

## CHAPTER 10

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### *Internet as Medium*

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#### ART, LAW, AND THE DIGITAL ENVIRONMENT

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THE EXPLORATION OF ALTERNATIVE MEDIA for creative expression has been one of the major artistic endeavors of the last century. From Kurt Schwitters's cavernous apartment Merzbaus to Donald Judd's manufactured industrial constructions to Nam June Paik's vision of art through a television screen, artists have been expanding the definition of art and the context within which it can reside.

The twenty-first century offers a new way to universalize art and to develop alternative forms of creative expression. Along with altering the state of international commerce and information exchange, the Internet offers not only another space for the presentation and distribution of art and literature but also a dynamic medium through which art can be conceived. Digital formats facilitate the creation of art that defies traditional assumptions about authorship, objecthood,<sup>1</sup> and duration in time, changing our expectations of what art can be. Digital media divorce creative content from the physical world, expanding access to creative works. The elastic space of the Internet allows artists to control the worldwide presentation and distribution of their work through low-cost Web publishing and hand-tailored licensing regimes. Meanwhile, cultural artifacts such as literary works, graphic art, and vintage film can now be preserved for future generations in the vast storehouses of digital archives.

The intellectual property (IP) laws that govern ownership and control of literary and artistic works, however, exist within traditional national boundaries. Despite significant progress toward the international harmonization of IP laws, this legal balkanization complicates efforts to compile electronic libraries, create virtual museums, and engage in the development of new projects. This chapter explores the way in which art, law, and the Internet interact to shape the future of cultural expression.

## INTELLECTUAL PROPERTY LAW AND ART

The branch of intellectual property law governing literary and artistic works—copyright law—covers a broad range of artistic production including literary and pictorial works, motion pictures, and sound recordings. Copyright owners hold a series of exclusive rights: the rights to reproduction, adaptation, public distribution, public performance, public display, and digital transmission in the context of sound recordings. A violation of any of these rights amounts to copyright infringement.

Within the United States, these rights are part of a law of intellectual property that seeks to promote creative output and innovation by using economic incentives. The U.S. Constitution grants Congress the authority “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>2</sup> Under this constitutional edict, Congress may carve out limited monopolies for artists and inventors, thereby granting financial rewards for creative output and, in theory, promoting progress in the arts. The current term of protection for newly created works is the life of the author plus seventy years or, for works of corporate authorship, ninety-five years. Once copyright terms expire, works can enter the public domain. This means that the rights to their reproduction and distribution are no longer privately owned, but open to the public for free and unlimited use. For example, film adaptations of Jane Austen and Henry James novels can be made and remade without concern over copyrights; the original works have long since entered the public domain, leaving their interpretation both financially and creatively free to anyone with the interest to do so.

On an international level, several major treaties attempt to harmonize national intellectual property laws. The most significant of these treaties is the 1994 Agreement on Trade-Related Aspects of Intellectual Property, generally referred to as the TRIPS Agreement. All World Trade Organization (WTO) member nations must conform their national laws to the minimum standards set by TRIPS. In the context of copyright, TRIPS requires a minimum term of fifty years plus the life of the author, or if the author is unknown, fifty years from first publication or creation of the work. Member nations are free to establish longer terms of ownership, as the United States has done. The existence of minimum standards of protection, without countervailing maxima or concrete provisions for the enhancement of the public domain, remains controversial.

DIGITAL ARCHIVES: PRESERVING CULTURE ON  
THE INTERNET

In many ways, the Internet makes art and literature freely available to anyone with a computer and Internet access. By making works available on the Internet, digital archives serve as a form of cultural memory, preserving creative works that would otherwise be destroyed by the passage of time or lost to

oblivion. Accessible archives not only broaden the scope of cultural and historical knowledge but also expand the potential audiences for such information—from elite academics to the larger and ever-growing online public.

However, from the perspective of the author, and more often the publisher, the availability of digital works on the Internet often conflicts with the legal rights of authors to control access to their work. Many library and museum items have long since entered the public domain, but the issue of rights arises for more recent works that are still protected by intellectual property law.

