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HEADLINE: **Intellectual Property Versus the Digital Environment: Rights Clearance**

Complete Paper
By [Linda Tadic](#)

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SUMMARY:

This paper addresses issues faced by for-profit corporations and non-profit cultural institutions as intellectual property users in a digital environment. Complexities in identifying audiovisual asset ownership and licensing assets are discussed.

Disclaimer

The comments in this paper are my own opinions and do not represent the opinions of HBO or AOL Time Warner, HBO's parent company.

1. Introduction

My presentation this afternoon will focus on copyright issues involved in using still images, audio, video, and text on the internet. These issues apply to for-profits and non-profits alike. It has been argued that the internet should be considered a new distribution medium, with unique laws and licensing requirements distinguished from those applied to more traditional means of distribution, such as publishing and broadcasting. Up to now, laws and practices have tried to fit copyright and the internet into these traditional constructs. But the internet is different, in that it provides quality copies of digital works immediately upon transmission. Users can easily make perfect copies of these digital works with one click of the mouse. It is being argued that a new distribution model for the internet is needed.

I will discuss the current process for securing clearances for audiovisual materials on the internet, and leave it to other speakers to discuss the potential future. For-profit corporations and non-profit cultural institutions face many of the same issues in needing to identify intellectual property owners and to secure permissions or licensing agreements before placing audiovisual properties owned by others on web sites. If the use *does not* fall under the fair use provision, then permissions must be secured.

I will not discuss fair use or public domain works, leaving those topics to other speakers to address.

2. Definitions

Let's first start with some definitions.

a. Asset ownership

I'd like to use business language and use the term "asset." An asset is a work/object in tangible form that can be owned and exploited by:

- Society and culture (public domain works)
- Creator (individual or a group of individuals; e.g. writer, composer, artist, etc.)
- Corporation/organization (includes licensing agreements)
- Government (can own rights to cultural landmarks, e.g. in France)

The US Copyright Code gives a copyright owner the exclusive right to reproduce, distribute, perform, display, or license his/her work (or asset). The owner also receives the exclusive right to produce or license derivatives of his or her work.

Putting assets or derivatives of assets on a website or on the internet is in effect reproducing, distributing, performing (if audio or video), and displaying the works.

Before an individual or organization decides to reproduce a work or "asset," it needs to be determined who "owns" the asset.

There are three other considerations related to copyright and licensing issues that will appear throughout my discussion. I will refer to these from time to time:

b. Unpublished works (ties in with first right of publication). Most organizations and individuals recognize that rights clearances need to be considered for published works. However, some believe that if a work wasn't published, it is therefore not copyrighted and there can be no infringement if it is used. But don't think you're safe using an unpublished work such as correspondence that you find in your collections. The Supreme Court *Salinger v Random House* (1987) decision says that writers (and by extension, any creator of a work that has been put into tangible form) have first right to publish their work. They might never have intended for their work to ever see the public eye, or they might choose to never publish the work, but the creator still has the first right to publish.

c. Asset in 3rd party's collection. If your archive/library was donated a collection and the donor assigned all rights to your organization, you do not have the rights to display or publish works created by a 3rd party that could be included in the donor's collection. Third-party works commonly include correspondence and artwork. You will need to obtain rights to use that 3rd party's work. This ties in again to the *Salinger* case; JD Salinger's letters were included in collections donated by his correspondents to several educational institutions. He successfully sued to stop their inclusion in a biography of him.

d. Rights to privacy and publicity. Throughout my presentation, I will also touch on rights to privacy and publicity, which in the internet environment are becoming increasingly linked to copyright concerns.

3. Identifying Who Owns An Asset

a. Introduction

Who could own an asset, and how do you find the owner?

Determining who owns an audiovisual or multimedia asset can be complex.

