turn saps the value of the contribution by the educational and cultural community to the international discussion on these issues.

### **Policymaking**

A new shift in 2001 was the movement into analyzing, changing and making intellectual property policy at institutions. This began at the University of Oregon by looking at creating and critiquing intellectual property policy in universities and was continued later in 2002 at a meeting and workshop beyond this current series at the Museum Computer Network conference that examined the creation of i.p. policy in museums.

The Eugene meeting clearly stated that its focus was higher education institutional policies, with a special interest in courseware and copyright. It was clear that this was set in a broader field that could include: the ownership of material created by faculty and graduate students in their research and teaching (including patent and trademark); the use of the copyrighted work of others; the securing of rights and permissions for faculty; asset management; institutional trademarking; technology transfer and new forms of scholarly publishing. It was important that policy distinguish among different kinds of intellectual property: inventions and discoveries, scholarly works, traditional

course materials and electronic courseware. It was also crucial that in these days where dollar signs were everywhere that policy track the larger goals of the university, such as academic freedom and the wide creation and dissemination of knowledge.

Laura Gasaway, professor of Law and Director of the Law Library at the University of North Carolina, Chapel Hill, reported on UNC's experience in establishing a complete intellectual property policy for the entire system. She emphasized how crucial it was to include every facet of the university: faculty, students, staff, administrators and legal counsel. Following this specific history of how an institution created a policy document, Georgia Harper, manager of the Intellectual Property Section of the Office of General Counsel for the University of Texas System, turned to the practical challenge of "how to start the ball rolling" when an individual clearly has a copyright problem but feels powerless to make any changes in university policy. She presented many examples of university policies and participants became quickly adept at reading and analyzing such documents to reveal their core assumptions. Harper continued with a step-by-step outline of how to proceed with analyzing and articulating a problem and bringing an issue to resolution.

The meeting proceeded with a dazzling presentation on the issues from the perspective of a technology transfer officer (Gerald Barnett, Director of Software & Copyright Ventures at the University of Washington), in which he stressed that intellectual property and associated policy should not be about protecting property but rather about enabling and managing relationships that will enhance productivity. Barnett's talk was followed by a hands-on workshop in which participants suggested policy language to deal with a range of specific situations. The first part of the workshop had participants read through IP policies from six universities and then summarize their position on electronic courseware. Laura Gasaway led the group through the second part of the workshop: an exercise in drafting policy in response to eight specific situations. Each group was assigned a situation and 30 minutes to create a policy draft about how to deal with the issue.

It was an invigorating meeting, with particular promise both for individuals and for institutions to assess their current situations and to start the ball rolling to create clear

and equitable policy statements. Gerald Barnett concluded that the key to creating effective policies was to be led by the future. Too many policies, he said, were only about analysis and forensics, where the question should be: "What is the future that is incentivized by this policy?" Beyond this were the logistics for creating something new: how do you rally the resources to make things happen?

### **Language**

At the New York meeting, both Peter Jaszi and Siva Vaidhyanathan independently commented on the need for a new vocabulary when discussing copyright matters. Vaidhyanathan repeated this emphasis in his Cincinnati talk, "10 Simple Things You Can Do to Save the Information Ecosystem," where he declared his purpose was to begin to break down the "vocabulary gap" between the copyright experts and the general public. Although Howard Besser found the property analogy useful in being able to talk about an information commons that was suffering enclosure, Vaidhyanathan felt particularly strongly that "property talk limits our imagination." While Vaidhyanathan's entire New York talk was about the terms by which we address copyright, others also commented on key terminology. Peter Jaszi particularly disliked the word "user" for its connotations of passivity, preferring the term "practitioner" and in Cincinnati, Jennifer Trant used provider and practitioner as preferred terms.

### **3. Conclusion**

The NINCH Copyright Town Meetings have come a long way since they were established as a way to seek opinion on the proposed CONFU Guidelines in 1997. Although we are still firmly committed to the meetings to educate the broad cultural and educational communities about the basic facts of copyright, new and impending legislation and its impact on the working lives of participants, we are increasingly turning to them as forums for mapping strategies for practitioners to chart what they need from intellectual property and how they need to use it in legal and economical ways.

