



Strictly Business: Providing Access to Digital Images

Imagine if a reputable academic library was able to develop a cutting-edge marketing campaign to promote its collection beyond its physical walls. Hundreds of spectacular rare images could be made available online, thereby increasing circulation and prestige in one stroke. The catch is that none of these images could be printed or saved on a personal desktop and users would be required to purchase print reproductions. The proceeds would benefit the institution.

Fair deal! Finally a cultural institution could market its assets appropriately and collect decent funds in the process. But as part of the library's collection, aren't these images in the public domain?

Digital rights management presents new ethical and legal questions for libraries. It may be tempting to adopt the business models of commercial content providers, locking digital image content under the guise of "value-added services." However, this is counter to the library's responsibility to provide free, unrestricted access to content within the confines of copyright. This article will discuss

the prohibitive licensing model of image databases, the hidden dangers of value-added services, and alternative product delivery models afforded by the fair deal clause under copyright law.

Licensing images in the digital age

Current copyright laws around image creation offer the artist a 50-year protection term in Canada. In spite of such protection mechanisms, image database aggregators add increasingly sophisticated measures to prevent free access and distribution of images online. These measures may be "tip[ping] the copyright balance away from the public good by restricting access to the free flow of ideas and information that copyright holds as an important part of the 'cultural bargain.'"¹

The most insidious method of controlling access to digital images is licensing. Licensing grants users restricted access to digital content for a fee. It creates the illusion of unlimited access through value-added retrieval services, but, in actuality, it controls access to materials at

the item level by imposing search restrictions, by displaying limited results, by prohibiting serendipitous browsing, and by limiting the number of simultaneous users. More important, licensing does not discriminate between copyrighted and public domain material. In direct contrast to licensing, the creative commons model lets artists negotiate image usage rights in return for name attribution.

The physical ownership of items has created an unsettling role reversal that has profoundly affected the decisions made by information providers. Custodianship, traditionally a role associated with libraries, has been transferred from cultural to commercial institutions. It is the custodianship of individual items that has allowed licensors to impose heavy access restrictions on their use. Publishing houses own the physical item at hand and are therefore in the commercially enviable position to grant and deny access to the intellectual content in their collections through the imposition of indiscriminate licensing fees. Under the guise of providing

value-added services to collections, licensing has effectively established a mechanism by which users pay for what they may not need or for what is – legally and morally – a free item.²

The danger-talk of value-added service

If users pay for digital images regardless of whether or not they are in public domain, is copyright dead? With the advent of licensing, should libraries focus on the provision of value-added services rather than open access to collections? Is emulation of commercial enterprises the model to follow in a world where access to information has a dollar sign attached to it and where cash-strapped libraries could generate revenue from digital images in their own collections?

The courts have started to favour such an approach. The Law Society of Upper Canada was sued by CCH Canadian Limited, an electronic database of articles that claimed copyright not for the content it provided, but rather for the value-added services it offered in the form of abstracts, headings and subject-based indexes. In this case, the selection and arrangement of the material in the database was considered sufficiently original to warrant copyright protection and the Law Society lost.³

Libraries, like commercial content providers, offer resource organization and access, so why

shouldn't they penetrate this lucrative market? For example, libraries could feasibly offer value-added services in relation to digital images by creating searchable databases of such collections, indexing items and creating topical headings, and even by offering them in print in the form of postcards and other collectibles. There is certainly an advantage to this method for fundraising purposes. If libraries charged a fee for their collections, they could carve a niche for themselves in the competitive information field.

It seems that by not going for the fee-based approach, libraries may become obsolete and forgettable in the fast-moving business world. Let's not forget, however, that libraries and other cultural institutions are not a business but probably the last bastions of freedom in a heavily regulated and taxed society. If they go, society will be at the whim and mercy of those who own physical items and control access to them.