Multimedia asset types:

- Still images (art, photos)
- Audio (music and spoken word)
- Moving images (film and video)
- Web sites (can contain text)

Possible owners of assets:

b. Still Images

- Photographer (NOT work-for-hire)
- Artist
- Publisher (if book cover)
- Person represented in image (rights to privacy/publicity)
- Company owning photo (Corbis, Getty Images)
- Company with rights to license digital reproductions (ex.: Corbis and Ansel Adams photos)

Licensing still images

Once you have identified who could own the right to digitally reproduce a still image, you need to license it.

1. Artist/ photographer. Some artists or their estates take care of their own permissions and licensing. You would need to contact them directly.
2. Licensing for images of art and photography: Some artists use licensing agencies or clearinghouses to license the use of art/photos in publications and for digital reproduction. (e.g., [The Artists Rights Society](#) represents over 40,000 artists and photographer, and have database online.
3. Digital rights licensing. Some artists or estates use companies who are only responsible for licensing digital reproductions. For example, the Ansel Adams Foundation must be contacted for reproducing an Adams photograph in print, but Corbis has the digital reproduction rights.
4. Using image of actor/talent. Let's say you'd like to add value to your website by using a photo of a well-known actor or actress, or character. Talent can own rights to publicity and their likeness, voice, and name. In California, their estate can control these rights posthumously. The feeling is that the talent's likeness is a marketable attribute, and they should be able to control its display. For-profits negotiate complex contracts with talent, agencies, and distributors providing specific parity, credit, and usage restrictions when a talent's image is used. Can non-profits use the talent's image without permission, even if the non-profit is not

making money off its use? This could depend on the context of the use, but if the image is downloadable, and the talent doesn't want their image available for mass reproduction, they could ask that the image be removed from the website. The right to privacy is available not just to actors/actresses or public figures, but also to individuals.

Using still image without obtaining clearance

Some organizations might think that they needn't obtain clearances before using an image on a website.

- Copyright notice

For example, a non-profit might believe that placing a copyright notice on or by an image will satisfy copyright concerns. But if the clearance was not obtained, the copyright notice means nothing. Also, a copyright notice near an image rather than embedded in the image can always be stripped from the digital image. The Digital Millennium Copyright Act bars removing the copyright management information from an asset without authority, as well as disseminating copies where the copyright management information has been removed. In *Kelly v Arriba*, the District Court for the Central District of CA found that Arriba's (now Ditto.com) using a crawler to retrieve Leslie Kelly's photographs off his personal site without Kelly's copyright notice attached was NOT a violation of the DMCA, since the copyright statement was not embedded in the image itself but rather was located elsewhere on Kelly's site. Kelly appealed the decision, and the appeal was heard on Sept. 10, by the 9th Circuit Court of Appeals-- the same court that ruled on the Napster appeal.

- Thumbnails

Citing the *Kelly v. Arriba* case (in which Arriba's search engine returned photographs by Leslie Kelly), Tadic said that re-using thumbnail images had been ruled as fair use (as the quality was below acceptable commercial use). (This case was upheld on appeal; see netcopyrightlaw.com/pdf/0055521.pdf.)

- On-site use only

Some cultural institutions are providing digital copies or surrogates of copyrighted items in their collections only on-site, on computers with the organization's IP address. This is allowed under the copyright law in Section 108, where digital copying is allowed for purposes of preservation, scholarship, and research, if:

- The copy is made without any purpose of commercial advantage;
- The collection is open to the public, and open to researchers;
- The reproduction includes a notice of copyright;
- The copy is not made available to the public outside the premises of the library or archives.
- No reproduction is allowed if:
 - The copyrighted work is subject to normal commercial exploitation;
 - or
 - A copy of the work can be obtained at a reasonable price

Marketing web sites

Some companies, especially film studios, encourage downloading authorized images from their marketing web sites for use in creating fan web sites, screensavers, e-cards, etc. It's considered a marketing tool. Harry Potter website at Warner Bros. site: register

your fan website. However, note that: (1) the company has decided what images are authorized for downloading; (2) the consumer is not allowed to use the downloaded image to sell products.

c. AUDIO

- Producer
- Production Company/Performer(s)
- Composer
- Recording label
- Distributors (licensed in various markets)
- Interviewee (rights to privacy/publicity)

To use a piece of published recorded music on the the internet, you must obtain composition rights (for public performance of the composition itself); recording rights (for the recorded work); and reproduction and distribution rights (for both the composition and the recorded work).

