

COPYRIGHT AND FAIR USE TOWN MEETINGS 1997-98: Final Report

See also summary report, [Themes in the Town Meeting](#).

Introduction

The College Art Association in association with the American Council of Learned Societies and the National Initiative for a Networked Cultural Heritage, with major support from The Kress Foundation, organized a series of five "Fair Use Town Meetings" between February 1997 and February 1998. The meetings grew out of the Conference on Fair Use (CONFU), addressing the growing awareness that, as Susan Ball later put it about art faculty members, there was "woeful, perhaps willful" ignorance on Fair Use and copyright issues in the community.

The five town meetings took place at the annual conferences of the College Art Association (New York, 1997 and Toronto, 1998) and the American Association of Museums (Atlanta) and on the campuses of Indiana University-Purdue University in Indianapolis and Reed College (Portland, Oregon).

The series started by focusing on the proposed Fair Use Guidelines in the context of Fair Use and current copyright law. As the series progressed, the focus shifted more to consider the future of Fair Use in an increasingly important digital environment. While the Conference on Fair Use had the strongest presence for the first meetings, later on in the series the meetings tended to focus on the broader intellectual property legislative proposals in Congress.

This report is one of many forms of reporting and documentation of the meetings. Several meetings developed websites for publicizing and reporting the events and for gathering resources. The papers from the Indianapolis meeting will be published in a special edition of the Journal of the American Society for Information Science and papers from the Portland and Toronto meetings will be published by Gordon & Breach.

Resources gathered and built during the course of the town meetings helped build the NINCH "Fair Use Education" web resources and, in turn contributed to the material available for participants of future Town Meetings. In addition, several sites developed their own packed resource books for the use of on-site participants.

INDIVIDUAL MEETING REPORTS

1. NEW YORK: FAIR USE OF DIGITAL IMAGES

**Cooper Union/College Art Association
Sunday February 16, 1997**

Panelists: (in order of presentation):

Susan Ball, College Art Association
Barbara English, University of Maryland
Cameron Kitchin, American Association of Museums
Leila Kinney, MIT

Lyndel King, Weisman Art Museum
Nancy Macko, Scripps College
Kenneth Crews, Indiana University
Adam Eisgrau, American Library Association
Ted Feder, Artists Rights Society
Macie Hall, Johns Hopkins University
Geoffrey Samuels, Museum Licensing Collective Development
Annette Weintraub, Artist, City University of New York
Elizabeth Schmidt, Colonial Williamsburg
Kathy Cohen, Art Historian, San Jose State University

Introduction

The first of the town meetings was probably the most ambitious and the most edgy, coming as it did in the middle of the CONFU debates. It was held at Cooper Union in New York at the tail end of the 1997 CAA annual conference. Close to one hundred people attended. Presenters included four lawyers, two art historians, two museum staff, two artists, an educator, a slide curator, and a licensing developer:

The day comprised a legal introduction to copyright and a presentation of the proposed digital images guidelines, followed by a panel presenting specific scenarios or predicaments (the art historian, museum director and artist). After lunch a very large panel reviewed a variety of general topics (educating communities about copyright; liability issues; artists rights, the copy photography issue and an introduction to site licensing) followed by a panel discussing use of the Web by an artist, art historian and museum staffer.

Introduction to Copyright Law and Proposed Guidelines on Digital Images

Barbara English opened by giving a broad introduction to current US copyright law as it applies to visual images, leading up to Fair Use and the four-factor analysis. She emphasized that it wasn't who you are but what you do with material that determines whether a use is Fair Use and recommended caution and prudence, emphasizing the openness and ambiguity of the four-factor analysis. Ms. English was virtually besieged by a wide range of general questions, submitted at first as written questions, vetted and organized by the moderators.