The controversial Google Book Search Project illustrates the problem that copyright law can pose for a digital archive. To enable people to search books on the Web, Google is digitizing the entire collections of several major libraries, including books currently protected by copyright as well as works in the public domain. Google asserts that its digital archive project constitutes fair use and is therefore legal. Although the digital archive will contain entire copyrighted books, a search result will show only a few sentences with the sought-for word or phrase in context, unless the copyright owner has chosen to display a whole page. Google has also agreed to exclude works from the archive should the copyright owner object. However, several authors and publishers have argued that fair use does not extend to scanning whole works and presenting excerpts on the Web, and lawsuits have been filed to enjoin Google from archiving copyrighted works.

The outcome of this controversy may take into account a similar case from the world of photography. In *Kelly v. Arriba Soft*,<sup>3</sup> Leslie Kelly, a professional photographer best known for his images of the American West and Amish society, sued a company for creating a search engine database that utilized thumbnails of images found on the Web. However, the U.S. Court of Appeals for the Ninth Circuit held that “the creation and use of thumbnails in the search engine is fair use.” A key factor in the court’s decision was that the search engine’s use of the images was “transformative”—whereas Kelly’s photographs are “artistic works intended to inform and engage the viewer in an aesthetic experience,” the thumbnails in the database serve “as a tool to help index and improve access to images on the Internet.” Whether courts will reach a similar conclusion as to the Google Book Search Project remains an open question.

Issues regarding the legality of archiving copyrighted material grow even more complex in self-organizing repositories of digital material. For example, while the popular photo archiving site Flickr tries to discourage users from uploading pictures that infringe on others’ copyrights, the site nonetheless abounds with copyrighted images lifted from Web sites or scanned from books and magazines. YouTube, a site for archiving videos, has also become notorious as a repository for copyright violations. Until recently users were able to upload entire movies and TV shows, a practice YouTube has tried to discourage by

limiting the maximum length of a video upload to a total of ten minutes. However, this does little to address the use of YouTube to archive unauthorized adaptations of copyrighted material, from video karaoke to humorous remixes of film clips.

Sites like Flickr and YouTube facilitate the transformation of literary and artistic expression to free information, which Professor Lawrence Lessig of Stanford Law School has described as the primary value of the Internet. Lessig conceives of the decentralized architecture of the Internet as a space for the democratization of culture, a place in which the owners of the network cannot control the creative forces at work at its edges. As part of this end-to-end landscape, digital archives promote an overall environment of creative production by benefiting both authors and users.

The creative virtual environment envisioned by Lessig is one in which the roles of author and audience are destabilized. Rather than a unidirectional flow of information, the Internet offers the opportunity for the constant exchange of ideas, information, and creative inspiration. Users gain free or low-cost access to vast amounts of expression that would otherwise be unavailable or difficult to obtain, often becoming authors themselves through exposure to creative output. Meanwhile, authors are given the opportunity to make their works available to the public at little or no expense and to improve their own work through exposure to the work of others.

This often-overlooked dependence of the creator on the public has been discussed by artist Marcel Duchamp, who conceived of artistic creation not simply as the product of an artist, but the result of collaborations between artist and spectator. In his essay "The Creative Act," Duchamp wrote, "In the last analysis, the artist may shout from all the rooftops that he is a genius; he will have to wait for the verdict of the spectator in order that his declarations take a social value and that, finally, posterity includes him in the primers of Art History" (Duchamp 1957, 818). Digital archives, as well as the vast space of the Internet, offer artists a considerable rooftop from which they may shout, giving them the best shot at posterity they have ever known. Duchamp's posterity, however, may look and feel different in the digital world, where content can flourish like wildfire and mutate in unexpected ways, divorcing them from their original makers. Web sites like YouTube have catapulted wannabe animators and filmmakers into Internet celebrities, but it is the kind of fame that verges on notoriety, and more often than not, is short-lived. YouTube demonstrates how the elasticity of the Internet has transformed the parameters of how content can be made and disseminated—often in violation of copyrights, sometimes in the advancement of the creator's celebrity, and almost certainly in a manner that reaches vast audiences.

