**"Scholarly Publishing and the Issues of Cultural Heritage,
Fair Use, Reproduction Fees and Copyrights"**

Workshop, January 11, 2008

Report

The purpose of this workshop was to bring together leading representatives from key universities, research institutes, libraries, museums, government agencies, commercial image providers and academic publishing houses to provide an opportunity to discuss experiences in working with and publishing visual images and cultural heritage items in academic contexts, especially in the humanities.

As science publishing moves forward into an increasingly fluid, international e-publishing model, the humanities scholars, especially those studying visual images, are being left farther and farther behind. They are constrained not only by restrictions to print and web publishing of images, but also by the confusion arising from conflicts of national, regional, and institutional policies concerning picture reproduction and cultural heritage citation. This is not only a question of copyright, but also a question of access, whether open or free, to uncopyrighted information, reproduction fees, and the politics of cultural heritage. Although the workshop was intended to address problems and concerns of scholars, it also aimed at addressing responsibilities of scholars in citation, fee-paying and publication of material.

The Max Planck Institute for the History of Science sees an urgent need to address these problems and to communicate them, in order to find ways to ensure the continued quality of research and scholarship. More and more scholars, especially in the history of science, are using images for their work, but frequently their choice of subject matter is unduly influenced by availability or affordability of key sources. As an internationally renowned institution that devotes its funds and energy to fostering innovative research in the humanities, the Max Planck Institute for the History of Science initiated this dialogue to yield a better understanding of and a broader subscription to fair practices of access that are acceptable to scholars, museums, libraries, publishers and research institutes alike.

On January 11, 2008, representatives and scholars from thirteen key institutions united in the MPIWG conference hall. The morning was dedicated to the short statements from many different viewpoints. Mitchell Ash (University of Vienna, Austria) and André Gunthert (EHESS, Paris, France) presented the scholars' viewpoint. From the publisher's side Susan Bielstein (University of Chicago Press, Chicago, USA) and Cristina Steingräber (Hatje Cantz, Berlin, Germany) gave an account of the current state of affairs in both book production and the problems of obtaining copyright and permission. Frank James (The Royal Institution, London, Great Britain) and Hans Rupprecht Goette (German Archaeological Institute, Berlin, Germany) represented two renowned Research Institutes with large image collections. Alan Seal (Victoria & Albert Museum, London, Great Britain), Doralynn Pines (The Metropolitan Museum of Art, New York, USA) and Kenneth Hamma (The Getty Trust, Los Angeles, USA) spoke for the museums, Norbert Lossau (Göttingen State and University Library, Germany) for the libraries, Annette Godefroid (Bridgeman Art Library, Berlin, Germany) and Carole Ann Fabian (ARTstor, New York, USA) represented two digital image providers. A session on legal issues, presented by Volker Kitz (Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, Germany) clarified some legal issues regarding copyright and physical ownership rights. The presentations were followed by a two-hour open discussion in the afternoon. Lorraine Daston, Director at the MPIWG and initiator of the workshop, summarized the meeting and drew preliminary conclusions about how to proceed.

Mitchell Ash, Professor of Modern History and Head of the Working Group for the History of Science at the University of Vienna, Austria, and past president of the Society for the History of Sciences (Germany), drew attention to three points. Firstly, he emphasized that scholarly publishing is not just about the free exchange of ideas, but also about quality control, reputation and, in the end, money. Concerning copyright, he urged that we not treat text and images differently, because in the digital age, any text can be scanned and is then, as an image, fair game. The conventional distinction between text and image in the age of copies we have today has lessened if not disappeared. In any case, images and texts form a 'unity of persuasion'. Does copyright law deal with text and images differently? Secondly, Ash focused on practices of Fair Use in teaching. In the United States, vetting of items for teaching materials – weeks if not months in advance – tends to be administratively complex, expensive, and irritating for university teachers. Publishers often see such proceedings, however, as necessary because using photocopies (or PDF-files) – in particular copying of large portions of published works – could be taken as a way of evading the purchasing of texts. The US has more stringent rules for the vetting of teaching material than Europe, though it is by no means clear whether this actually results in higher revenues for scholarly publishers. Ash wondered why this is so. In the discussion, it was pointed out that in Germany the situation is regulated by charging global user's fees to libraries and other institutions with copying apparatus. This simplifies the situation for

teachers and students, at the cost of allowing them to remain less aware of the actual legal and economic problems involved.

Thirdly, Ash addressed the issue of authors assigning their copyright for specific works to publishers. This practice was rarely problematic in most cases of scholarly publishing. Scholars simply signed the agreements and then did what they wished. The issue, however, appears to have become a much more important question recently; authors now receive copyright agreements to sign that appear to be far more complex and restrictive than before, unless journal editors or owners successfully negotiate more advantageous terms. Important to this change is the use and distribution of text image (PDF) files not only by publishers but also by scholars. With this new formatting possibility something has shifted in the landscape of scholarly activity, and authors should be more aware of this change. Ash suggested that we discriminate between the realities and formalities of the current situation. Efforts to clarify the differences between the legal situation and the actual working situation of scholarly authors might help all parties to understand how to move forward.