Following the outline of the general statute came a presentation of the Proposal for Educational Fair Use Guidelines for Digital Images by the AAM's **Cameron Kitchen**, who navigated through the guidelines' basic structure. Questions covered both the history of the guidelines and the composition of those most closely involved in the two-year process as well as very specific questions about why certain provisions were the way they were. This session could easily have doubled in length given the battery of questions that followed it. Pat Williams reminded panelists that this was a highly wrought and negotiated document and that many passages had quite complicated histories.

Presentation of Predicaments

Opening the panel on specific predicaments, art historian **Leila Kinney**, from MIT, speculated chiefly on the relations of "original" artworks to their different forms of reproductions raised by digitally networked images. She was interested in taking the issues raised by Walter Benjamin and later by John Berger into the legal dimension by reconsidering the terms "original," "derivative work", "copy" akin to the way the "Manifesto Concerning the Legal Protection of Computer Programs" had done" (94 Columbia Law Review

2318). She questioned whether it was socially desirable to have layer upon layer of rights, and permissions to negotiate in every sector of the use of images. She hoped that there might be a space in which people with very different interests in using digital imagery might be able to forge a new consensus about providing for a depository system for high-quality images in the public domain that would be easily accessible online.

Weisman Museum director, **Lyndel King** presented the practical concerns of museums in the intellectual property debate. Aware of all sides of copyright debate she was also increasingly aware of the need to carry over the care of their collection into the digital world: a space many museum people felt was like the Wild West with few fences and sheriffs. Just as the storage and care of collections isn't free, many curators and directors feel that use of such collections can't be free. There was doubt and worry about whether campus networks were secure and whether site licensing was or was not the way forward. There were long-term implications for museums' ability to preserve images and protect collections if their images could easily be downloaded and used in ways museums have no knowledge of, and earn no revenue from. "If we lose control of the use of our collection, do we lose the means to use our collection as an asset to help preserve it?" (See Lyndel King's article, "The Fair Use Dilemma," in the July/August 1997 issue of Museum News.)

Artist and teacher **Nancy Macko** felt strongly that the guidelines did not include the voices, concerns or needs of artists. Artists were like others conflicted in their simultaneous desire for unlimited access and strong protection of their own work: this paradox lies at the heart of education and artistic production. She felt there were parallels between artists' and museums' attitudes to their work. Just as artists often gave away slides of their work to writers, researchers and slide librarians, Macko expected that museums should charge minimal fees for the educational use of images.

General Issues and Topics

Educator (and director of the Copyright Management Center at Indiana University) **Kenneth Crews** opened the large after-lunch panel presenting a range of copyright-related issues by speaking about his approach to teaching and advising on copyright issues and especially fair use questions at Indiana's Copyright Center. Granting that staff wanted practical solutions, not copyright lectures, he tried to help them find their own solutions rather than to rely on meticulous, and often alien standards and guidelines delivered from outside their experience. Crews found the detail and the approach of the digital images guidelines unhelpful and intrusive.

Legislative Counsel for the American Library Association's Washington Office, **Adam Eisgrau**, in speaking about liability issues in copyright law stressed that copyright was not at core about economic issues but rather about encouraging the progress of "science and the useful arts" in the nation. The digital images guidelines in ALA's view were premature and could well force institutions into situations in which they might be liable. Legal counsel and educators should be able to offer some guidance at a time when too much was in flux, while new market models and new public sector models of providing service and information were evolving. Eisgrau's advice was to think critically, be willing to sacrifice detailed guidance on Fair Use issues in order to avoid the imposition of draconian Guidelines and to work together on new legislation.

Ted Feder from the Artists Rights Society spoke about the work of the society, its concern for artists' moral rights and re-emphasized many of Nancy Macko's points about the artist's place in the economy of ideas.