Certainly, from a traditional copyright perspective the digitization of creative works cannot so easily be categorized as an absolute benefit to authors.

Copyright regimes theoretically provide an incentive structure for the promotion of artistic output, allowing authors to reap financial reward from their labor. Taking the principal right to reproduce and distribute creative works in the hands of the authors diminishes the economic benefits of creative production and thus may negate incentives for the works' initial production.

REGULATING THE INTERNET ACROSS BORDERS:  
FROM COPYRIGHT TO COMMERCE

Perhaps the most complex aspect of regulating the Internet is the tension between globally accessible Web sites and the myriad and often conflicting domestic laws that affect them. Maintaining a digital archive, for example, can raise copyright issues even when the archive consists exclusively of works in the public domain. One instance of the legal concerns attendant to such an enterprise involves Project Gutenberg, an ambitious volunteer project to make the contents of libraries available in digital format to as many people as possible. As of June 2006, approximately eighteen thousand books were accessible through Project Gutenberg. Its plain text coding makes literary works easily downloaded, copied, and searched by extracting them from their traditional hard copy forms such as physical books or even bulky electronic files of digitally scanned pages.

The format of Project Gutenberg's e-texts solves the problem of what Professor Yochai Benkler of Yale Law School has described as the overcapacity of books. Benkler offers books as an example of products whose use value—the communication of literary content—is not used to its full potential by the individual book purchaser. In the form of a physical hardbound volume, a book can only convey its content to a limited number of users within a certain amount of time, even if the book is shared by multiple users in the context of a library (Benkler 2004). As an e-text in Project Gutenberg's database, the literary content is divorced from its hard copy form. It can be reproduced infinitely at negligible cost and can be transmitted to anyone who desires to read it. Freed from its hard-copy format, access to the literary content is virtually limitless.

Project Gutenberg generally attempts to sidestep copyright issues by limiting its e-texting to works in the public domain, unlike the recent and broader initiative announced by the Google search engine. If Project Gutenberg determines that a particular work has entered the public domain, it is cleared for reproduction and inclusion in the database. Project Gutenberg's approach would be simple in a world of clear-cut copyright protections, but the unique, non-geographical space of the Internet presents the difficulty of negotiating various national intellectual property regimes. This problem has especially come to the fore in recent years as Project Gutenberg has taken on an international dimension, launching databases in Australia, Germany, Finland, the Philippines, Serbia and Montenegro, and the European Union.

The clash of national copyright terms is exemplified by the case of Margaret Mitchell's *Gone with the Wind*. An e-text of Mitchell's novel was posted on Project Gutenberg Australia (PG Australia), where the book had entered the public domain in 1999, fifty years after the author's death. However, under recent copyright-term extensions, the work is currently under copyright in the U.S. until 2031. This conflict illustrates the irrationality of regional intellectual property regimes in the context of the borderless Internet, where users in the United States can easily access Australian Web sites and vice versa. Any U.S. user who downloads Mitchell's novel from PG Australia likely violates domestic copyright laws. PG Australia addresses this problem with a disclaimer preceding the novel's e-text: "Copyright laws are changing all over the world. Be sure to check the copyright laws for your country before downloading or redistributing this file."<sup>4</sup>

The conflict between PG Australia and U.S. copyright law over Mitchell's e-text novel presents a single instance of a monumental problem—enforcing regional laws in a venue that defies geographical boundaries. Within the United States, courts have taken a number of approaches to determining jurisdiction. In *Zippo Manufacturing Co. v Zippo DOT Com, Inc.*,<sup>5</sup> the federal district court applied a sliding scale of sufficient commercial Internet contacts with members of the state in which jurisdiction was being sought. Web sites that engaged in commercial contracts with members of the forum state constituted the most active level of contact. However, since the commerciality of online activities is difficult to define or measure, this test is likely to suffer from inconsistent application (Berman 2003, 58). Other approaches involve determining the offending Web site's intentional effect on or harmful targeting of members of the forum state. Setting a standard for determining such criteria may prove to be difficult. Moreover, these intentional effect approaches neglect the reality that online spaces are by their nature universally accessible, regardless of the Web site operator's intent.