André Gunthert, Professor for Visual Arts at the EHESS, Paris, and editor of the scholarly journal of visual culture, *Études Photographiques*, gave a vivid impression of the restraints of the situation in France, where neither a principle of 'fair use" (by that or any other name) nor quotation rights for still images exist. He described the common practice for scholars of visual arts as "authorized scholarship": the use of every image under copyright relies on the consent of the copyright owner. According to Gunthert, the phenomenon of "authorized scholarship" is leading to a split in the scholarship in the visual arts in France. 20th century art is mainly treated by national institutions in large exhibitions and beautiful catalogs, because they own the pieces and have money to obtain the permission to reproduce them. Other research and academic publications, however, rely mostly on uncopyrighted artwork of earlier centuries that are considered part of the public domain. In the realm of teaching, both students and educators of all sorts are legally prohibited from keeping copies of any copyrighted material on their hard drives, and use of copyrighted material is specified by contract. It should be noted that for each single use of each image, a new contract is supposed to be negotiated, according to a degree by the Ministry of Education (June 2006). According to a recent report by the Ministry, it is acknowledged that this rule is not being enforced, because it would be impossible to do so. What has ensued is that individual scholars, who know they are breaking the law anyway, have embarked on experiments, abiding only by rules they have invented. It has produced a sort of waiting game, where the scholars are pushing the limits, waiting for the legal opponents to catch up, or file suit. So far, there is no end in sight, although Gunthert is hopeful that the recent push to teach art history in secondary education will lead to a solution. At the moment, nearly all critical discourse in scholarship has been severely curtailed in France. [Gunthert has published the

full text of his talk online, and it can be seen at
http://www.arhv.lhivic.org/index.php/2008/01/12/599-authorized-scholarship]

Susan Bielstein, Executive Editor of the University of Chicago Press, focused on the concept of the public domain, a "free zone of property in a commercial world" and the "critical trace of history and also our legacy for the future." Institutions or individuals who own objects whose copyright exists in the public domain need to be asked to think about their role very carefully. In her view, the very idea of the public domain has been greatly affected in recent years by a profound disconnect between federal statute and common ownership rights managed by contracts. Bielstein concentrated on the situation in the United States. In many aspects, however, her elaborations apply to the situation in Europe, as many institutions who own uncopyrighted, public domain objects are working to change the basis of copyright protection altogether by insisting they can copyright the digital reproductions they make of public-domain works in their collections. (In Germany, they are legally entitled to do so under the German copyright law which attributes copyright protection to slavish copies.) Slavish copies in the US are not considered original works of art and are therefore not protected by copyright, though their status is the subject of much dispute and could change. What does it mean in the larger sense to claim copyright on a 'copy'?

Cristina Steingräber, art historian and director of the Berlin office of the publishing house Hatje Cantz, presented the academic publishers' concerns in Germany. As an internationally renowned publishing house of art books, Hatje Cantz publishes approximately 200 books a year, of which 80 percent are considered "academic" – by content if not necessarily by print run. What then is the definition of "academic" and how do the sciences differ from the arts in this respect? Renowned scholars presenting high standards of scholarly research write many of Hatje Cantz's high quality exhibition catalogues. But as they are sold in higher numbers, they do not count as academic but instead as commercial publications. In many ways, academic publishers face problems similar to those of scholars. Steingräber alluded to the recent restructuring of the photo archive of the Stiftung Preussischer Kulturbesitz (Prussian Cultural Heritage Foundation) in Berlin. With more than 12 million digitized photographs, the Foundation has become one of Europe's largest online photo collections. Besides the Foundation's own holdings, the Archive has very successfully established a quasi-commercial service for smaller museums and collections who cannot afford their own image archives or do not wish to undertake such a project. Although part of a public institution, the image archive of the Prussian Cultural Heritage Foundation became a commercially run agency with no agenda to meet scholarly or academic publishers' needs.

Frank James, a historian of science representing the Royal Institution, London (RI), explained that the RI's images are now handled by the Bridgeman Art Library (BAL). This decision to outsource was based on the high cost (both time and monetary) of handling image requests. The BAL does the digitization of the items for free, and they market the images for the RI. The RI is not only an archive of older material but also an active research institute. They also run a large public program of education for both children and adults.

James discussed the way in which images gain currency. Much of this happens through marketing of images, which the BAL does well. The RI can give instructions for the BAL to provide images for free, or waive fees for particular cases, like scholarly books, films etc. In this it is flexible. But they are slightly constrained by the BAL's interpretation of what might be marketable (what images they want to handle) and what James, as a scholar, finds interesting. There is a clear conflict of interest here. James also alluded to the fact that the British Research Council structure of giving grants is forcing academics who do research funded by these grants to allow free access to their websites (this is in fact similar to trends in Germany and the United States). This policy is undermining the peer reviewed journal culture, and there is a movement afoot to restrict the amount of information available for completely free access. This is thought to be the only way to prop up the journal and peer review culture, which is necessary for authenticating not only images and objects (back again to the way in which images gain currency) but also scholarship done about or with those images and objects.

