The session began with Howard Besser's energetic discourse on the increasing and real loss of public domain and with it a public place for human interaction. Besser compared the loss of public domain to the gradual loss of public space over time. Agoras, public baths, and the grand concourses of urban train stations, where people from all walks of life and ethnic persuasions intermingled, have been replaced with a world of increasingly private spaces. The decay of public transit, the lack of a center in many of our urban environments (the fact that we use terms like "urban environment"), and the rise of what Besser calls "pseudo-public spaces," mark our current culture as one in which we separate ourselves more and more from each other. He cites the example of the use of the cell phone, which brings private space uncomfortably into the public realm and destroys the shared nature of public space.

Besser sees a parallel to the loss of public space in the loss of public domain in the digital world. He began his talk by reminding us what copyright is -- limited rights held by an author or inventor as an incentive for further creation and sharing of knowledge. It was intended to provide a balance between the creators and the users for the public good. The public domain is the realm of information that includes facts and ideas: those things that are freely available to all for any use (no permissions, no fees, no tracking). Besser argues that public domain allows for a common heritage, allows for progress (building of ideas on ideas), and for social commentary. Most threats to public domain come from the content industry that works to protect that content by returning out-of-copyright material to copyright, by extending terms of copyright, by requiring licensing (that exceeds the bounds of copyright), and by imposing other forms of contract law. In addition to these tactics, content industry is trying to change the definition of what belongs in public domain. Facts used not to be copyrightable, but recent database extraction legislation says that someone can assert copyright over an entire database even if they don't have copyright of the data content (e.g., phone numbers). This erosion of the definition and access to public domain is paralleled by the changing interpretations of fair use. Increasingly fair use is curtailed or entirely pre-empted by licenses and contracts. The public space created by the notion of fair use and public domain is being eroded.

But what does this mean for art and creativity? What does this mean for our digital world, our digital spaces? Besser argues that the control of ideas by license and contract limits the artistic process in that derivative works (often the nature of artistic creation) are disallowed, experimentmentation with and exploration of other's ideas are diminished, public discovery is limited and core democratic values are denied. Art does build on earlier art and, as we know, art doesn't follow business models in that money is not (usually) the primary incentive. The artistic process will not be served by the clamping down of rights regarding the access to and use of ideas.

Besser suggests that it is absolutely crucial that we, as art and visual resource librarians, be aware of and work to protect the notion of public domain and the practice of fair use. While industry may make libraries out to be the enemy of their cause, we in fact provide the necessary balance. Artists lack the financial resources to defend their rights, but we, as libraries, have much of the content and we have the knowledge to know how to protect access to it. The public domain is ours to protect and fair use is ours to use. If we're not aware then these will be taken without our realizing it.

Howard's copyright page -- all the links you could imagine to copyright sources and to Howard's publications.
The paper presented to us can be found at:

http://www.gseis.ucla.edu/~howard/Papers/pw-public-spaces.html

Sharon Farb, UCLA, Coordinator for Digital Collections

"Now You See It, Now You Don't: the Perils and Practice of Licensing Digital Resources for Art Collections"

While Besser told us why we should be active participants in the copyright and fair use arena, Sharon Farb gave us advice about how to do that. Her main message was of the necessity and power of negotiation. Licensing of digital collections is a complex, but fluid environment. Though it is an often-confusing environment, it is one in which we must realize our own position and potential for power. Farb pointed out that with the increasing commodification of information, intellectual property is the highest value export. As with any negotiation, it's as important to understand the position, needs, and demands of those with whom you are negotiating as it is to understand your own objectives. Libraries and museums are in a unique position in that we are on both sides of the licensing issue; we license materials that we hold and we purchase/subscribe to copyrighted materials.

In Farb's experience, she's found that there are recurring perils in the licensing of digital materials (visual resources included). She reminds us that while seeking licenses, to keep in mind that everything (that's EVERYTHING) is negotiable. In addition, until negotiated, there are no guarantees of fair use rights, first sale rights, archiving rights, preservation rights, perpetual access rights, or completeness or integrity of content.

Farb suggested four maxims to follow in the negotiation process. The practice of negotiating is one in which past practice heavily influences current negotiations so keep in mind that current negotiations quickly become past practice. Each negotiation is different and should be approached that way. Always negotiate for the ideal license. Take everything back three times before giving up. When one request is denied, rephrase it and try again.