Other courts have taken a more extreme approach. In *Inset Systems, Inc. v. Instruction Set, Inc.*, a federal district court in Connecticut declared that it had jurisdiction over any Web site accessible within the state.<sup>6</sup> On an international level, a French court asserted jurisdiction over Yahoo! Inc. simply because its Web sites were accessible to French residents and despite the fact that they were transmitted from American servers. Yahoo! Inc. offered for sale on its Web sites Nazi memorabilia in violation of French law and did not comply with court orders to block French residents from purchasing the items. While Yahoo! Inc. took down Nazi memorabilia from its French subsidiary, Yahoo.fr, it kept such items on its more popular main Web site, Yahoo.com. In response, the French government began levying fines of eleven thousand dollars a day against the company for failing to take down the items as of February 2001. A divided per curiam opinion of the U.S. Court of Appeals for the Ninth Circuit

sidestepped the dispute,<sup>7</sup> leaving unclear whether Yahoo!'s First Amendment arguments may do it any good in an international context. The Ninth Circuit's opinion leaves uncertain whether the Yahoo! Web site's universal accessibility, one of cyberspace's most significant values, may bring with it a broad spectrum of liabilities across jurisdictions. Indeed, the French court's ruling sets an ominous precedent, setting the standard whereby the most restrictive jurisdictions may determine the extent of permissible activity of parties outside of its jurisdiction—from the context of obscenity laws and issues of free speech to that of intellectual property and the availability of free creative works.

The legal community has suggested some alternative frameworks for addressing this problem of Internet jurisdiction. One view conceptualizes the Internet as “a radically decentralized environment demanding grassroots, nongovernmental lawmaking.”<sup>8</sup> Instead of developing international legal entities that are merely collaborations of geographic governmental entities, this approach acknowledges the Internet's existence as a separate and unique space that exists beyond borders—one that should be subject to an alternative conceptual paradigm. The potential for a nonregional, nongovernmental entity to map onto the Internet in a manner more reflective of its unique space is appealing, but problems concerning authority and enforceability are immediately apparent. Moreover, such an isolated entity would neglect the overlap between the Internet and the physical world. Internet commerce in Nazi memorabilia ultimately results in the physical exchange of such goods. The downloading of MP3s has had serious impact on compact disc sales, and Web publishing of literary works has affected the commerce in books in myriad ways. While the Internet exists as a space independent of geographic parameters, the activities that occur within that space nevertheless have real-world effects no different from those dealt with by traditional authorities constitutive of state governments.

#### DIGITAL ART: DEFYING AUTHORSHIP AND OBJECTHOOD

The Internet is not only a conduit for the exchange of literary and artistic works but also an artistic medium in its own right. In the spring of 2001, the San Francisco Museum of Modern Art (SFMOMA) launched an exhibition entitled 010101: Art in Technological Times, which focused on art inspired by digital technology. A Web component of the show contained five Internet projects commissioned by the museum. The curatorial challenge was this: how to exhibit the Web projects in conjunction with the show while presenting the unique nonphysical and nongeographical nature of the Internet-based works. Conceiving of the works as more than just digital gallery installations, the curators chose to make the Web projects accessible online from remote locations instead of at computer kiosks within the galleries. Viewers

experienced the works not in the space of the museum, but within the virtual space of the Internet, independent of physical locations. To highlight the Web projects' existence in an alternative environment, the Web portal was designed as a highly sophisticated architectural space, demanding the viewer's meticulous navigation through labyrinthine menus and virtual passageways.