Hans Rupprecht Goette, Archaeologist and licensing executive of the photographic material of the German Archaeological Institute (DAI), Berlin, introduced the state funded system of images that are made available for scholarly use. The DAI and its outposts in Rome, Athens, Istanbul, Cairo and eight other locations host one of the largest archaeological photo collections worldwide, with more than 800,000 black and white negatives alone accessible to the public, spanning the years from 1870 to the present. The collection is available for scholarly use and to the general public, handling fees of 20 Euros per print/scan are charged for use in scholarly publications. Digitization of the archives as a means of preservation and in the interest of improving public access is currently underway. In this case preservation is two-fold, it not only means recording the holdings, but creating one single site online where all the images will be available for users (this is an issue because there are many collections, geographically separated from one another). Digitization and preservation are both funded by the German government and a grant of the German Research Foundation (DFG). The fees charged do not remotely near the costs of the project, but the DAI sees it as a part of its archiving mission and of its support of scientific research. Since the DAI depends entirely on public funding, it will offer its services to scholars free of charge, once the images are accessible online. The moderate handling fee for producing prints of digital images and postage will remain just that, a moderate fee.

The DAI supports the idea of an Open Access plan for everyone, not just scholars. (In addition the negatives, there are modern digital images as well, but at the moment, standards and workflows have to be established in order to sustainably archive data, which requires more than 2,000 gigabytes at present.)

Alan Seal, Head of Records and Collections Services at the Victoria and Albert Museum, London, explained the background of the Museum's new policy to cease charging reproduction fees for private and scholarly use of digitized photographs in their collection. According to Seal, the Museum's change of policy in early 2007 was a small decision (because images for such use had often been provided free of charge previously), although it has had a big impact. Direct factors in the decision were primarily technological. In 2005, the museum installed a storage area network that made it possible to archive high-resolution digital photographs online. The acquisition of a new digital asset management system to handle the terabytes of data, and the fact that the museum already had images on the website for downloading made the decision easier, one of practicality not of philosophy. The Museum was interested in cutting down costs for transaction and delivery (charges have traditionally been aimed at recovery of cost and not profit oriented). There is now better control of the images and better profiling of the collections and through that, better knowledge and use of the Museum itself. Between June and December 2007, 4,581 images have been downloaded for scholarly use; most users have downloaded just one image. The service is too new to give decisive numbers and answers as to impact all around, but Seal pointed out one particular trend they have noticed. Managing copyright questions used to be done at the point of use, now it must be sorted out at the time of acquisition (by the Museum). This cost has been a hidden and often overlooked staffing cost to the Museum. Seal would like to introduce images with a permanent URL, so web-based projects can point to the original at the V&A, instead of having to copy or buy one of their own for their own website. The goal is to generate more traffic and more recognition by having the users always returning to the V&A site, even while using other web resources. The V&A license is restricted to one-time use of an image for academic, educational, or scholarly publications and scholarly journals with a print run of under 4000 copies, and for doctoral theses.

Doralynn Pines, Associate Director for Administration of the Metropolitan Museum of Art, New York (MET), seconded Seals remarks by pointing out that technology played a central role in creating a new service (IAP, *Images for Academic Publishing*) for scholars in cooperation with the non-profit digital image archive ARTstor in mid 2007. ARTstor is available by subscription only, but the images offered on IAP are made freely available for downloading and use in publishing by the scholarly community. The MET facilitates access to IAP for scholars who do not have access through their institutions. In this way, they do not need to be subscribers to ARTstor. The goal of the Museum is to make the use of

digitized images available to scholars, provided that this service would not create any additional costs for the Museum. Not many downloads have occurred, only about 3,500 images so far. Since images were already being digitized in-house for commercial use, making them available through ARTstor provided a solution at no additional cost. In agreement with Seal, Pines reiterated that the costs of digitization could never be recouped through the charging of fees. These costs, like the V&A, are mostly staffing costs.

Kenneth Hamma, Executive Director for Digital Policy and Initiatives at the J. Paul Getty Museum, Los Angeles, presented the Getty's planned policy of providing images. The Getty's initiative to revolutionize their online access to images stems from questions about the revenue stream. The institution's leadership decided that the revenue stream could be divorced from the cultural heritage responsibilities of the Getty. When analyzing the way they make money, they realized that they make much more money in the shop from selling things than they do from selling images, or intellectual property. The Getty's assessment is that restricting access to use of their images has resulted in a very small potential gain, whereas the overall potential harm to the networked environment of scholarship, attribution, authenticating and branding of the Museum is great. A new policy granting unrestricted open access to high-resolution images online will generate, they anticipate, more income. The Getty is in the process of deciding to try to revolutionize the carousel of permissions, images, charging of reproduction fees from the inside. However, there are problems with the acquisition of museum objects due to this policy and to notions of copyright. Again, copyright issues get pressed back to the point of acquisition, as put by Alan Seal.