Our roles as educators require that we also educate the vendor about why the issues we raise are important. For instance, explain why access is necessary to the entire .edu domain of the institution (and not to a building or campus address). At this dawning of the digital era, education of the publisher/vendor is pivotal to cultivating and maintaining a long-standing relationship. Licenses are legally binding to the institution, so we will be asked to protect the institution's interests as well.

Farb spoke briefly about the constraints imposed by the UCITA (Uniform Computer Information Transaction Act) legislation. Though conflicting with much intellectual property law, UCITA puts controls in place to regulate all information transactions. To counter that control, we need to add clauses to nullify its effect. She offers this clause: If UCITA becomes the law of (STATE name here) for purposes of this License, the law of (STATE name here) existing prior to the effective date of UCITA shall be applicable.

Key items (with appropriate clauses) for negotiation (excerpted from Farb's handout):

**Completeness of Content**

Licensor shall use reasonable efforts to ensure that online content is equivalent to print versions of Licensed Materials, represents complete, faithful and timely reproductions of the print versions of such Materials, and will cooperate with Licensee to identify and correct errors and omissions. Licensor shall fully disclose to Licensee and Authorized Users all known missing content.

**Perpetual Rights**

Licensor (fill in Publisher name here) grants Licensee permanent rights to use the information that is included in the subscription (or database -- fill in name of Product) that have been paid for even in the event the licensed resource is subsequently cancelled or removed. Licensor agrees to cooperate with Licensee to provide mutually acceptable means for ongoing access to permanently licensed content.

**Archiving**

Licensor (insert name of Publisher here) agrees to allow Licensee to copy the (insert name of Product here) data for purposes of preservation and the creation of a usable archival copy.

**Fair Use**

No term or provision of this contract shall be interpreted to limit or restrict the fair use rights of licensee and its Authorized Users provided by US
Copyright Law, Title 17 U.S.C..

Three online resources (of particular note) for licensing issues:

California Digital Library Licensing Toolkit (guidelines, procedures, etc. for CDL)

http://stubbs.ucop.edu/libstaff/sharedcoll/toolkit/

ARL Site on Licensing Issues (note upcoming workshop: Aug. 13-14, 2001)

http://arl.cni.org/scomm/licensing/index.html

Stanford University Copyright and Fair Use Site

http://fairuse.stanford.edu/

Cheryle Robertson, LACMA, Rights & Reproductions

"Everyday Copyright: Implementation for You and Your Institution"

Although as librarians, we're most typically working to gain access to digital materials, Cheryle Robertson provided valuable insight into the complexities and difficulties of recognizing and working with the rights of the artists. At LACMA, Robertson works with artists and curators to acquire license agreements (generally for digital display of artwork). According to Robertson, artists are becoming more aware of their rights and more astute at asserting and protecting them. Increasingly artists are finding that revenue from licensing can be greater than that from sales, which brings them to demand clearance for all uses of their work. Institutions, which rely on good relationships with contemporary artists, feel the need to tread lightly between the artist's copyright of a work of art and the museum's mission to educate with it. While one could argue Fair Use supports the educational purposes of the museum, the cost to defend that use is usually seen by the museum as too high. Interestingly museums are also caught on the other side, in that they raise revenue by holding rights to photographs of their collections.

Robertson argues that better clearance policies need to be developed. Creation dates and publication dates are rarely coincident, which raises difficulties for Rights & Reproductions departments. LACMA, like many museums, has taken a relatively conservative stance. This has required more staff and the charging of fees (for reproduction) but results in a decrease in liability. She argues that were an institution to take a more aggressive stance and argue Fair Use (educational use), it would open itself up to suits from artists. She suggests that networking is very important and advises to follow listservs and the web as indicators of what is going on at other institutions and within the arts community.

Summary of Question & Answer period

Evidence of the wealth of information and insight brought by the three presenters and the topical nature of the papers, a lively question period followed.

Q1 (for Sharon Farb)

In regard to negotiating licenses with vendors, do you foresee a time (in the near future) when there will be standard options (like Saturn car buying) coming?

A1

Yes and No. Farb said there's much work being done to fashion a model license (for instance, the California Digital Library license). But there is still (or there perhaps will continue to be) variety in licenses. In negotiating, you have to know what your bottom line is -- what's the deal-breaker for you -- what can't you agree to or compromise on (just as in car buying).