Composition rights (public performance of the composition). Licensing organizations such as ASCAP and BMI act as clearinghouses for licensing composition rights. They represent the publisher or administrator of the piece of written music. Both organizations have special rates for webcasting or internet use.

Recording rights (public performance of the recorded music). The recording label owns the specific recording of the piece of music. It's a common practice that the rights revert to the performer 35 years after the recording's release. Must obtain permissions from labels directly.

Reproduction and distribution rights. Internet transmissions are considered to involve reproduction and distribution, which are separate from public performance and involve two steps. Reproduction occurs in downloading the music to a hard drive or server; distribution occurs by making the music widely available over the internet. Again, ASCAP is only concerned with public performance of a composition. Reproduction and distribution rights for the composition are represented by the [National Music Publishers' Association](#) and are licensed through the Harry Fox Agency, a clearinghouse for reproduction and distribution. Reproduction and distribution rights for the recording are again owned by the label.

Let's consider some examples to help illustrate these various rights.

Example One: You want to use Aretha Franklin's version of the Beatles' "Eleanor Rigby" on your web site. You go to the ASCAP database on the internet. You see that the Publisher/Administrator of the song "Eleanor Rigby" is Sony/ATV, which owns the composition right. You pay the minimum \$264 a year licensing agreement for using ASCAP licensed works on the internet. Again, this licensing agreement covers "public performance" of the composition ONLY. You then go to the Harry Fox Agency and license reproduction and distribution rights to download and distribute the composition over the internet. You still need to obtain licensing from the recording label (Arista), which owns the rights to the recording itself. From Arista, you obtain licensing for public performance of the recording, AND reproduction and distribution rights. These are the rights that must be obtained before using the tune on your website. The clearinghouses make it easy for you—they have databases and license applications on their web sites, so it's not as complex as it might appear.

Example Two: But perhaps you decide that getting clearance to include Aretha on your

website is too much of a headache, so you'll use music that is in the public domain. You select a recording of Mozart's String Quartet KV 387, performed by the Emerson String Quartet. Now while the quartet is certainly not on ASCAP's list of protected compositions, you would still need to secure rights for the recording from Deutsche Grammophon.

Example Three: OK, let's forget the Mozart and look at the folk music field tapes in your collection. The tapes were recorded by a professor at your university, and he assigned all rights to the university. Sounds safe and clear. That's fine as far as his rights are concerned, but you will still need to obtain signed agreements from the performers permitting public performance, reproduction and distribution of their performances, if a contract allowing this wasn't done at the time of recording. While the recordings could have been originally made with no intent at the time to "publish" them, the performers could still have first right to publication. (unpublished works)

In sum, the three kinds of rights that must be acquired to use a recording on the internet are:

1. Composition rights (composer/publisher of music)
2. Recording rights (distributor/recording company; performer if unpublished; commonly the performer owns if over 35 years after release)
3. Reproduction and distribution rights (for composition AND recording)

These are the issues that the record labels are facing as they develop subscription-based sites for downloading music in the wake of Napster. An internet music start-up developed by FullAudio made news this past summer with an announcement that it had signed a deal for recording rights from EMI Recorded Music, and licensed the composition rights for these recordings from EMI Music Publishing and BMG Music Publishing. The labels themselves are joining forces to create subscription-based digital music distribution services that are supposed to go live in the fall: Pressplay (Sony and the Universal Music Group), and MusicNet (BMG, EMI, AOL Time Warner, and RealNetworks). It was announced last week that the Big Five labels had reached an agreement with the music publishers that would allow the two subscription services to license reproduction and distribution rights of the compositions.