Nobert Lossau, Director of the Göttingen State and University Library, Germany, urged the participants to define the notion of access more clearly. He regarded the term a misnomer better described as use and re-use. However, contracts usually reflect a muddied notion of the two, and there seems to be a firm line drawn between private research and publication. He also drew comparisons between the situation in Great Britain and Germany. In the UK, digitization is not well funded by the state, and therefore, usually private enterprise gets involved in some way, shutting the door on any kind of open access. But in his view, money as well as technology is not the core of the problem; individual decisions are. Even if all financial and technological issues (foremost the harmonizing of data) could be solved, there would still be a problem, because of the individual institutions involved. The institutions' reluctance to allow unrestricted use and re-use of their image collections has resulted in Lossau's view for a need for branding (as well as reputation building and authentication). In fact, Lossau underlined that the harmonizing of data must not come at the expense of institutional individuality. Institutions needed to get their individual message out, and this affects issues of access, use and re-use.

Annette Godefroid, Director of the Berlin office of Bridgman Art Library (BAL), introduced the company, a commercial, online, image archive specializing in history and art history. Together with the main offices in London and New York, BAL employs about 60 people, mostly art historians, historians, and archivists. BAL creates its own metadata of each item included in the database, providing consistency through cataloguing. Usually, images get first imported as a low-resolution scan; high-resolution scans are produced by request. BAL hosts images from about 1500 different image suppliers, mostly individual photographers, artists, etc., and from 300 museums, libraries, and bigger art collections. Small museums benefit from working with BAL, because they cannot afford to have their own digitization unit. They also may not have proper digital archiving facilities. BAL provides both services for them. Museums that work with BAL wish to create additional revenue by outsourcing their imaging services to BAL. Scholars are not the target clientele of BAL, and there is no policy to meet their special needs in the commercial section of BAL. For scholarly usage BAL offers a special service – Bridgmaneducation – available by subscription. As Frank James pointed out, institutions can ask that material be made available for scholarly work, defined by a print run of 1000. There is, however, a minimum fee of 50 euros. Each regional office of BAL is relatively independent, allowed to make decisions based on the local climate of image use. Godefroid tries to separate as much as possible the use of images by scholars from commercial use, often recommending that scholars obtain their permissions elsewhere, for less.

Carole Ann Fabian, Outreach Coordinator of the non-profit organization ARTstor, New York, introduced ARTstor's new feature, the *Image for Academic Publishing* Database (IAP). This recently established database provides images from the MET free of fees and in high resolution for scholarly publication. ARTstor is mainly meant to provide teaching materials to educators; its main features are only accessible through educational institutions subscribing to ARTstor. However, ARTstor provides individual access to IAP for scholars world wide. ARTstor is not an image provider in the sense that the BAL is an image provider. What is very important to ARTstor is the accuracy of the metadata, that is, scholarly accuracy for the users of images in the database.

Volker Kitz (Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, Germany) drew a clear line between intellectual property rights and ownership rights in physical objects. The law distinguishes between the physical property of an object (book, painted canvas, paper copy of photograph) and the intellectual property of the immaterial content embodied in that object (text, image). The latter is protected by copyright or, if not, belongs to the public domain; the former is protected by physical ownership rights. Owners of the physical object have the right to regulate access to their object by contract, even if the immaterial content embodied in the physical object is not protected by copyright (because the copyright has expired and the intellectual property is

now considered part of the public domain). In this case, access to and use of a reproduction, quotation etc. have to be negotiated. Owners of a physical object are in a particularly strong position if they own a unique object. They can restrict access and the usage of image reproductions on the basis of contracts. Public domain only applies to intellectual property; it does not cover the physical object. The physical property never expires, even if the copyright has run out. There is no concept of 'fair use' in physical property. As a consequence, the owners of physical objects have the right to ask for reproduction fees and handling fees for granting access to their object. But users only have to pay fees if they agreed to it in contract.

Kitz's clear distinction between copyright and physical ownership rights triggered a lively discussion about how contracts concerning academic usage of copyright undermine the principles of copyright/public domain. **Lorraine Daston** brought up examples from American, German and French libraries, which own unique books from the 18th century. They wish to be paid by the user for quoting the book – and the user is made to sign a contract to see the book. Signing the agreement is the precondition for getting to the physical object. What they are really making users do is pay for looking at the physical object, but they phrase it as if it were a copyright issue. The effect is the same, but the libraries pose this (contract of adhesion) as copyright. Kitz agreed with Daston's interpretation. If the libraries insist that the user has to sign a contract in order to see the object in the name of copyright, they are usurping the normal copyright by contract. In **Hans Rupprecht Goette's** example, one negative of a photograph existed in the DAI collection, and the museum that owns the unique physical object depicted in the photograph demanded copyright fees from the user of the photograph.

In the United States as well as in Great Britain and in Germany, 'Fair Use' is a strictly defined concept dealing with exceptions from copyright for non-commercial, educational purposes. **Susan Bielstein** questioned whether commercial use meant any kind of exchange of money. There were many cases in the U.S.A. and in the U.K. in creating publications that involve commercial transactions - and these have been often upheld as fair use. In the US making money would not preclude fair use. The definition of commercial use where the concept of fair use does not apply seemed to change on a case-by-case basis. Fair use is not a right but a legal defense which judges use to decide if someone is stealing the immaterial essence of a work or not. **Kitz** amended that under German law there are very strict rules for fair use. The purpose in using material must be non-commercial, not for profit.

