

Getting an Art Journal Online: JSTOR and the Art Bulletin

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The Goal: Archiving and *Access to Art Bulletin*

- Eliminating need to store back issues
- Facilitating electronic access from the desk-top
- Ease of searching
- JSTOR: joining with dozens of publications of other learned societies
- Non-profit environment

Prior Online Experience

- CAA had experience with other online data bases
- Individual issues or articles available
- Sometimes subscription/per usage charges
- JSTOR to supplement existing data bases

JSTOR and CAA

- Add back issues to electronic database based on three-year “moving wall”
- CAA granted copyright license to JSTOR to reproduce (on computers) and distribute (to users) *Art Bulletin* articles and associated images/third-party materials
- But...over the history of the *Art Bulletin*, CAA hadn't expressly obtained “electronic publishing” rights from contributors

Obtaining E-Publishing Rights: Impact of *Tasini*

- Copyright Act and *Tasini*
 - Where there is *no* express copyright license, copyright law *expressly authorizes publisher* – without permission of contributor – to publish a “contribution” to a collective work as “*part of*” that collective work (or in a revision, or later work in series) (17 U.S.C. § 201(c))
 - Publisher has a separate copyright right in its “collective work”
 - CAA and others relied on Copyright Act as a statutory grant to authorize e-publishing

Obtaining E-Publishing Rights: Impact of *Tasini*

- In *Tasini* freelance authors brought suit: statutory grant is *not* applicable to e-publishing because...
 - Online access permits searching, retrieval and printing of contribution “separate from” (*not* part of) publication
- CAA/JSTOR discussions against backdrop of *Tasini*
 - Scope of statutory grant would be affected by decision
- In 2002, Supreme Court decided *Tasini*:
 - If the database permits searches and allows retrieval of article apart from rest of the issue, then
 - Must obtain *each* contributor’s permission for e-publishing
 - Key: does the user “perceive” the contribution as “separate” from the publication?
 - Contrast online database experience with microform:
 - Where user scrolls through/experiences article in context, Copyright Act still permits e-publishing without permission

JSTOR and *Tasini*

- *Tasini* decision left lots of room for discussion
 - Clear that allowing classic database access – article search and retrieval – probably is infringing absent a license from contributors
 - Publishers have had to clear rights retrospectively or remove articles/images from data bases: administrative burden, costs, etc.
 - Class action lawsuit filed by freelancers: effort to resolve issue
 - Now in mediation
- CAA could not go back and get permissions from hundreds and hundreds of contributors
- *But...* effect of *Tasini* on e-publishing through JSTOR may well be limited because ...

JSTOR and *Tasini*

- JSTOR experience is the type of e-publishing for which *Tasini* can be read to say that copyright law still grants a publisher the right to publish electronically: article remains “part of” the journal
- JSTOR is more like microform:
 - Creates a photograph of each page of a journal, not a manipulated text file
 - All pages are presented exactly as in the hard copy
 - Browse exactly as a hard copy-journal, with the pages in series
 - Search function retrieves article, not an individual page
- In short, user’s perception of JSTOR does not differ materially from that of the hard copy

Publishing Contract: Prospective Rights Clearance

- Heightened attention to clearing rights and e-publishing agreements
- Contributors/publishers focused on licenses, not on Copyright Act's default grant of rights to e-publish
- *Art Bulletin/Art Journal* contracts now require contributors to license expressly e-publishing rights to CAA and its e-publishing licensees (such as JSTOR)
 - No publication in CAA publications without grant of e-publishing license

Prospective Rights Clearance: Third-Party Images/Materials

- Need to clear rights to images/other third-party material (e.g., interviews) in *Art Bulletin/Art Journal*
- CAA publishing agreement puts burden of rights clearance on author/contributor
- Third parties are now more assertive in maintaining control over e-publishing rights in negotiations
- They might authorize only hard copy publication, with constricted e-publishing rights (even for JSTOR)
 - Rights owners can include artist of underlying work, estate, photographer, institution owning rights to image
 - High license fees
 - Grant only for limited periods, subject to periodic renewal

Prospective Rights Clearance: Some Possible Effects

- Great difficulty in administering/paying for rights to e-publish all third-party material used in articles
- CAA/JSTOR argue that licensors should recognize:
 - JSTOR's academic purpose: save library space
 - Intended for academic use; institutional users
 - Non-profit organization
- Potential developments will chill use by CAA of images/other materials in CAA publications
 - May need to use fewer (or lower quality) images
 - Greater emphasis on public domain images
 - Use of more standard images, where rights are cleared

Prospective Rights Clearance: The Future

- Who is best able to address e-publishing demands of third-party image owners ... and *pay for, monitor and administer* rights clearances?
 - Author (e.g., contributor to *Art Bulletin/Art Journal*)
 - Print publisher (e.g., CAA)?
 - E-publisher (e.g., JSTOR)?
 - Collecting/rights administration societies