Slide curator **Macie Hall** gave a detailed and commanding presentation about how the digital images guidelines were essentially created to solve the problems of slide curators but, due to the fears and power of copyright owners, the resultant guidelines were unworkable and seemed mostly geared to protecting the potential future profits of publishers, rather than protecting the educational constituency they were meant to serve. Macie informed her presentation throughout with a history of the longstanding practice of

copy photography for educational use, which has suddenly been re-examined by commercial publishers and now considered by them to be virtually illegal. Macie also gave examples of the time taken to gain permission for use of images (It took her two years to gain permission for the use of 300 images for a book; a given art history class consumes 2,000 images a semester, which would thus take 14 years to obtain permissions).

Another model of obtaining quality digital material was presented by **Geoff Samuels**, developer of the Museum Digital Licensing Collective. The educational site licensing model would enable museums to contribute digitized works to a collective which would then license collections of slides to universities, allowing a broader range of uses of very high quality, fully documented images for a low fee determined by cost-recovery principles. The Museum Educational Site Licensing Project was closing its two-year investigation into what the essential terms and conditions were that should be considered by both parties to a license. Two projects in this community, AMICO, run by the Association of Art Museum Directors, and the Museum Digital Licensing Collective were using the work of MESL in developing their licensing schemes.

Responses in the question period focused on the time limits to copyright protection, some discussion about licensing issues, a statement by Adam Eisgrau that museums and libraries were essentially at the same place, in the same position in the copyright landscape--knowledge-based non-profits trying to strike a balance in copyright negotiations, and a plea from the audience that what many artists and institutions needed was specific guidance on the use of the Web, which the Digital Images Guidelines did not give.

Practical Uses of the Web

This particular plea was partially met in the last session of the day as it brought together an artist, a museum director and an art historian to talk about web issues. Actually they mostly characterized their use of the Web, though a few issues emerged.

Artist and teacher **Annette Weintraub**, working with digital images since 1984 was impressed by the chameleon like character of the Web--its different functions and characteristics some of which were at odds with one another. She shared the paradoxical experience of wanting total access to others' materials yet also total control of her own work. However, she realized that control is illusory. She has been most impressed by the way the Web allows direct interaction with audiences--her "Realms" piece on ArtNetWeb was quickly listed as a "cool site of the day" and email poured in from all over the world. Tremendous sense of contact from a different kind of audience. This inspired her to make new communication-oriented pieces.

Kathy Cohen, an art historian at San Jose State University spoke about her extraordinary range of experiments, mostly in teaching using digital imagery on and off the Web. There were, she said, enormous possibilities, especially using distance learning, even though current technology had to be negotiated. Her position was that so much was in flux that one should not sign on to any guidelines at present. Indeed her work would be affected by all proposed CONFU guidelines and it was often confusing which one would apply at any time. She recommended writing our own guidelines--echoing Kenny Crews philosophy.

Finally **Elizabeth Schmidt**, from Colonial Williamsburg, described this large living history museum and its website. Williamsburg's several hundred acres of antiques with 88 Colonial buildings were matched by its intellectual assets including 750,000 images; 50 years of films; scripts, curricula, archeological research that are now being turned to use on the Web. Fortunately, Williamsburg has no copyright problems and has been actively engaged with distance learning, combining the synchronicity of TV with asynchronous Web and listserv experiences.

The allotted time for our meeting seemed to come to an abrupt end and, as the hall had to be vacated by 4:30pm, the meeting concluded, with many conversations spilling out into Cooper Square.

2. INDIANAPOLIS:

FAIR USE, EDUCATION AND LIBRARIES: A TOWN MEETING TO EXAMINE THE CONFERENCE ON FAIR USE

The Indiana University Institute for the Study of Intellectual Property and Education, Indiana University
Purdue University at Indianapolis
Friday April 4, 1997

The second town meeting was organized by Kenny Crews at Indiana University in Indianapolis. It specifically did not address the digital image guidelines and was focused more on the impact of the CONFU guidelines in general on education and libraries. The proceedings of this meeting will be published in a forthcoming issue of the Journal of the American Society for Information Science.