Cristina Steingräber shared her impression that the copyright mark in Germany is being used more and more frequently. She wondered whether it had any legal status in Germany. **Kitz** denied this. In contrast to the U.S.A., the copyright symbol has no legal

status in Germany. It would not matter if the © symbol appeared under a text or an image. Texts and images without the symbol are already protected by copyright, if it applied. The symbol by itself does not make the law apply.

Open discussion

The open discussion centered around nine topics. We have consolidated the comments made by participants under main headings that represent the direction of the conversation. These are:

1. Terminology; 2. Misuse/Control; 3. Trust; 4. Economics (cost/profit); 5. Licensing; 6. Scholarly/Commercial; 7. Print/Online; 8. Archiving; 9. Models present/future

1. Terminology:

Kelley Wilder opened the general discussion by clarifying some central terms:
1. The phrases "public domain" and "cultural heritage" are being used interchangeably to characterize the intellectual property of objects and images that is not under copyright protection and should therefore be available to open access.
2. "Fair Use" refers to a legal defense in the United States and Great Britain for the use of images or intellectual property that are still under copyright protection even for non-commercial, non-for-profit and/or educational purposes.
3. Differentiation is needed between access and use, i.e. responsible re-use. Use could refer, like in France, to quotation rights. Scholars might define access with the broadest possible definition including use and printing of images – whereas access for museums and libraries is often restricted to viewing only. Only agreeing on a good definition of access and use would help to clarify the situation.

Catriona MacCallum, Senior Editor of PLoS (Public Library of the Sciences) Biology, suggested not to use the terms access and use, but instead, as defined by the Berlin and Bethesda declarations of the Open Access movement and used in the natural sciences, to use the terms free access and open access: free access defined as the right to view and read, open access however including the right to make derivative copies, to have re-use, and to have open access data deposited in a public database. (See also MacCallum CJ (2007) When Is Open Access Not Open Access? PLoS Biol 5(10): e285, published October 16, 2007, http://dx.doi.org/10.1371/journal.pbio.0050285).

2. Misuse/Control:

Concerns of misuse and control (to prevent misuse) proved to be a central issue of the discussion on all sides, and a driving force behind restrictions to open access. According to **Frank James**, institutions like the RI had been defensive, perhaps overly defensive, about the images in their collections in recent years. In most cases, however, the revenue stream of images did not produce enough money to pay the salary for those handling and controlling access to images. James identified fear of misuse as the main motivation behind fee charging, even if actual instances of misuse appear to be quite rare.

Whereas curators expressed fear of inappropriate use of their collections by non-scholarly, commercial users, commercial image archives showed concern about scholars "stealing" their carefully produced images printed in books. Scholars point to misuse by museums and institutions of the attribution of copyright to uncopyrighted images (images that ought to be in the public domain). **Kenneth Hamma** questioned this approach based on fear and suggested four categories of misuse for clarification: disallowed use, contractual misuse, moral misuse, and misappropriation of the image.

In the course of the discussion, most concerns of misuse turned out to be intuitive and counter-factual. **Carole Ann Fabian** reported that concerns of misuse by participating museums had first led them to display only low-resolution images in ARTstor. But by now, three years after ARTstor has been used so successfully, these concerns were dwindling, and images were being displayed in higher resolutions. To date, ARTstor has not encountered a single case of misuse. The risk proved not to be as great as it seemed at first. The non-profit image provider has not had any takedown requests and not a single case of a lawsuit stemming from the misuse of an image has been seen in the community. **James** and **Seal** confirmed Fabian's experience, but drew different conclusions. In James' opinion copyright and reproduction fees were required for policing, because the possibility of misuse was always looming. Seal however encouraged institutions not to overestimate misuse. He pointed to the balance of benefit of access and risk of misuse. He also implied there was a moral right assigned to misuse - that misuse would always be frowned on.

Legal expert **Volker Kitz** put into perspective the scholarly "stealing" of images out of books. Only edited collections of public domain works as a whole are protected by copyright, not the individual works alone. Scholars can therefore rightly scan images out of books and display them online, if these images are in the public domain, and if they give attribution to the source of each image. "Stealing" mostly occurs when laws are too restrictive, as in the case of France. **André Gunthert** made clear that French scholars increasingly find ways around laws and contracts, taking images from books and the net without legal permission or contracts. To date, there is no way of completely controlling the use of images or text. He pointed to the example of music: anyone can download ("steal")

music off the Internet, whether it is allowed or not. Not only did control in the music industry not work – it also proved to work against profitability.

In **Gunthert's** view, societies were currently facing a development very similar to the time when photography was invented as a new means of mechanical reproduction. In the face of the World Wide Web and digitization, copyright laws prove to be inadequate for the new situation. As long as scholarship is not as well protected as intellectual and physical property, misuse on the scholarly side is bound to occur. The question here is to find some balanced solution, with the law adjusting to the change.

As to misuse of copyright on the side of institutions, **Bielstein** introduced the famous legal case of the James Joyce Estate in the US. The estate forbade any kind of quotation of Joyce's work in a particular biography and accused the scholar in questions of having violated the copyright. This went very high in the courts who consequently found in favor of the scholar, because the estate was misusing their copyright. It was called copyright misuse, and the court favored freedom of speech.

