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 databases: 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