Just as for-profits take rights management very seriously, non-profits should as well. Once a museum, library, or archive includes an asset owned by others on their web sites, they have stepped into the same realm that the for-profit community lives in. A non-profit could argue that its use of copyrighted assets is fair use and should be protected.

In brief: fair use of a work is decided by four factors:

1. the purpose and character of the use (commercial nature or non-profit educational purposes);
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. the effect of the use upon the potential market for or value of the copyrighted work.

If a non-profit includes assets owned by others on its site, it could be argued that the use of that asset is impacting the asset's market value. Users can download the image or audio file from the site, rather than purchasing a copy of the work, which deprives the asset owner from the right to exploit the work. Why is this being taken seriously by the music industry? Jupiter Media Metrix estimates that single paid downloads currently represent \$25 million in sales.

d. FILM/VIDEO

- Producer
- Production Company
- Performer(s)
- Composer
- Distributors (of various markets)
- Interviewee (rights of privacy/publicity)
- Actors
- Screenwriter
- Director
- Location

For-profits have been struggling with the issue of controlling audio over the internet for some years now. Streaming video on the internet is just now beginning to become an intellectual property rights issue. The large size of digital video files made it prohibitive for most organizations—non-profit and for-profit alike—to distribute video on the internet. Digital video files can take too much server space on the supply end, and can take a long time to download on the receiving side. A feature film can be 500 MB in digitized form, and take 20 to 40 minutes to download on a broadband connection. However, with the growth of faster broadband access, it is certain that video on the internet will increase in the next few years as bandwidth capability increases. Analysts at PricewaterhouseCoopers estimate that 8.2 million of the 54.3 home internet users will have broadband (DSL or cable modem access) by the end of 2001.

For-profits view the internet as another means of distribution. As I mentioned in my introduction, traditional distribution venues include broadcasting (radio, television, cable) and physical sales and rentals (music CDs, VHS tapes, DVDs). Following the precedent of online music subscription services, the major film studios have created two joint ventures that will offer subscription “rental” copies of movies over the internet. One venture called Movies.com was formed by the Walt Disney Company and the News Corporation (Fox). Another venture, as yet unnamed, was formed by five studios—Sony Pictures, Warner Bros., MGM, Paramount Pictures, Universal Pictures. This service will use a content protection system called Digital Transmission Content Protection, which will embed IPR information into the file; allow the downloaded file to be played an authorized number of times; authorize whether it can be copied, or block copying completely; and will self-destruct 24 hours after first play. If copying was allowed, content owners could then scan web sites and computer hard drives to find unauthorized use of the downloaded file, similar to how digital still images can be found on the internet. I’ll discuss content protection for all asset types in a moment.

Few non-profits can afford to put much more than short clips of streaming digital video on the internet, and those are usually QuickTime movies (small box, jerky image). The Library of Congress’ “American Memory” project has digitized dozens of films that are firmly in the public domain. These video files are available for streaming playback in QuickTime; some are also available as MEG files. The Internet Archive, which you will hear Jane White discuss, also has educational, public domain films available for download at: www.moviearchive.org OR <http://www.archive.org/movies/> These are stored in MPEG2 and MPEG4, and need to be downloaded to view rather than view as streaming video.

Who owns?

Determining who owns rights to a film or video can be a moving target as rights are frequently sold. Even if you carefully note the copyright credit on your videotape of a film

or television program recorded off-air ten years ago and decide to pursue that company to obtain rights, that company could have sold the rights to another company last year. You would also need to investigate whether any rights need to be cleared that could be held by the actors, producers, writers, performers, guilds, or music. To my knowledge, there are no clearinghouses for film/video as there are for music and art, so research to identify the various rightsholders can be intensive.

The first place to research film and video copyrights is the Copyright database at the Library of Congress: www.copyright.gov. This database lists claimants and copyright ownership to works created AFTER 1978. To search before 1978, one must search in the Library of Congress online catalog, LOCIS, or in the published lists. However, remember that rights could have been sold after the initial copyright claim was filed.

There are also copyright services that conduct title searches.