Panelists (in order of presentation)

Kenneth Crews, Indiana University
Mary Levering, Library of Congress
Kenneth Frazier, University of Wisconsin
Lolly Gasaway, University of North Carolina
Joann Stevens, Association of American Colleges and Universities
Christine Sundt, University of Oregon
Colin Day, University of Michigan Press
Peter Jaszi, American University
Georgia Harper, University of Texas.

Introduction

The second town meeting was organized by Kenny Crews at Indiana University, Indianapolis. It specifically did not address the digital image guidelines and was focused more on the impact of the CONFU guidelines in general on education and libraries. The proceedings of this meeting will be published in a forthcoming issue of the Journal of the American Society for Information Science.

The day was divided into four sessions: "Are Fair Use Guidelines Right for the Academic Community?" divided into pro- and con- presentations; "Fair Use for Teaching and Learning"--presentations on distance learning and multimedia guidelines with perspectives from librarians, educators and scholarly publishers; "Library Issues," with presentations on the Interlibrary Loans and Electronic Reserves Guidelines, with a Scholarly Publishing perspective on both; and finally "Where Do We Go From Here?"--a look at political and practical options.

This meeting had a number of particular assets: Kenny Crews himself, a wonderfully effective theatrical and educational presence; a preceding half-day introduction to basic copyright issues, masterminded by Mr. Crews, and a voluminously inclusive conference loose-leaf book, packed with reference material.

Are Fair Use Guidelines Right for the Academic Community?

After introductions, the day began with the rhetorical pros and cons on guidelines from Mary Levering (US Copyright Office) and Ken Frazier (Librarian of the University of Wisconsin). **Ms Levering** presented the CONFU guidelines as essential reminders, helping users to interpret the law; veritable "Hints from

Heloise" that could help navigate the thickets of copyright. She urged the audience to accept the guidelines as provisional, temporary documents that, although they might soon need superseding, contained essentially good advice. **Ken Frazier** declared that although he was not against guidelines per se he was against institutional adoption of guidelines. If it was just advice one needed one didn't need institutional adoption. Already he could see classroom guidelines being used to limit fair use. It seemed these guidelines were being produced far too soon. As a librarian dealing with exorbitant costs of information (which the guidelines don't recognize) he understood the complaints against publishing monopolies that gave rise to the 18th century Statute of Anne: "They take our learning and charge whatever price their avarice demands." The 20th-Century agenda seemed very parallel, given statements from the Association of American Publishers, the White Paper on Intellectual Property and the language proposed for the WIPO Treaty: fair use is being made out to be irrelevant to 'normal publishing.'

Fair Use for Teaching and Learning

The second session presented distance learning and multimedia guidelines. **Laura Gasaway** spoke on the hurdle that the Distance Learning Guidelines faced with [section 110](#) of the copyright law itemizing the materials that could and could not be transmitted. These guidelines were very limited in that they only dealt with synchronous transmission of material: the decision was to revisit guidelines in a period of between 3 and 5 years for consideration of asynchronous transmission (which is essentially what web-based distance learning will depend upon). Joanne Stevens presented the Multimedia Guidelines: her essential point was that as multimedia digital productions were so complex and used so much material, there had to be a way to work around the labyrinthine permissions process. She believed that the guidelines were a very workable solution to an almost intractable problem.

Giving perspectives were **Christine Sundt**, Slide Librarian at the University of Oregon, and **Colin Day**, director of the University of Michigan Press. Sundt's paper, The CONFU Digital Image and Multimedia Guidelines: The Consequences for Libraries and Educators, included a compelling account of the history of the issue of the reproduction of visual materials in educational settings--a complementary account to Macie Hall's presentation in New York. Briefly, she felt that the burdens imposed by the guidelines, specifically those of the digital images guidelines, essentially made them unworkable--especially with the insistence on slide librarians seeking permissions for material that most practitioners felt were being used fairly. Sundt strongly recommended the community producing its own "guides to good practice" perhaps based on the work that has gone into the guidelines. Colin Day felt he needed to make the case that university publishers were very much embedded in the university structure and should not be regarded as the enemy. A process of professionalization of university presses had made them a medium or intermediary between universities and commercial publishers.