What the SFMOMA curators were trying to convey was the sense that digital art is not merely art that happens to be on the Internet, but rather an expression in the medium of cyberspace itself. Digital works present a form of conceptual art that transfers the art object from the physical world to that of cyberspace. The implications of this conceptual displacement are ripe for exploration.

In an ordinary museum context, administrators are forced to cope with copyright concerns on a daily basis. When purchasing an art object, the museum must decide whether to acquire exclusive rights to the work or to obtain nonexclusive licenses. When borrowing the object, the museum must consider issues such as the manner in which it may display the object and the extent to which it may reproduce and distribute images in its catalogues and promotional materials. Many of these same concerns apply to virtual display spaces, but they are often complicated by questions of ownership and maintenance in online environments. These management problems often arise from the same qualities of the Internet that positively impact creative expression and expand artistic possibilities.

One opportunity offered by the online environment is the collaboration of artists across national boundaries and creative fields. Timothy Murray, a cocurator of an online journal and exhibition space titled *C Theory Multimedia*, has discussed the way in which online exhibition spaces are thematically designed around exhibited works. Design elements of these exhibition spaces are often inspired by the works they are created to display (Murray 2005, 451). The overall effect is that of a total environment, an organic virtual space of collaborative creative expression. In traditional IP frameworks, this reproduction and incorporation of copyrighted design elements might be considered an unauthorized creation of a derivative work; in the online environment of digital art, it is common practice.

Such creative collaboration stretches the traditional understanding of joint authorship under copyright law. These new works often involve programmers, technicians, and even curators, to the extent that individual works take a backseat to the larger framework of joint projects and thematic spaces. For example, *C Theory Multimedia* has exhibited a project called Triad Hyperdance, which was produced by choreographers, musicians, and media artists working together from the United States, Finland, and Japan. Collaborations in such virtual environments blur the lines among artists, curators, and conservators. The resultant complexities involving authorship and ownership may create

problems down the line, when decisions regarding financial profitability, maintenance, and the work's creative determination eventually come into play.

The space of the Internet affects other ways art can take shape. Digital works housed on the Internet can exist as constantly adapting and growing organic entities. For instance, the SFMOMA's e.Space began hosting a work by Lynn Hershman entitled *Agent Ruby* in 2000. For four years, *Agent Ruby* interacted with users and "learned" from her exchanges with them, becoming a more complex digital entity with every cyberspace conversation. Ongoing interactive projects such as *Agent Ruby* transform the role of the author as the work's sole creator to that of principal collaborator—one who sets events in motion and allows the vicissitudes of time and cyberspace to determine the work's ever-changing form. When is this work complete? When the SFMOMA decides to no longer host it, will it be automatically destroyed or can its ownership change hands?

Digital works offer a number of challenges to traditional art institutions. Such works are difficult to install and maintain, since they live beyond the space of the gallery. Several museums have interactive online exhibition spaces, such as the New Museum's *ArtBase* and the Whitney's *Artport*. The SFMOMA's 010101 Web portal is currently in operation. Beyond these exhibition spaces are countless Web projects independent of brick-and-mortar art institutions that exist solely on the Internet. In addition to the issue of display and installation, the ways in which this kind of art can be reproduced, purchased, and sold are questions to be answered on a case-by-case basis in the coming years.

#### SHAPING ACCESS TO CREATIVE EXPRESSION

One of the most unusual qualities of the digital medium and the virtual environment is the ability to separate content from its physical embodiment. This quality has allowed digital rights-management systems to change the way in which intellectual property law interacts with creative works. These systems control user access to digital media through software that provides on-the-spot licensing or databases that calculate the rights relationships between users and rights holders. With the advent of such systems, users pay for the experience of and access to a creative work rather than the work itself. One example of a digital-rights management system is Apple's highly successful *iTunes Music Store*, which sells songs for about a dollar each. Apple's *Fairplay* encryption system incorporates usage restrictions such as limitations on the number of machines on which the purchaser can use the music and the number of times one can burn CDs of the same playlist. The Apple *iPod* is the only digital music player that is compatible with the *iTunes Music Store*, and it does not support competing digital music formats. The *Fairplay* system allows the seller to control the purchasers' use of the creative content, while the operational

specifications of Apple's machines and software encourage their mutual use and purchase to the exclusion of competitor formats.

