Developing Legal and Policy Frameworks to Sustain Digital Scholarship

Michael Furlough
Madelyn Wessel

October 19, 2005
Roadmap

- Defining digital scholarship
- Collecting digital scholarship in a digital library: an experiment
- Libraries, publishers and author relations
- Copyright law, permissions to use, and fair use
- Broader institutional issues
What is “digital scholarship?”

Scholarship—especially in the humanities—which elaborates new interpretive methods for research, teaching, and learning through the use of digital resources and tools.
Digital Scholarly Projects

- These are not illustrated articles, monographs, or electronic theses
- Virtual exhibitions, thematic archives & scholarly editions
- Tend to cross research/teaching boundary
- Networks of heterogeneous digital content
- Elaboration of new scholarly genres
NINES: a networked interface for nineteenth-century electronic scholarship

~ nineteenth-century scholarship ~
Over the past ten years a growing body of digital scholarly work has been undertaken, much of it put online, nearly all of it executed without peer review processes, none of it integrated (except by hyperlinking). NINES is a project to found a publishing environment for integrated, peer-reviewed online scholarship centered in nineteenth-century studies, British and American.

~ and a scholarly collective ~
NINES believes it is clearly in the interest of scholars to coordinate our work. We know that the migration of scholarship from paper-based to digital platforms and networks, already underway, will only grow space. Scholars and educators must act on our own behalf if we are to help shape the form and result of this migration. To that end, NINES is promoting the means and a way for excellent work in digital scholarship to be produced, vetted, (eventually) published, and recognized by the discipline. [read more]
The Library supports digital scholarship through

- Creation of digital content
- Services that support its use in teaching and research
- Research and development in digital library tools and applications, e.g., Fedora
- Unique copyright and IP expertise
Why Libraries and Copyright?

- As stewards of books, journals, films, images and other resource materials, public and academic libraries have long served as a central resource of copyright expertise for scholars and community.

- Libraries and related associations have long advocated in the public interest in litigation and legislative settings.
Case Study: The Rossetti Archive

- Critical archive of works of Dante Gabriel Rossetti
- Includes all textual and graphic expressions of each work
- The digital extension of the critical edition
- 12,000 images, 5,000 XML files, 40,000 relationships
- A new model for such projects
Digital Library Assumptions

- Heterogeneous types of content
- Large numbers of digital surrogates of primary resources
- Include born digital primary resources
- Curated collections, focusing on use/re-use: not an institutional repository
- Sustainability of digital scholarship goes beyond web hosting
Collection policy framework

- Collect digital projects through a defined selection process
- Manage them with our digital library infrastructure
  - Provide for multiple “views” of the content
  - Collect new “genres” and formats as needed
- Provide open-access to the extent possible
- Develop formal agreements with authors
  - Define the level of effort to sustain the work
Sustaining Digital Scholarship: UVA’s model

- Original scholarly work
- Selection
- Implementation Assessment
- Collectible scholarly work
- Updates & New Editions
- Access & Delivery Preservation
# Levels of Collecting

<table>
<thead>
<tr>
<th>Metadata</th>
<th>Files</th>
<th>Content Relationships</th>
<th>Original Delivery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fully Compliant</td>
<td>Fully Compliant</td>
<td>Exact</td>
<td>Exact</td>
</tr>
<tr>
<td>Fully Compliant</td>
<td>Fully Compliant</td>
<td>Exact</td>
<td>Approximate</td>
</tr>
<tr>
<td>Fully Compliant</td>
<td>Fully Compliant</td>
<td>Exact</td>
<td>Representative</td>
</tr>
<tr>
<td>Fully Compliant</td>
<td>Fully Compliant</td>
<td>Exact</td>
<td></td>
</tr>
<tr>
<td>Fully Compliant</td>
<td>Fully Compliant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fully Compliant</td>
<td>Binary Files Only</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fully Compliant</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| 1                  |                     |                       |                   |
| 2                  |                     |                       |                   |
| 3                  |                     |                       |                   |
| 4                  |                     |                       |                   |
| 5                  |                     |                       |                   |
| 6                  |                     |                       |                   |
| 7                  |                     |                       |                   |

Furlough/Wessel: Policy/Legal Frameworks for Digital Scholarship

[University of Virginia Library logo]
Sustaining Digital Scholarship: an experiment

- Test our policy frameworks
- “Ingest” subsets of Rossetti and THDL into our digital library system
- Assume a three-year commitment
- Aim to complete first round by summer 2006
- Responsibilities somewhat negotiable
SDS Participants

- University Library staff (sr. administrators, lawyer, managers, subject librarians, technologists)
- Rossetti Archive and NINES staff (faculty member, post-doc, technologists, project managers)
- Tibetan-Himalayan Digital Library staff (faculty member, project managers, technologists)
Author responsibilities

- Prepare “camera ready copy”
- All editorial review, including peer review
- Meet intellectual property standards
- Define an “edition” of the work to be collected
Library responsibilities

- Define and develop the infrastructure based on Fedora
- Provide technical assistance and guidance in our specifications
- Provide legal/policy assistance as needed
Digital Library vs. Publisher

- Libraries are not traditional publishers (peer review, editing, promotion, advertising)
- But publishers are not in the business of preservation, and few are willing to invest in technologies necessary to support complex digital scholarly works
- Libraries may be positioned to exploit Fair Use in innovative ways
Structuring the Relationship

- As would be the case in the context of a formal publication, a written agreement is important to the scholar and the library.
- We analogize these agreements to “deposit agreements” used in our special collections.
- Agreements must be constructed around agreed project standards.
Agreements Must Address:

- IP constraints
- Levels of collecting
- Access assumptions
- Duration of the commitment
- Financial issues
- Modifications of projects after collection
- Standards of preservation
Copyright Constraints

- Increasingly well-recognized as fundamental problems in digital scholarship

- Digital tools are facilitating a creative explosion in humanities scholarship through use of images, sound, music, film and other materials – but
Copyright Restricts Use Of:

- Literary Works (including articles, books, software with written documentation)
- Musical Works (including score and lyrics)
- Dramatic Works (including any accompanying music)
- Choreography and Pantomimes
- Pictorial, Graphic and Sculptural Works
- Motion Pictures and other Audiovisual Works
- Sound Recordings
- Architectural Works (including plans and drawings)
Copyright Law is Reeling From

- From the impact of the web and digital technologies
- From an aggressive property rights culture supported legislatively (DMCA, Sonny Bono, TEACH)
- From the political impact of widespread infringement activities by kids
- From legally unresolved questions about the use of photographs, images, and sound recordings
SDS Projects Must Meet Legal Standards

- For web-based public access, which means:
  - Self-created
  - Public domain
  - Used with permission
  - Fair Use
Permissions

- Museums see these as a source of revenue
- Short-term and use-limited are the norm
- Contracts can limit what the law otherwise protects
- Maddening processes typical
Complete this form and deliver it to your acquisitions editor as soon as you have a complete MS that has been accepted for publication. We need this information to ensure that copyrighted and archival materials are properly acknowledged in your book. …

Have any portions of your MS or its accompanying art program been created or written by someone other than yourself? …

*Photocopies of ALL necessary letters of permission must accompany the final version of your MS.*
Fair Use

- **Purpose and character** of the use including whether the use is for educational vs. commercial purposes
- The **nature of the copyrighted work** – is it a factual or creative work
- The **amount and substantiability** of the portion to be used in relation to the work as a whole
- The **effect or impact** of the use upon the potential market for or value of the work.
Fair Use is a flexible, fact-specific standard

- No single factor in the test is decisive.
- The fact that a use might be commercial, or that it might impair the marketability of a work, does NOT invalidate the use as fair (Cambell v Acuff Rose Music – 1994)
- That a use is educational does NOT guarantee that it IS fair.
- Fair Use is an affirmative defense, which means that some lawyers hate it.
It IS Easier to Defend A Use As Fair…

- When no sale of materials is involved
- When a strong public interest argument is available
- When the uses are research, academic, educational
- In other words, when an academic library is involved
Special issues With Images, Photographs, and Music

- Viewed by publishers as the thorniest areas
- Object owners have rights independent of copyright
- New case law is helpful as to thumbnails and images of 2-D objects
- Perplexing case law out of 6th Circuit on use of even tiny portions of sound recordings
Mean both sides need to be prepared to accommodate potential removal or shielding of materials or portions of sites.

Institutional support for IP stance of the library is critical so that projects meeting those standards are defended by university legal counsel.
Footnote on Scholars as Publishers

- Some of our projects intend to publish journals within their sites
- Not fee-based so far, but acceptance of external materials and peer-reviewed
- Legal responsibilities of contributors
- Shielding some portions of sites?
Questions

- Are you “publishing” and should you act like a “publisher”?
- When do you require written permissions?
- What will constitute due diligence on your part?
- What will your institution require if it is serving as the “host”?
- Getting a signed statement of responsibility
Broader Institutional Issues

- Policies on campus regulating faculty IP
- Digital preservation and longevity
- Economics of supporting and sustaining digital scholarship
Intellectual Property Policies

- The UVA Policy:
  Employee Ownership
  ... The University cedes copyright ownership to the author(s) of scholarly and academic works (such as journal articles, books and papers) created by academic and research faculty who use generally available University resources. However, the University asserts its right of copyright ownership if significant University resources (including sponsor-provided funds) are used in the creation of such works, and: (a) the work generates royalty payments; or (b) the work is of commercial value that can be realized by University marketing efforts.
“Significant Resources”

- “Significant” University Resources:
  ...The use of a computer in a faculty office, incidental supplies and occasional use of University personnel or shared facilities would typically not be considered significant use. **In contrast, utilization of University laboratories or special instrumentation, dedicated assistance by University employees, special financial assistance or extensive use of shared facilities would constitute significant use.**
Science vs. Humanities

- Significant resources focus of current policies typically stem from an interest in commercially exploiting scientific inventions made possible over 20 years ago by Congress.

- Impact on digital humanities scholarship which also benefits from special resources, is not clear.
Commercialization by Universities

- University patent policies are less implicated in humanities context
- But software treated under most policies as reportable and subject to commercial exploitation
- Can have negative impact on collaborative software developed for humanities projects and open source decisions
Digital Scholarly Communities

- Need to develop common strategies and proposals to modify institutional IP policies to better address and protect interests of digital scholars.
- Open source and dual license strategies may provide some solutions.
Preservation and longevity

- Digital preservation is not fully realized

- We assume that migration is key

- We are laying the ground for the ability to preserve scholarly works
Economics

- Scholarly communication is subsidized by publishers and libraries
- How do these subsidies need to shift to sustain digital scholarship?
- Alternative models: pay to play, fee-based “memberships”
- Need for an institutional support model
Contacts

- Mike Furlough: furlough@virginia.edu
- Madelyn Wessel: mfw2y@virginia.edu
- Rossetti Archive: http://www.rossettiarchive.org/
- Tibetan Himalayan Digital Library: http://www.thdl.org
- U of Virginia Library Digital Initiatives: http://www.lib.virginia.edu/digital