Library Issues/Where Do We Go From Here?"

After presentation of where librarians felt they were with the Inter-Library loan and Electronic Reserves CONFU working groups, which did not produce guidelines, the conference proceeded to the larger issues of political and practical next steps. **Peter Jaszi**, Professor of Law at American University gave a sweeping sense of recent international and domestic developments in copyright legislation. Jaszi is a key player in the activities of the Digital Future Coalition, an ad hoc coalition of some thirty organizations committed to continuing the current balance between rights holders and users in copyright law in any new intellectual property legislation. After the effective blockage of last year's legislation and the volte face by the World Intellectual Property Organization, Congressional staff now understand the DFC position on the importance of balance and the continuation of educational fair use and exemptions. Now was not the time to negotiate but to be eloquent in the insistence of fair use as the community's birth right. Jaszi reminded

us of related issues of term extension; [the database protection act](#); and [universal commercial code revision](#) especially its language on shrinkwrap licensing.

Georgia Harper, legal advisor at University of Texas, spoke on practical steps she was taking to inform faculty and administration about their copyright responsibilities. This included educating university members both about intellectual property assets they themselves own as well as about what was allowable under fair use. Perhaps the single most important act any institution could engage in was to formulate both intellectual property management principles as well as a management policy: one that addressed use of others' works involving fair use and licensing and copyright ownership and management, so that the university could protect and exploit works its members helped to create. It was increasingly important to remember that copyright was a two-way street.

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.

4. PORTLAND

COPYRIGHT LAW IN THE DIGITAL WORLD: FAIR USE, EDUCATION AND LIBRARIES AFTER CONFU

Based on and incorporating the report by Jessica Tagliaferro, College Art Association

**Reed College, Portland, Oregon
Friday-Saturday, September 26-27, 1997**

Presenters/Panelists: (in order of presentation)

Kenneth D. Crews, Indiana University
Robert Baron, Museum Consultant
Elaine Koss, College Art Association
Georgia Harper, University of Texas
Mike Holcomb, University of Oregon New Media Center.
J. Q. Johnson, University of Oregon

Penny Hazelton, University of Washington
Gerald Barnett, Office of Technology Transfer, University of Washington.
Maryly Snow, University of California Berkeley Slide Librarian.
Mary Levering, US Copyright Office
Chrysanne Lowe, Academic Press.

Friday September 26

1. Kenneth Crews: "Copyright Law and the University Mission."

As he did in Indianapolis, Kenny Crews, Director of the Copyright Management Center at Indiana University gave a half-day workshop on basic copyright and Fair Use issues addressed to the education and library communities.

He reminded the audience that the academic community has vested interests on both sides of the copyright debate, being creators, owners and users of intellectual property. Growing concern about copyright issues has always coincided with advances in technology and publishers have been particularly concerned about the proliferation of materials within educational institutions since photocopying and VCR machines were introduced. The 1976 revision of the copyright law, which codified the photocopying of materials, has not been extended to cover digital materials.

Crews indicated that the Copyright Act covers such a high volume of "creative" material that there was much room for interpretation, which brought with it advantages and disadvantages. For instance, the rights belonging to the owner/creator of a work include: reproduction, distribution, derivative works, public performance and display, and moral rights (protection of works of visual art only produced in small quantities). These terms make the mere acts of reproducing a copyrighted comic strip, putting it on an overhead projector and reading the caption to an audience, technical infringements. Furthermore, Crews discussed the vague nature of these terms, especially in a technological age. (What is a reproduction? What is a derivative? Is a slide of an artwork a derivative, a reproduction, or an original, independent work eligible for copyright protection by the photographer?)