In 1996 the World Intellectual Property Organization (WIPO) concluded two significant treaties that supported the development of digital rights-management systems. The WIPO Copyright Treaty extends protection to computer programs and databases, while the WIPO Performances and Phonograms Treaty addresses performances and sound recordings. Both treaties conceive of the scope of protection as encompassing a right of distribution, rental, and communication to the public. Notably, they prohibit circumvention of technological measures for the protection of works and unauthorized modification of rights management information contained in the works.

U.S. implementation of the WIPO treaties arrived in the form of the controversial Digital Millennium Copyright Act (DMCA) passed in 1998. The DMCA incorporates the WIPO treaties' anticircumvention measures, supporting the development of digital rights-management systems. Along with First Amendment concerns about the freedom of programmers to create circumvention technology, critics of the DMCA are anxious about the threat to user privacy, since many digital rights-management systems use encryption technology to limit access to the digital work based on information obtained from users. However, others view such systems as the only practical means of enforcing copyright protection in the digital arena.

Whether one views them as good or evil, digital rights-management systems offer an architectural solution to copyright protection, embodying instantaneous enforcement mechanisms of the terms and conditions of use with each instance of user-work contact. Embedded in the digital works themselves, these systems fundamentally alter the way in which the law interacts with users and rights holders, closing the distance between legal enforcement and actual use. Laura Gasaway has argued that by supporting these rights-management systems, the DMCA's anticircumvention provisions have created a new right of access under copyright protection. In digital works, authors have the ability to narrow the scope of how users can access their work, determining specific elements such as the number of computers on which works can be accessed and the duration of each use. This is a departure from the traditional rights model, wherein, under the first sale doctrine, an individual or library could purchase a book and allow an unlimited number of patrons to read the book however and for as long as they like. The expanded regime of digital access rights under the DMCA could lead to stringently regulated pay-per-use systems, limiting the ability of libraries to provide free public access to digital works (Gasaway 2003, 269, 270).

Of course, the implications of digital rights-management systems reach far beyond library access. They alter the nature of works themselves, allowing rights holders not only control of the work, but users' experience of the work.

What users are paying for is not a book, CD, or painting with which they may do what they will, but the ability to experience the work within narrow parameters. This pay-per-use system is achieved through the unique quality of the digital medium, wherein content is divorced from the physical world. In the digital world of rights-management systems, the work can be understood not in terms of the object within which it exists, but rather, of the user's experience of the work.

OPTING OUT OF TRADITIONAL IP REGIMES:  
CREATIVE LICENSING

Another innovation born from the uniquely flexible space of the Internet is the development of free software and "copyleft" licensing schemes outside the default rules of traditional intellectual property law. Under the Free Software Foundation's GNU General Public License (GPL), for example, free content must be alterable and contain few usage restrictions. Any work that incorporates the original must be made available under the same license or one that is less restrictive. Inspired by the GNU GPL, a group of academics led by Lawrence Lessig developed Creative Commons (CC) in 2001. Creative Commons provides eleven different user-friendly copyright licenses for free public use based on existent legal frameworks.<sup>9</sup> Designed for creative works such as Web sites, music, film, photography, and literature, CC licenses allow artists and authors to release their work into the public domain or to tailor licensing schemes that retain certain rights while allowing others to use the works under certain conditions and limitations. Artists can choose from a variety of license provisions, such as requiring attribution, limiting users to non-commercial uses, and permitting the distribution of derivative works only under the same kind of license. In addition to its legal licensing provisions, CC has developed machine-readable metadata that can be used to associate works with their licensing status. This feature enables users to search for works based on their attendant rights and conditions and increases the efficiency of communication between artists and users regarding legal rights.