Q2 (for Farb and Robertson)

Regarding Robertson's reference to the Bridgeman vs. Corel case, have any cases come along since then? What's the behind-the-scenes discussion of this?

A2

Robertson: She knows of no cases after B&C. Museums are continuing with their copyright notices on 2-dimensional works and she sees no changes coming as a result of the Bridgeman case.
Farb: She cited the ditto.com case. She found it interesting to read the judge's analysis of the 4 factors in this case. He found that thumbnails were acceptable, falling under Fair Use.

Besser: He noted that the cases and the judgements are all over the map, depending entirely on the judge's thinking about the case. He also noted that Bridgeman vs. Corel is a Canadian case (though filed in NY) and did not follow US law.

Christine Sundt: Sundt added further clarification noting that the Bridgeman case was a district case and not federal. It does speak to the interpretation of Fair Use in the US, but on the district level, not the federal level.

[recorder's note: Bridgeman Art Library is a British company with an office in New York. Corel is a Canadian Corporation. The case was heard in federal district court but the ruling was under British copyright law. After the first decision, Bridgeman requested that the court revisit its opinion, but under US copyright law. The court reached the same decision. For a synopsis of the ruling see: <http://www.panix.com/%7Esquigle/rarin/corel2.html> with excerpts from an American Assoc. of Museums presentation.]

Q3

The question raised was about renegotiation of contracts. What would require renegotiation?

A3

Robertson: new editions

Farb: Sometimes a license will have an automatic renewal. She suggests negotiating as broad a license as possible the first time around. When necessary, renegotiate as you would a new license. Keep what you like and renegotiate for whatever changes are necessary.

Q4

A comment (Sundt) responding to Robertson's remark of LACMA's conservative stance. Sundt reminded us that NINCH/CAA will have a town meeting this November that will include Georgia Harper (Manager of Intellectual Property Section, UTexas, Austin). She noted also the recent town meeting on image copyright held in conjunction with the CAA meeting in Chicago earlier this winter. See <http://www.pipeline.com/~rbaron/ctm/CTM/htm#0701.Baron> Sundt argues that we need to be more aggressive regarding Fair Use.

A4

Besser: Noted the problem with being aggressive is that legal counsel departments are, by nature, conservative and require that we "play it safe" to avoid litigation against our institutions.

Sundt, in response, notes that counsel need to be educated on what we need as much as the vendors do. She argues that lawyers should be approached as one would a renegotiation.

US Copyright Office
http://www.loc.gov/copyright/

Canada's Copyright Act

ALA Copyright
http://www.ala.org/washoff/copyright.html

ARL Copyright & Intellectual Property
http://www.arl.org/info/frn/copy/copytoc.html

IFLA Committee on Copyright & Other Legal Matters
http://www.ifla.org/III/clm/copyr.htm
VRA Copyright, Intellectual Property Rights, and Fair Use
http://www.VRAweb.org  (copyright page currently being updated: coming soon)

Copyright & Fair Use Resources on the Internet
http://fairuse.stanford.edu/internet/

Links to a variety of resources, organized by the Stanford University Libraries.

Copyright & Image Management by Georgia Harper (University of Texas System)
http://www.utsystem.edu/OGC/IntellectualProperty/image.htm

One of the various copyright "crash courses" offered by the UT Office of General Counsel.

Copyright Law & Graduate Research by Kenneth D. Crews
http://www.umi.com/hp/Support/DServices/copyright/


Copyright Resources Online
http://www.library.yale.edu/~okerson/copyproj.html

An annotated list of academic and non-academic copyright policies available online.

The Copyright Website
http://www.benedict.com/

Personal web site by Benedict O'Mahoney with descriptive examples of people who challenged infringement of copyright in the arts.

Copyrightlaws.com
http://www.copyrightlaws.com

Informative web site on international copyright, digital property, and other issues by copyright lawyer Lesley Ellen Harris, editor of *The âopyright & New Media Law Newsletter*.

Fair Use of Copyrighted Works
http://www.cetus.org/fairindex.html

Full-text of a pamphlet published by the Consortium for Educational Technology in University Systems.

Liblicense: Licensing Digital Information
http://www.library.yale.edu/~llicense/index.shtml

Everything you need to know about digital licensing by Ann Okerson at Yale.

When Works Pass into the Public Domain
http://www.unc.edu/~unclng/public-d.htm

Table of information created by Laura Gassaway that provides assistance to understand when works are no longer protected by copyright.