The central problem for scholars however, as **Frank James** pointed out, was not copyright but plagiarism from colleagues, which can only be solved by social and peer pressure. **Catriona MacCallum** alluded to current practices used by natural scientists who were also very concerned about plagiarism. She referred to the Creative Commons License developed by Lawrence Lessig, Professor of Law at Stanford University and a protagonist of the Open Access movement. The Creative Commons License maintains that the author has the right of proper (correct) attribution, and that authors have access to legal repercussions if their work is plagiarized or if the content of their work is misinterpreted. **MacCallum** suggested that museums deploy a similar license for open access procedures to objects and images of their collections, where the holder of the object can retain the appropriate authorization and attribution.

3. Trust:

Carol Ann Fabian brought in the notion of trust. The IAP project was launched within a high trust environment. Both parties (museums and ARTstor) promised to make appropriate use of the images. Also, ARTstor provides no license, but functions on trust; they trust the user that he or she is going to use the image in an appropriate fashion; they have to agree to the IAP Terms and Conditions of use in order to download the images. In the context of ARTstor's digital library use the stipulation is for academic use only. The IAP is meant specifically for publishing, and each set of images from each institution is controlled by that institution.

4. Economics (Cost/Profit):

Economic considerations centered on the question of whether or not museums needed reproduction fees to cover their costs for providing scholars with images (this also covers publishers needing a certain print-run to keep producing books and journals.) **Thedel von Wallmoden** (Wallstein Verlag, Germany) pointed out that publishing houses would have to cease publishing journals if they could not sell a sufficient print-run (because copies were increasingly made available online). **Annette Godefroid** shared **von Wallmoden's** view and emphasized that the costs involved in producing metadata were considerable. If everyone took everything from the Internet for free, publishing houses as well as museums would have to close. This verdict, however, encountered some resistance. Susan Bielstein pointed out that publishers also were facing considerable costs clearing rights. It is a highly complex task to evaluate profits and losses. Moreover, large museums have different resources at hand for meeting scholars' needs than smaller ones. All representatives from museums agreed that charging fees would never cover their costs of producing metadata. In addition to these costs they were losing money not only through the production of metadata but also through the costs incurred by taking care of image licensing in-house. As **Kenneth Hamma** pointed out, museums had a multitude of different tasks, and if the task of licensing images disappeared, it would not be the end of museums (and in fact, many museums have closed their licensing operations, and some have outsourced them). If public domain images were much more freely available, for creative use (of which scholarship is a subset), none of the museum representatives would think this was a bad development. The different parts of the trade-off should be carefully examined. Museums should not assume that the revenue stream is the answer to all of their problems.

Hans Rupprecht Goette drew attention to the fact that editors, scholars, and archive personnel might have different roles in the processing of images for scholarly work, but they all face a huge amount of paperwork to clear copyright and reproduction fees. While on the one hand access (the viewing and finding of images) was getting easier, obtaining the right for use and re-use, on the other hand, was becoming more and more complicated. The amount of time spent in obtaining rights to publish images needs to be considered as a cost factor as well.

5. Licensing:

Alan Seal pointed to one particularly pressing problem concerning image licensing. For the V&A, clearing the copyright of orphan works was an especially daunting and time consuming task. Best efforts to clear copyright should be sufficient, but at the moment this

practice was legally unjustified. Dealing with orphan works becomes a major problem for museums when they are making images available. Seal asked for clearing the copyright more easily in cases where the copyright holder cannot be found.

Bielstein reported an effort to pass legislation about orphan works in US, which was dismissed. Having talked with many scholars in different disciplines, she suggests that more institutions and organizations should issue guidelines of best practices to help clarify such issues. Such guidelines would help to use material in responsible ways on all sides. This also holds true for dealing with orphan works used frequently within fair use models.

6. Scholarly/Commercial:

All institutions present distinguished between scholarly and commercial use. The line between these categories is usually not defined by content but by print run. According to **Mitchell Ash** 'academic' has become a synonym for non-profit. **Seal** explained that the V&A drew the line between scholarly and commercial at a print run of 4000 copies, a number that the museum recognized was above the limit of most academic publications, including academic journals. The relatively high print run was set in order to avoid arguments about whether a publication was academic or not and to allow for academic newsletters and journals. **Doralynn Pines** reported that the MET sets a lower limit with a print run of 2000 copies, following a standard set by College Art Association.

Cristina Steingräber agreed that a limit of a print run of 4000 copies for defining a book academic would enable publishers to produce and sell scholarly art books at more reasonable prices; with runs of only 1000 or 2000 copies the prices are quite high. However, she maintained that the distinction being made between scholarly and commercial via print run is unsatisfactory. As an example she mentioned the exhibition catalogue that Hatje Cantz produced for the international art exhibition on melancholy (Melancholie. Geist und Wahnsinn in der Kunst, Neue Nationalgalerie Berlin, 17.2.-7.5.2005). Highly academic in content (and produced according to the highest standards), the catalogue was printed in a run of 35.000.