The CC licensing scheme is based on the belief that public access to creative expression benefits both the artist and the public. It facilitates the fundamental desire of artists to gain exposure to their work and provides the general benefit of public access to creative expression. CC licenses offer a way for artists to determine an optimal balance of access and limitation on a case-by-case basis. Personally tailored incentive structures allow artists to take into account the opportunity of exposing their work to the public, something that artists often struggle to accomplish. This value is often ignored by traditional copyright regimes, which assume the possibility of financial benefit through reproduction and distribution of the work to be the artist's sole incentive. These traditional regimes ignore the reality that many artists fail to reach publication.

The labor of these artists not only goes unrewarded but is completely unappreciated by the public. CC licenses promote the exposure of creative works to the public, while continuing to offer financial and/or personal incentives as desired.

Creative Commons is not the only provider of alternative licensing on the Internet. Such legal regimes are often referred to as copyleft licenses. Unlike copyrights which set out the boundaries for private ownership of reproduction and distribution rights, copyleft licenses outline the rights of the public to use the licensed work. One example is the GNU General Public License (GNU GPL) developed by the Free Software Foundation.<sup>10</sup> This license is one of the first legal regimes to codify the terms of free software. Such software can be loosely described as that which is freely available to users to be copied, altered, and redistributed. The GNU GPL requires that any improved version of licensed software must also be distributed as free software, ensuring that improvers do not capitalize on the work of others. Accompanying the GNU GPL is the Free Documentation License. Although originally created for reference materials accompanying free software under the GNU General Public License, it can also be applied to any text-based work. The Free Art License is another copyleft license under French law that outlines the terms under which an artist may release intellectual property rights and allow other artists to use or incorporate his or her work. Developed at a 2000 Copyleft Attitude conference in Paris, the Free Art License was created by members of the art community and freeware activists with the goal of promoting an artistic environment of respect and cooperation.

#### DIGITAL IMAGES AND THE ONLINE ART MARKET

Commercial market forces, too, are affected by the relationship between digital media and the law. The business of providing digital images to entities such as publishers and advertisers is a multimillion-dollar industry. Getty Images, which reported approximately \$622.4 million in 2004 revenues, leads the industry, while Corbis comes in second at \$170.4 million that same year. Interest in investing in digital images began to grow in the late 1980s and early 1990s, not coincidentally when Bill Gates created Corbis as a pet project. Companies were anticipating the incipient thirst for content on the Web, while museums and art institutions realized that the potential for profitability coincided with an invaluable opportunity to preserve images of the objects in their collections.

During the 1990s, Corbis focused its attention on amassing the digital rights to renowned collections such as that of Saint Petersburg's State Hermitage, the National Gallery of London, Japan's Sakamoto Archive, and the Bettmann Archive, which houses one of the world's largest collections of photographs. In 1999, Getty Images partnered with the United Kingdom-based Bridgeman

Art Library, which owned digital rights to works from institutions such as the Barnes Foundation and the Dresden State Museums. In 2000, Japan's Toppan Printing Company purchased the digital rights to works in Beijing's National Palace Museum; it already owned electronic rights to the collection of Florence's Galleria degli Uffizi. In competition with Toppan, Dai Nippon Printing Company had been digitizing thousands of works from the French Réunion des Musées Nationaux. These companies were not only purchasing potentially lucrative assets but also gaining the digital ownership of national heritages. They realized the value of the Internet as a vast cultural storehouse.

Before the development of comprehensive digital image archives, authors and publishers used photo libraries as image sources for their publications, paying small permissions fees for reproduction. There was little policing of eventual additional uses, such as later print editions or affiliated presentations. But with the advent of online digital archives and their consolidation in large companies such as Corbis and Getty Images, image procurement for publication has become both easier and more difficult. Massive storehouses of easily searchable materials are readily available online for those who need them. However, as the digitization of images has become big business, providers have become more vigilant about keeping track of the complicated labyrinth of use rights involved. Several parties must be considered when it comes to digital image rights—the artist, the owner of the original work (photograph, painting, art object), the owner of the digital rights, the rights seeker, and any subsequent potential users of the digital image. The growing interest in defining these separate parties and rights is coupled with the significantly increased ability to police uses of the image over time, thanks to the development of sophisticated watermarking and tracking software. All of these factors lead to complicated licensing agreements, often resulting in prohibitive legal mazes to parties such as self-publishers or small companies seeking to reproduce such images.