Rights of the licensor/distributor

Distribution rights can vary by market. Different companies can own the national, international, cable, and internet distribution rights to a film or program. The definition of internet rights becomes tricky—is it international distribution, since the internet crosses borders? Or, does the internet not fit in the definition of traditional distribution media like television, cable, and radio? Is a new distribution model needed?

For example: If a television or cable channel decides to broadcast streaming video through a broadband service, or offer video-on-demand through its website, its cable carrier or MSO (multiple system operator) could possibly claim that this alternate access is infringing on their business. This very situation occurred when ESPN withdrew its ESPNNews from being carried by Charter Communications. ESPN wanted to stream video content over the internet; Charter felt that this infringed on their contract to carry ESPNNews. The National Association of Broadcasters (NAB) then joined the fray by saying that Charter can't force exclusive rights; a channel can sign separate agreements to be carried by multiple MSOs, as well as have internet distribution. You might wonder why a non-profit organization should care about what happened between ESPN and Charter, but consider: if your non-profit places on the internet an episode of or clip from a TV show or film, it is essentially giving that clip international distribution. You need to research not only the rights holder of the film or program, but also who might have licensed the rights to international or internet distribution of that program.

The issue of whether the internet constitutes another "market" or is an extension of performance rights already acquired has also been experienced in the online radio community. Hundreds of radio stations across the country broadcast simultaneously over the air and on the internet; hundreds broadcast ONLY on the internet. The Recording Industry Association of America (RIAA) claimed that the radio stations who both broadcast and simultaneously webcast should pay record companies an additional 15% over what they already pay for broadcasting performance rights (remember the areas of rights mentioned in the audio section). To them, webcasts constitute a second run. Actors in commercials also claimed that they should receive additional payments when their radio spots are played on the web. The stations asserted that they already pay fees to broadcast the music, and these fees should apply to ALL broadcasts, no matter how transmitted. And with ad revenues down, they can't afford to pay the additional fees. Internet-only Webcasters sided against their dual broadcast-internet brothers and sisters, saying that since they paid internet royalties as required, relieving the dual broadcasters from paying internet royalties would give the radio stations an unfair financial advantage. The US Copyright Office decided that according to current law, the radio stations should also pay internet royalties, and the US District Court in Philadelphia upheld that decision.

An arbitration panel is deciding what should be the webcasting royalties on top of the broadcasting fees.

Let's switch gears and consider how the rights to privacy and publicity come into play with moving images and audio on the internet. Rights to privacy and publicity can affect a non-profit's use of home movies, oral histories, etc. Example: A donor could give rights to use his/her family's home movies in an exhibition/web site, but the organization must then obtain clearances from other members of the family who are represented in the footage. These are private images that when they were created were not intended for public viewing. While no money is exchanging hands in the use of this material, permissions should be obtained before exhibiting or publicly performing what were originally private works.

e. Web Sites

- All of the above
- Author (if unpublished text)
- Translator (original work could be in PD, but translator owns rights to his/her translation)
- Publisher (if text)

These are the main multimedia asset types. I've discussed who can own the assets, and considerations in licensing. Now let's briefly touch on digital rights management.

4. DIGITAL RIGHTS MANAGEMENT

As assets become distributed over the internet, owners and distributors want to control, track, and protect their use. Content protection has become a key area—content owners don't want to have their assets copied for free when they have the right to exploit their property. They want to control the usage of their assets. And if you're a non-profit that gained clearances to use an asset owned by another entity, you might want to protect that asset too, so that you can't be held liable later if someone downloaded that asset without authorization and then re-purposed it illegally.

Digital rights management consists of these primary concepts:

1. Tracking who created the asset
2. Who owns the rights to control usage
3. Content protection

There are many digital rights management systems in place, and many in development. Some only provide a means to track rights information, some focus on content protection, some do both. My mentioning these products does not constitute an endorsement of them; they are mentioned for informational purposes only. I will not discuss copy protection of physical items like CDs and videotapes; e.g. Macrovision.