He continued with a discussion of each of the exceptions to the rightsholders' domain. These included "Fair Use" (Section 107 of Copyright Law), library copying (Sec. 108), the "first sale" doctrine, performances and displays (Sec. 110, 1-2) (face-to-face teaching, distance learning, and computer software (Sec. 117).

Crews cautioned that simply giving credit to the author of material one used was not a sufficient Fair Use defense. Neither was the fact that a use was by a nonprofit or educational institution sufficient defense; commercial enterprises may also make "Fair Use" of materials. He further warned that while the definition of "Fair Use" was traditionally left up to educators and librarians to interpret, the proposed CONFU guidelines were not the law. Crews gave the example of the Kinko's decision (Basic Books, Inc. vs. Kinko's Graphics Corp., 1991), in which the Supreme Court concluded that photocopying by a for-profit business for classroom use does not meet Fair Use requirements.

September 27, 1997

The second day of the Portland meeting was divided into four sessions: Facing the Challenge; Users' Perspectives; Working with the Guidelines; and an Open Forum. There were roughly seventy-five people in attendance, including speakers, moderators, and sponsors. After Elaine Koss and Georgia Harper made their welcoming remarks, questions ensued, mostly about the status of the CONFU Guidelines.

SESSION 1: Facing the Challenge

1. Robert Baron, "The Challenge to Education"

Robert Baron asked educators and administrators to rise to the challenge to democratize information retrieval. He asked whether or not the fundamental goals of education had really changed in light of the advances in technology. He asserted that in order to preserve educational culture, we must continue to protect what was considered most valuable about education in the past.

Twenty years ago, he said, scholars had the right and the freedom to pursue a pure scholarly mission. Scholars' and educators' activities were separate from politics and the commercial world. Education did not, as it sometimes does now, bow to the "lowest common denominator."

Baron used several examples to illustrate what he sees as the clash between academia and the marketplace. Baron bemoaned the "industrialization" of education characterized by, among other things, the prevalence of business jargon surrounding the education profession. He harkened to the "spiritual ownership" that scholars traditionally had over their material. He used the analogy of colonialists staking out land to illustrate the ways commercial enterprises are increasingly staking out educational products, art objects, etc.

In closing, Baron called on educators to embrace technology but to preserve an educational legacy.

2. Mike Holcomb "The Challenge to Rightsholders,"

The New Media Center Program at the University of Oregon is a consortium of new media and software businesses worldwide. The center pairs industry (professional multimedia developers) with subject matter specialists in order to create various instructional materials. Mike Holcomb outlined the program's mission to play a definitive role in the future environment of higher education. He indicated that the center often relies on the "Fair Use" doctrine when dealing with the dissemination of existing materials.

Holcomb challenged universities to expand their position as rightsholders and to empower faculty to find new outlets for their work as well as new resources from which to produce. He also challenged scholars to work more collaboratively to create new media projects. Holcomb emphasized that universities have roles as rightsholders not just as users. He said that universities must engage in the game before industry buys intellectual property out from under them.

3. J. Q. Johnson "The Challenge to Libraries,"

Johnson outlined the "delicate balance" of interests among libraries, copyright holders, and the creators and users of digital technology. The digital age is an era when pre-existing understandings, such as Fair Use copying in libraries, are being challenged.

Johnson indicated that CONFU is a "dead" construct and called on his colleagues to start looking for alternatives. Because the digital world is rapidly developing, no one can predict what will happen in the near future. In order to cope with the current atmosphere, one must: 1) tolerate uncertainty; 2) take a risk management approach; 3) protect one's own intellectual property; 4) study contract law; 5) start lobbying more aggressively. When considering applying the "Fair Use" defense to use of copyrighted material,

Johnson suggested applying the following tests when considering "Fair Use": 1) "What's legal?" 2) "What's fair?" and 3) "How do we avoid getting sued?"