One important issue is whether owners of photographic rights to an image for prior print publications have subsequent ownership to the photographs' digital rights. In *Greenberg v. National Geographic*, the Eleventh Circuit held that the conversion of photographs to digital form is not permissible under the fair use doctrine.<sup>11</sup> *National Geographic* used digitized photo images in a commemorative CD-ROM; one such image was Jerry Greenberg's diver photo, which had appeared in *National Geographic's* prior print issues. The court determined that the digitized image in the CD-ROM did not fall under the fair use exception, but amounted instead to an infringement on the photographer's exclusive right to create derivative works. It focused on the transformative quality of the electronic work, noting the digital image's inclusion in the CD-ROM's complex audiovisual presentation. The court also took into consideration the commercial sale of the CD-ROM and its preclusion of the

photographer's potential licensing of digital rights to other potential electronic publishers.

Outside the commercial market of digital rights is a limited degree to which educators and researchers may use copyright-protected digital images under fair use. The determination of fair use generally involves four considerations: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the entire copyrighted work as a whole, and the effect of the use upon the potential market for the copyrighted work.

The specific parameters of fair use in the educational context were informally discussed at the 1994 Conference on Fair Use (CONFU) hosted by the Patent and Trademark Office under the Clinton administration. CONFU participants were unable to come to a consensus regarding guidelines for educational fair use. However, several institutions developed their own guidelines, including the Visual Resource Association's Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections and Rules of Thumb for interpreting the fair use of copyrighted materials devised by Georgia Harper of the Office of General Counsel for the University of Texas system. These guidelines generally limit educators and researchers to the use of digital images and texts in educational, noncommercial contexts. In keeping with this general principle, many digital image libraries license their services only to nonprofit institutions and limit access to the images in their archives to noncommercial educational purposes such as use in theses, academic conferences, and classroom instruction. One such archive is the Artstor Digital Library founded by the Andrew W. Mellon Foundation, which houses more than three hundred thousand images. Arranging agreements with participating arts institutions, Artstor seeks ongoing nonexclusive licensing agreements in order to achieve the greatest degree of resource availability on the Internet.

#### CONCLUSION

In his introduction to *Law, Ethics, and the Visual Arts*, the late Professor Albert Elsen provided an answer to why we care about art: "Art is basic to cultural history. Every work of art is a cultural artifact whose study enriches our understanding of who we are and where we come from" (Elsen and Merryman 1998, xix). If Elsen is correct, art must also have very much to do with where we are going. The Internet offers an alternative avenue for the future of creative expression, altering the form of art and the location of culture. The law governing cyberspace can either facilitate or constrict. It can take advantage of the elasticity of the digital medium to make art more available to the online public through licensing schemes such as Creative Commons, or it can exploit the

virtual architecture of the Internet in order to enforce stringent control over copyrights through encryption software such as those found in digital rights management systems. The options for cyberspace regulation are as expansive and dynamic as the opportunities for creative expression, but one thing is certain—the terrain of the artist is irrevocably changed.

## NOTES

1. In his seminal 1967 article entitled “Art and Objecthood,” Michael Fried argued that the Minimalist artists of the period had betrayed the American Modernist movement by engaging in “theatricality.” His analysis focused on the ways in which the art objects interacted with their environment and raised the question of where a work’s meaning operated or took effect. The article was reprinted in Michael Fried, *Art and Objecthood: Essays and Reviews* (Chicago: University of Chicago Press, 1998).
2. U.S. Const. art. I, § 8.
3. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).
4. <http://gutenberg.net.au/ebooks02/0200161.txt>.
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