Kenneth Hamma contended that there was no distinction possible between scholarly and commercial. The example he provided was a collection in the Huntington Library, Los Angeles. Ken Burns used the archive to make a very successful documentary on the American Civil War. The documentary was defined as non-commercial because it was produced for public television. The project of publishing these images was scholarly. The publication turned out to be a great success. In view of the commercial success, the

archive demanded a share of some of the revenue. In Hamma's opinion they were wrong, because the artefacts that were used for publication would still be unnoticed had they not been published. It was only through the action of the scholar that they were 'rescued' by this documentary. Without a scholarly undertaking, the material would still be gathering dust in the archive. It was a gain for everybody. Even if the archive did not get any money out of the endeavour, they got recognition. Hamma concluded that any gate keeping function put up was a gatekeeper for everybody. It did not discriminate.

7. Print/Online:

Another problem discussed was how to draw the line between commercial versus academic use on the Internet. How should we consider hits on a website vis-à-vis print run? How do we assess and calculate fees? All participants agreed that standards were far from being established. **Godefroid** stated that BAL charges about 20% more for reproduction fees for online publications published in addition to the print publication. Pure online publications were treated just like academic publications by the German office. Personally, she believed that providing images for online presentations should be cheaper because the images did not need to be in printing quality.
Wilder reported that for the first time in the UK the RAE (Research Assessment Exercise) was assessing Internet publications, and she expected some impact on standardization from this rating. **James** argued that the Internet provided built-in mechanisms to trace users. Taking the Talbot Project (The Correspondence of William Henry Fox Talbot; http://foxtalbot.dmu.ac.uk/) as an example, he predicted in general that more detailed data about the users would become available and also help to define better what scholarly use might be. **MacCallum** gave a short account of alternative metrics and citation measures being used in the natural sciences, like G-factor (the ranking of Universities by counting on Google the number of links to a University's web pages from other web pages) or the number of downloads a particular institution had, and rankings by numbers of downloads. But these were all test cases, and new evaluation methods must be developed.

8. Archiving:

Frank James expressed serious reservations about permanence in the Internet. Printed paper had been around for 500 years. In his opinion it would be very foolish to put material on the net in the hope that it will remain there permanently, in terms of centuries. The paper journal and paper book would persist, providing the permanent record, regardless of the developments of the Internet. **MacCallum** agreed that archiving is a huge problem, also in publishing in Open Access in the sciences. Huge amounts of information had to be online. But technology was increasingly well equipped for archiving data online. In the sciences, it

was simply impossible to put enough information in print. Also, mirror sites were now in place. She contended that similar concerns about archiving were made when printing was introduced, compared to papyrus. **Lorraine Daston** wondered whether we have been misled by a conflict model that one form will take over and the other will die out. Internet and printed books should be considered as two co-existing models, which will exist for a long time. Access now and archiving (access tomorrow) are two very different things. This workshop was meant to focus on access now.

9. Models Present/Future:

Kelley Wilder suggested a discussion of the different models of open access:
1. The scholarly model, which is often either intentionally or unintentionally illegal.
2. The open access model represented by the Berlin Declaration, used for instance at MPIWG and its ECHO project
3. The newly introduced models of the MET and the V&A of open access to parts of their collections for scholarly use. These collections will continue to grow.
4. The rather radical model that the Getty is putting on the table as a new and untested attempt to generate the same sort of attention and profit through an entirely different method of making images fully accessible.
5. The various working commercial models that provide services in the form of access to images, and are utilized as a service by smaller museums and collections.

Christine von Oertzen encouraged the participants to dare making a prognosis for future trends: What will be the winning models? Will we be surrounded by restrictions and wholly commercialized environments in ten years? Or will we there be more avenues to open access than today?

Bielstein was optimistic and opted for more open access. In her view, the law was slowing change down at the moment, because it has not caught up, and has yet to adjust to the new situation. The law follows advances in technology. We are just on the edge of what we can do and what the possibilities might become. It will become easier.

James agreed that laws don't seem very helpful in this case, the Internet being such an open medium. Users will go and do what they want, and they will do so unhindered, because it will cost more to sue than institutions could gain. In the scholarly community, James predicted a realignment of financial structure. The cost of journals would be switched from subscription to the author. Big restructuring of cost would be the future. In Great Britain, he saw a trend (by the scientific community) to move cost of funding journals from

subscription to authors paying page charges. This would alter the balance of journals. There was also much resistance going on, but in the long run, he saw the funding stream change from University funding to Research Council funding.

According to **Seal**, the central issue in ten years time would be authenticity. If that could be solved, copyright laws would no longer be needed.

Concluding remarks by Lorraine Daston

1. What is the situation now?

The situation now is characterized by variability – in terms of national, disciplinarily, institutional variability, and variability in terms of domain: commercial or scholarly versus state-funded or non-commercial or self-funded. But there are also crosscutting concerns: that there are conflicting interests here is obvious, but there are also convergent interests. Checks and balances exist in this system. Although scholars may feel that they are the weakest party here: in fact, however, even though they do not own the objects they work on – Aby Warburg was the exception here and not the rule – without the scholars, the libraries lose their raison-d'etre, museums lose their reputation, and the publishers have nothing to print. So let's keep that in mind. A final point about the situation now: The new media may force us to revise our intuitions about conflicting interests. This is borne out by Susan Bielstein's very interesting example that contrary to everybody's intuitions, granting free access to new books online may actually *increase* rather than *decrease* sales. Not only are interests sometimes convergent as well as conflicting; what is converging and what is conflicting is changing as we speak.

