3. ATLANTA
FAIR USE OF DIGITAL IMAGES

American Association of Museums Conference
Sunday, April 27, 1997

Panelists: (in order of presentation)

Douglas Bennett, Vice President, ACLS
Suzanne Quigley, Head Registrar, Guggenheim Museum, New York
Christie Stephenson, Museum Educational Site Licensing Project
Stephen Weil, Center for Museum Studies, Smithsonian Institution
Mary Levering, Copyright Office

Introduction

This town meeting was held in two parts as two sessions during the AAM Annual Conference in Atlanta. The audience here was again different: principally museum staffers and those who were on the whole more concerned with the perspectives of copyright holders. However the importance of Fair Use was stressed throughout the sessions. The first 75-minute session consisted of a panel of six speakers presenting aspects of the Fair Use debate. This was followed by an open 90-minute town meeting in which the panelists fielded comments and questions from an audience of some 50 participants.

MORNING SESSION

1. Douglas Bennett

Doug Bennett opened the session by introducing copyright law as an architecture of balance between the rights of copyright holders and the interests of users of copyrighted material. He reviewed the four factor analysis of whether any particular use of copyrighted materials without permission was fair use.

In introducing the movement of copyright into the digital environment Bennett emphasized two sets of worries consuming copyright owners and users: one was the fear of millions of digitally pirated copies of copyrighted works appearing on the Internet; the other was the fear of a pay-per-view despot in which all property was locked up behind licenses.

After a brief account of the history of the NII Task Force and the progress of the Green Paper and White Paper, Bennett gave a synopsis of the Conference on Fair Use and outlined the Digital Image Guidelines.

Bennett then broadly analyzed the structure and concerns of the Guidelines. First he noted there were three important distinctions:

- between the behavior of individuals v institutions;
- between regular digitization programs and spontaneous digitization of material by teachers before a class; and
- between digital images acquired from now on versus the digitization of an institution's store of analog images.

Bennett finally noted two special issues germane to digital imagery:

a) that of the use of whole images v. portions of images (whole images generally need to be quoted or used, whereas only small parts of a text work are normally quoted in fair use); and

b) the copyright status of copy photography: whether a photograph of a copyrighted work was itself copyrightable.

2. Stephen Weil, Center for Museum Studies, Smithsonian Institution

Mr. Weil presented the current copyright debate as one more about the control of intellectual property than economics. He cited his experience while at New York's Marlborough Galleries of William Rubin's request for the use of an image of a Jackson Pollock painting in a forthcoming critical article. Pollock denied the request and Rubin was only able to publish the image by finding a photograph of the painting not controlled by Pollock: so fair use stands between the control of a work by its owner and the use of an image of the work for critical or educational use.

Weil emphasized Bennett's point about the difference between text (the predominant concern of copyright law) and imagery. Images cannot be paraphrased or abbreviated in the way that text can (you need the whole work); and museums, to do their work, need to be able to reproduce visual images in very many different ways. Weil saw the current CONFU Guidelines as substantially undermining fair use and cited the White Paper's reference to fair use as an anachronism with no role in the National Information Infrastructure. It was, he felt, a provision that was seen to interfere with the smooth functioning of the NII, as envisioned by the Dept. of Commerce: a world of licensing and micropayments.

3. Suzanne Quigley

Quigley spoke as a registrar of contemporary art and expressed her general dismay that few museum directors and registrars had read or were acquainted with the CONFU Guidelines. She reported on her own informal telephone survey of how her peers at other institutions used or were preparing to use digital images. The results showed a general ignorance of many of the issues or implications of the new environment. She noted that several museums are increasingly asking for the digital reproduction permission for works that they borrow for exhibitions and often the lenders do not understand the implications.

4. Christie Stephenson

Christie Stephenson introduced the Museum Educational Site Licensing Project (MESL) as a way of showing how the licensing model can fit into a package of the delivery and use of visual images in a digital environment alongside fair use. MESL has, for the last two years, worked with seven museums and seven educational institutions to determine the practical mechanisms for delivering quality digital images for use on campus networks. The economic model is that of cost recovery, in which a modest income stream can help museums continue with the digitizing of their works.

The advantages of establishing an educational site license for universities include:

- the provision of a clear environment for the use of digital materials;
- its ability to ease the administrative burdens of rights clearance; and
- the creation of a relationship between owners and users that can be used as a platform for ongoing dialog between the two.

The environment that MESL's work applies to is only that of the museum and educational communities and their shared values.These values include:

- a predominant common interest in providing access to cultural heritage
- an acknowledgment that education is a critical part of the mission of museums and universities; and
- a desire to facilitate access while acknowledging curatorial responsibilities.

The license model recommended by MESL would have no intention of limiting "fair use" and indeed would clearly enable users to go beyond fair use (for example it would give users the rights to download and print and copy material and allow the manipulation of copied images). Ms. Stephenson noted that, as a librarian, she could personally endorse this as a pragmatic response to the issues of the protection and educational use of digital materials. Licensing is not the only answer but it should be included as part of the overall picture.

Ms. Stephenson concluded with the thought that in this kind of licensing transaction and relationship, Esther Dyson's formulation of "intellectual value" seemed more relevant and useful a concept than the usual one of regarding images and their use as "intellectual property." Such value adhered in the aggregation of content from multiple sources; in the collection of authoritative data; and in the ability to use sophisticated searching mechanisms and other value-added services.