Digimarc (Still images: embeds a unique number owned by the content owner that can then be found through a Spider crawler. Video/audio: disallows copying of audio/video digital files; monitors broadcast of digital signals.) www.digimarc.com

Digital Object Identifier (DOI) (owner registers the digital asset with DOI by assigning a unique identifier to the digital object that is embedded in, or securely associated with, the object. It is a persistent identifier, rather than a URL that can change. The DOI can enable linkage to asset creation and rights information wherever it is encountered.

Currently, the DOI is used for ePublications; developing DOI for digital audio and video and other digital object applications. DOI is partnering with several industry and standards organizations (including W3C, WIPO, SMPTE, MPEG21, XRML (ContentGuard), etc.) For further information refer to www.doi.org.

SMPTE UMID (Unique Material Identifier) (Video: owners register the digital asset with SMPTE, which assigns a unique identifier embedded into the video file that also provides creation and ownership information.) www.smpte.org

MPEG Rights Expression Language and Rights Data Dictionary (used with MPEG7 and MPEG21) (digital video and audio) OPEN STANDARD. www.cseft.it/mpeg

Digital Transmission Content Protection (used by studios for subscription rental service over internet; controls usage) (digital video) www.dtcp.com

XrML (Extensible Rights Markup Language) (developed at the Xerox Palo Alto Research Center (PARC) as an open standard for tracking DRM and usage information with digital objects: all formats) www.xrml.com

ContentGuard (content protection using XrML; for all formats; allows content holder to authorize specific usage of digital assets) www.contentguard.com

CleverContent (content protection; still images and text only; allows image/text files to be accessed but not downloaded or otherwise captured without authorization). www.alchemedia.com

5. For-profit and non-profit comparisons : issues and solutions

a. For-profit

i) Issues

- Owns assets (IP)
- Wants to provide access to assets (profit motive), but to control that access/distribution
- Rights management awareness firmly in place

ii) Solutions

- Content protection. Can't access assets unless have authorization or pay (subscription services)
- Digital Rights Management tools to track ownership and usage

b. Non-profit

i) Issues

- Owns physical item (sometimes IP)
- Wants to provide access. Profit isn't usually a motivating factor. Any control placed on that access is out of fear/respect for rights.
- Rights management awareness still new concept

ii) Solutions

Content protection usually limited to giving copyright credit on web site. Not enough (see Kelly v. Arriba).

Follow new business model:

- Be strict in clearing rights/permissions; non-profits are now in the “distribution” business
- Secure rights to publish electronically; don’t assume that a contract to “publish” also applies to the internet.
- Consider rights to privacy and publicity
- Protect content
- Copyright your own web sites (design and content)
- Conclusion

6. Conclusion

Since the passage of the Digital Millennium Copyright Act, digital copyright law has been primarily defined and refined through lawsuits. On August 30, the US Copyright Office submitted its required report on the Digital Millennium Copyright Act to Congress, and asked Congress to clarify the copyright law for online music, encryption, the first sale doctrine, and whether the act of webcasting does encompass “reproduction” as it is currently interpreted. The report recommends that buffer copies of audio files—currently defined in the copyright law as “reproductions” that could make webcasters liable for additional licensing fees above public performance—fall under fair use. Webcasters must make these copies in the course of an activity that is already licensed by the webcaster (public performance). The report recommends that Congress should enact legislation amending the Copyright Act to preclude any liability for reproduction infringement for webcasters creating buffer copies that will be used for licensed public performance. [The report can be found on the Copyright Office home page: www.copyright.gov]

It’s obvious that the DMCA will undoubtedly be re-visited by Congress. Much of what I said today will change tomorrow, so it is important for users of copyrighted materials to keep up to date with changing law and cases in the courts. Non-profits that place assets owned by others on the internet have in effect become distributors. As a new distribution model for the internet is created, non-profits and for-profits could discover that they have more intellectual property rights issues in common than they had previously thought.

 **BACK**

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National Initiative for a Networked Cultural Heritage

21 Dupont Circle NW, Washington, DC, 20036

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