The emphasis on practical guidance can be seen in two meetings on institutional intellectual property policy: one at the University of Oregon, on making policy in universities (reported on here), and a second at the Museum Computer Network conference on creating IP policy in museums (September 7, 2002). Both included practical workshops and, in addition, the museum meeting will result in a book to be co-published by NINCH with the Canadian Heritage Information Network (CHIN): a “Guide to Creating Museum Intellectual Property Policy.” For our forthcoming 2003 series, we plan at least one town meeting around Digital Rights Management issues that will result in the production, in association with OCLC and the Colorado Digitization Project, of a “Digital Rights Management Toolkit” for the community.

The value of these meetings is multifold. As they address the needs of mixed audiences on this cluster of issues, the meetings reflect NINCH’s mandate to cross institutional and sectoral boundaries. As they provide a forum for information sharing and problem solving, they also create an ideal space for thinking out new solutions for the future. As they evolve into an ongoing series, they reflect the history of the community in its engagement with these issues and reveal its growing confidence and determination to make solutions that work in everyday practical situations.

## INDEX OF SPEAKERS AND PRESENTATIONS

- Anderson, Kevin. "Giving Credit: the Permissions Cycle," Denver.
- Aramanda, Geraldine. "Museums and Archives and the Management of Intellectual Property," Houston.
- Barnett, Gerald. "Technology Transfer and Intellectual Property, Eugene.
- Besser, Howard. "The Fate of the Commons," New York.
- Craig, Ryan. "Distance Education," New York (Presentation Slides Available Online).
- Eisgrau, Adam. "Policy Issues," New York.
- Gasaway, Laura. "Creating Policy in the Real World," Eugene (Presentation Slides Available Online).
- Gasaway, Laura. "Negotiating the Hot Issues," Eugene (Workshop) Slides Available Online.
- Goldberg, Rhoda. "Copyright: An Indispensable Element in Fulfilling the Mission of the Library," Houston.
- Harper, Georgia. "Getting the Ball Rolling: You Can Make Something Happen," Eugene (Presentation Slides Available Online).
- Harper, Georgia. "Copyright Law in Cyberspace," Houston (Presentation Slides Available Online).
- Harper, Georgia. "Initiating the Policy Process," Eugene (Workshop).
- Hilyer, Lee. "In this case, it's better to get permission . . . ," Houston.
- Jaszi, Peter. "Aggressive Asset Management," New York.
- Jaszi, Peter. "An Introduction to the Issues: Asset Management," Denver.
- Johnson, J. Q. "Setting the Stage: I.P. Policy," Eugene (Presentation Slides Available Online).
- Keshet, Amalyah and Suzanne Quigley. "Intellectual Property Issues for Museums," Cincinnati.
- Miles, Coe. "Licensing and the Public Domain," Houston.
- Ochoa, Tyler. "From Betamax to the DMCA: Copyright Owners and Device Control," Houston.
- Pantalony, Rina. "The Carrot v. The Stick: Can Copyright Be Used to Enhance Access to On-Line Cultural Heritage Content?" Cincinnati (Presentation Slides Available Online).

Petersen, Rodney. "NEThics and Digital Policy," Houston.

Quigley, Suzanne and Amalyah Keshet, "Intellectual Property Issues for Museums," Cincinnati.

Reedstrom, Ross. "Copyright and the Free Software Community," Houston.

Reilly, Bernard. "Intellectual Capital and Building Museum-Media Relationships," Denver.

Schott, Marshall. "Instruction," Houston.

Shulman, James. "Intellectual Property: The ArtSTOR Approach," Cincinnati.

Tadic, Linda. "Intellectual Property Versus the Digital Environment – Rights Clearance," New York (Presentation Slides Available Online). Entire paper available online.

Trant, Jennifer. "AMICO — IP Issues in Delivering a Multimedia Library to Educational Institutions," Cincinnati (Presentation Slides Available Online).

Vaidhyathan, Siva. "10 Things You Can Do to Save the Information Ecosystem," Cincinnati.

Vaidhyathan, Siva. "Copyright and How We Talk About It," New York.

Wallach, Dan. "Adventures in Copy Protection Research," Houston.

Waters, Donald. "ArtSTOR: A Case Study of Responsible Use of Copyright Materials," New York.

White, E. Jane. "The Internet Moving Image Archive," New York.

Williams, James. "Copyright and the University of Colorado's Digital Future," Denver.