2. What are the principles that ought to govern our practice?

Going into this workshop, she had, like Kelley Wilder, a rather nebulous and vague idea of what fairness meant, only to learn here that it is a *terminus technicus*. But she reverted nonetheless to vernacular intuitions in talking about fairness, because she thought that a technical framework is less useful for the moment. So what are these interests? Here, remember that fairness has to be some kind of balancing act between interests we admit to be legitimate. First: making money. It is absolutely legitimate to want to make money. Second: establishing a reputation. This is not just a concern of scholars, but also a concern of institutions like libraries, museums, and research institutions like the German Archaeological Institute. There is also something to be said under this rubric, establishing

reputation, about its ramifying consequences in the world of new media. We are all familiar with new economies of attention and the fact that fortunes can be made by selling visibility on Google websites. But there is also a question of trust. Trust is absolutely essential for both scholarly as well as economic transactions, and reputation is the currency of trust, particularly in a virtual world. Thirdly, there is serving the public good, as in the case of preserving cultural heritage and enriching classroom teaching and, to use an old fashioned phrase, the diffusion of useful knowledge. Whether these activities make money or not – they all cost money. It cannot be part of the system that scholars undermine the very existence of those institutions which serve the public good, regardless of whether or not in some national contexts the taxpayers are so enlightened as to see that it serves their interests to support such institutions (as perhaps in Germany) or whether they are not. Can the current law be stretched by analogy to cover these new cases? Daston is not persuaded. This is because Volker Kitz gave an absolutely crystalline distinction between possession of a physical object and intellectual property. The gap between that pellucid distinction and the messy reality that scholars encounter suggest to her that there are very strong pressures in practice that work to blur this distinction. These practices at the moment are endlessly inventive – and that is a sign that perhaps at the moment (though the future may change this) the law is not the best instrument to clarify matters. One thought about why this might be the case: Although the making of copies is as old as the scriptorium and the copying of manuscripts, there are points where a change in degree becomes a change in kind. The very ease and verisimilitude of making copies nowadays might indeed have created a kind of bleed-through effect between what had previously been, de facto as well as *de jure*, a completely clear distinction between physical objects and intellectual property.

3. What is to be done?

Although copyright remains important for scholars who are publishing and of course for the publishers, it is something that is going to require more thought to be extended to other cases. Daston rehearsed then a few other titles that could be applied under the rubric of recognition and recompense, which had come up in discussion: skill, work, trouble, time. It may stretch the idea of copyright based originally on originality to its breaking point to make it cover these cases, and perhaps what is needed here are new tools to determine what should be copyrighted or not.

2. The fungibility of interests. Having already drawn attention to the increasing importance of recognition, reputation, and attribution, Daston asserted that this is a point where scholars, museums, libraries and publishers can make common cause. All of us have an interest in the shoring up of the mechanisms of trust. They may take different forms in

different sectors, but all of us depend crucially on accuracy. As to the thought that the law has not caught up, Daston is not sure the law should even try to catch up at this point. The situation is so fluid that perhaps the best that could be accomplished right now would be to set guidelines about principle: short, clear, not many of them, which will serve as a bridge until the time when perhaps the changes in technology and in practice solidify to a point where the law can render them more precise and systematic – but not at the price of more paperwork.

4. What do scholars want?

a. Access to research materials. This seems pretty unproblematic at this point. We scholars have never had it so good.

b. Scholars want to use research materials in teachings, collaborations and discussions with colleagues in publications, on a basis which is affordable – and – this is an important proviso – which ensures the continued existence of the institutions upon which we absolutely depend. Scholars depend on scholarly publishers. They cannot be put out of business. Scholars depend on libraries and museums. If scholars have to finance these, they have to think about (and this is where fairness comes in) what would be a fair contribution to keeping them running.

c. Finally, scholars want to be acknowledged and for sources to be authentic.

5. What will scholars give?

First and foremost: new knowledge. Scholars are the guarantors of reputation and authenticity that underlies the ramifying empire of trust in a virtual world. We are all much too familiar with the risks of the virtual world we now live in, which is a world of potential masquerades and forgeries. This is not a meager good which the scholars bring to the table. They are, in a sense, the gold standard of the value of library and museum collections. They are the scribners who feed the presses.

The final word: We need you – you need us – can't we cut a deal?

Christine von Oertzen (MPIWG) and Kelley Wilder (MPIWG/De Montfort University, Leicester, U.K.)

Abbreviations used in this document:

AIP	Images for Academic Publishing (images made available by the MET for Open Access to Scholars)
BAL	Bridgeman Art Library
DAI	German Archaeological Institute
ECHO	European Cultural Heritage Online
MET	Metropolitan Museum of Art, New York
MPI	Max Planck Institute
MPIWG	Max Planck Institute for the History of Science
RAE	Research Assessment Exercise
RI	Royal Institution, London
V&A	Victoria & Albert Museum, London