5. Mary Levering

Ms. Levering spoke to her commitment to copyright law, fair use and the process of CONFU, addressed the question of why we need Guidelines and why we need them now.

She spoke of the CONTU (National Commission on New Technological Uses of Copyrighted Works) experience at the time of the 1976 revision of the copyright law, which is when fair use was first embedded in statute law in section 107--principally in the form of the 4-factor analysis. She spoke to the pressures at the time to go beyond the four factors and be more specific but that, as vague as they are, they are proving a good bedrock.

Ms. Levering referred to a survey conducted by Kenny Crews of university policies and guiding principles about copyright and his discovery that most university counsels are overly conservative in interpreting fair use and thus overlook their own interests. Guidelines can help in this process and give back one's fair use rights.

Ms. Levering emphasized that the negotiation process is at the vital center of the CONFU Guidelines and thus, even though they are far from perfect, they are "somewhat workable." The risks are far greater now than they were in 1976, with rightsholders even more nervous about the loss of revenue. But her experience as part of CONFU spoke to the need on both sides to continue the dialog engaged upon in CONFU in another format. What was needed was a willingness to put the current guidelines to the practical test in the changing technological landscape and then re-visit these guidelines in the future: perhaps in as little as 2 years time.

She wanted especially to emphasize that the guidelines were not law; that Fair Use exists beyond the guidelines and that the guidelines do not and could not limit fair use. She pointed to the need for different sets of guidelines to address the different uses and risks in the different areas of digital images, multimedia and distance learning. The general preamble clearly stated that the recommendations of one set of guidelines did not necessarily apply to another area of work.

Guidelines are needed now, she stressed because thousands of teachers are desperate for help in interpreting the 4 factors; the guidelines make the interpretation of the four factors much clearer and enable practical use of copyrighted material. One could see the Guidelines as a kind of "Hints from Heloise".

Ms Levering ended by quoting from a D-Lib article by Sarah Sully on JSTOR. Recalling the difficult negotiations between publishers and libraries over whether print-outs from the digital versions of JSTOR journals could be sent to other non-subscribing libraries via Inter-Library Loan, Sully wrote, "We had to propose some compromise or neither side would have been willing to work with us. With the help of friendly hard-liners from each camp, we molded and negotiated a clause that offers something to both sides." This is the spirit of CONFU and Ms. Levering recommended that the broad community treat the CONFU Guidelines the way that JSTOR managed to bring libraries and publishers together to practically test a negotiated agreement.

Conclusion

In summing up, Mr. Bennett noted that we were in a particular copyright predicament. That we were concerned especially with the educational interpretation of copyright law in the digital environment. The draft CONFU guidelines were now available and would be finalized at the CONFU meeting on May 19.

The Big Question, as he put it, was: "how do we live together in the digital environmen?." Educational site licensing is one way to go ahead, it is part of an overall digital package, but there is still fair use beyond the conditions of any license. Bennett noted Mr. Weil's impassioned plea for the vital center of fair use to be held and to be exercised and Ms. Quigley's complaint about the complicated, cumbersome nature of the guidelines. But finally, as Mary Levering reminds us, we do still need some guidance and perhaps we should first test the guidelines, continue the dialog and produce further guidelines in the not too distant future.

AFTERNOON SESSION

During the afternoon's discussion, Mr. Weil spoke more on his sense of the erosion of fair use and that there were two notions of fair use: as a limitation on copyright and as an extension of copyright for public use. This second understanding was contested by Mary Levering. Weil's contention that a postcard reproduction of a painting was essentially a different work was contested by Howard Besser who held that in such a case it was useful to consider the different levels and different forms in which an image could exist under copyright, without a particular version being a "transformative" version.

To the question about whether a museum that knows it does not own the copyright to images in its possession should post the works on a public web page, the answer was that although images could be digitized for internal use and on an Intranet, they should not be published on the Web. Weil reminded the audience that the vast majority of works owned by museums were in the public domain and could thus be published--though this would generally not be true of contemporary art museums.

Distance Learning was noted as an area of potentially enormous growth that may drive a new section of revised copyright law.

On the piracy issue and the fact that international piracy was more of an issue than domestic piracy: Howard Besser pointed out that the market argument was fallacious--the millions of people buying cheap pirated copies of works would not pay standard prices. Bennett noted that although individual countries might have weak copyright protection, the WIPO Copyright Treaty, dealing with digital copyright would

help in this regard. Bennett also emphasized that the WIPO Treaty gave much added weight to fair use and other limitations to copyright.

The importance of continuing to vigorously exercise and experiment with fair use was mentioned, emphasizing Mary Levering's point in the morning that the CONFU Guidelines gave one a certain level of security that was generally much higher than university general counsels would offer.

Answering Suzanne Quigley's dismay that few museum directors and registrar's had read the CONFU Guidelines, Weil emphasized his position that the Guidelines did not adequately answer the concerns of museums. He felt that commercial interests and universities were represented much more than museums. David Green suggested that perhaps AAM might consider drawing up an internal document of principles or recommended policies for museums' use of digital intellectual property, along the lines of the National Humanities Alliance's "Basic Principles."

Many panelists spoke again to the need for a continued dialog beyond CONFU, although what the formal avenues would be were unclear.

Mr. Bennett closed by emphasizing the need for CONFU to come to closure so that Congress can consider its final recommendations and include it in legislative history.