Deal fairly – use fairly

Rather than emulating for-profit business models, libraries could follow the counter example of providing open access to collections to favour people with disabilities. For instance, the MBooks program, sanctioned under copyright law, is a partnership between Google and the University of Michigan to provide content to visually impaired students.⁴ Other examples are digital

repositories that exempt users from paying fees for images accessed from their collections unless it serves commercial purposes. This creates a two-tiered service whereby access is granted based on the intended use of an image under the fair use provisions of the Copyright Act.⁵


Unfortunately, publishers have tried to appropriate the fourth clause of the fair use provisions in the Copyright Act to their own advantage and against the open access principles which libraries seek to promote. Two non-profit academic publishing houses recently sued Georgia State University for allegedly breaching copyright law and depriving them of economic benefit after the library made digital content freely available to students through interlibrary loan, document delivery and the posting of course materials on password-protected course management sites.⁶ The library did nothing but perform its traditional service functions under the fair use clause, for which neither it nor its users should have been found in defiance of the law.

In Canada, fair use provisions are still retained in the Copyright Act regardless of the format of the copyrighted material. In the United States, however, the Visual Artists Rights Act of 1990 has tried to subtly control access to digital image content by excluding certain categories of images from the fair deal clause.⁷ Obviously, this creates a loophole in legislation that allows content providers to control access

to the images in their collections regardless of the copyright status of these images. Yet again, the economic interests of copyright owners prevail at the expense of the interests of the majority of the population. The focus is on commoditization of knowledge on the grounds that copyright entices artists to be prolific.

Conclusion

Locking down digital images through excessively strict licensing procedures inhibits the free dissemination of knowledge in a democratic society. While licensing models may be an efficient and profitable business model for commercial content providers, a library should shy away from such discriminatory practices for the benefit of the community of users it serves.

Rather than locking digital image content on websites under the disguise of value-added services, libraries would do better to direct their efforts toward delivery of free services to underrepresented and disadvantaged user groups and to advocate progressive changes to copyright legislation that move toward a community of free and unrestricted access to content according to the creative commons model. Copyright is not dead – licensing should be. 

Notes

1. Diane M. Zorich, *Introduction to Managing Digital Assets: Options for Cultural and Educational Organizations* (Los Angeles: The Getty Information Institute, 2000), www.getty.edu/bookstore/book/sites/intro_mda/index.html, accessed March 9, 2009.
2. Alex Guindon, "A Very Short History of Copyright: Adopting the User's Perspective," *Canadian Journal of Information and Library Science* 30:3/4 (September-December 2006), pp. 153-74; Teresa Scassa, "Intellectual Property in a Digital Environment," in *Access to Information in a Digital World*, ed. K.G. Adam and W.F. Birdstall (Ottawa: Canadian Library Association, 2004), p. 43; Canadian Council of Archives, Draft Letter in Response to Proposed Amendments to the Copyright Act (Ottawa, November 2008).
3. T. Scassa, "Intellectual Property in a Digital Environment," in *Access to Information in a Digital World*, ed. K.G. Adam and W.F. Birdstall (Ottawa: Canadian Library Association, 2004), pp. 48-50.
4. Jessamyn West and Rachel Singer Gordon, "Content – Yours, Theirs, and Ours," *Computers in Libraries* (September 2008), pp. 38-39.
5. Anne Blecksmith, "Virtual Resources Online: Digital Images

of Primary Materials on Public Web Sites," *College & Research Libraries News* 69:5 (May 2008), pp. 275-78.

6. George. H. Pike, "Putting Academic Fair Use to the Test," *Information Today* 25:6 (June 2008), pp. 1 and 56.
7. VRA Committee on Intellectual Property Rights, "Appendix M: Visual Resources Association Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections," in *The Librarian's Copyright Companion*, ed. J.S. Heller (Buffalo, NY: William S. Hein & Co., Inc., 2004), pp. 209-12.

Further Reading

- Hopkins, Richard. "Copyright Complexities and Concerns." *Canadian Library Journal* 44:5 (October 1987): 273-278.
- Wilkinson, Mary Anne. "Genie in the Bottle: Intellectual Property and the Flow of Information." *Canadian Law Libraries* 28:5 (Winter 2003): 206-211.

Manuela Boscenco is a student in the MAS/MLIS program at the UBC School of Library, Archival and Information Studies in Vancouver.

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