Discussion:

One attendee suggested that the market be allowed to play itself out before legislation is created to govern these new mediums.

When asked if faculty were paid to contribute work to the New Media Center, Holcomb answered that they volunteer but indicated that it operated much like a commercial publishing enterprise within the university system.

A discussion ensued on the "professionalization" of the scholarly community. Holcomb thought this had already happened and that it was now a matter of the institutions gaining control of their faculty's productions. (He gave the example of software project production.)

Also discussed was the idea of the "social good," particularly the blurred lines between scholars and the commercial world.

SESSION II: User's Perspective

1. Penny Hazelton, "Electronic Reserves,"

Library course reserves provide short-term and high-volume access to material. They are more ephemeral than handouts and course packs, and therefore keep to the spirit of copyright. Use of reserves has increased since the Kinko's case. For instance, the highest percentage of circulation transactions at the University of Washington library is in reserve materials.

Hazelton asserted that there is a need to find a more effective way to disseminate materials. She indicated that while electronic reserves will not save time or money, they will improve access to materials for student and faculty. She then discussed the advantages and disadvantages of this medium. Does this version look more like a course pack? (This would present the same difficulties as the Kinko's situation.) Another difficulty is that electronic reserves may only give students the opportunity to read material secondhand, compiled by faculty or library staff. This makes libraries more vulnerable to accusations of copyright infringement. Hazelton also warned that one should not make the assumption that every student has the technological literacy or the resources necessary to access electronic reserves.

Hazelton asked how much of a role university libraries want to play in the creation and governance of faculty websites.

2. Gerald Barnett, "Distance Learning,"

Gerald Barnett discussed how to share and disseminate materials for the purposes of distance learning without violating copyright. He touted distance learning as one way to use technology more effectively, as it can extend the classroom, simulate the classroom, or provide greater access to reference materials.

He compared and contrasted the standard classroom model established around the turn of the century with the emerging "Digital Media" model, brought about by the technological dissemination of information.

He indicated that this new model needs collective action in creating materials, continuous effort to update and support projects, innovative institutional services, active deployment of curriculum, and investment by institutions. He also discussed how the emerging model is also characterized by convergences in academic enterprises.

Barnett has difficulty accepting the Fair Use guidelines, which he viewed assuming the outdated classroom model. He called for new types of guidelines that could accommodate systematic use of instructional materials, withstand license-based markets, define the limits of "market rights," and emphasize and promote innovation.

3. Maryly Snow: "Digital Images"

Maryly Snow discussed the use of images in image databases on the World Wide Web. The project that she is involved with, [SPIRO](#), provides a database of image thumbnails and information on how to obtain the image for instructional use.

Snow explained that "thumbnails" and "vignettes" of artworks are too small and of such low resolution that there is nothing to steal or misappropriate; thumbnails are solely for reference use. She cites other websites that are examples of "Fair Use," sites that do not violate the Fair Use four factors. These include the Art ImageBase of the Fine Arts Museum of San Francisco and Vincent van Gogh Information Gallery. She provided a demonstration on how to use these sites.

Snow encouraged the creation and continued use of these educational sites as one way to combat the commercialization of the Internet and the "commodification of information."

Discussion:

When asked about the financial value of putting an image online, Snow replied that she would refuse to pay \$10 for a low resolution picture on principle. A discussion ensued on the problem of rightsholders (i.e., private owners, museums) attempting to acquire fees unfairly or inflating costs.

One participant distinguished between museums protecting their interests as rightsholders when charging fees for the use of photographs of their holdings and contemporary artists trying to protect their rights over their own work.

Barnett suggested that many rightsholders had not recognized the economic value of educators putting their images into service.

Christine Sundt pointed out that, not too long ago, museums were not interested in these copyright issues and were more interested in their tax interests. Charles Rhyne concurred by testifying to the recalcitrance of many museum officials.

Hazelton warned that the guidelines are not the law, and strict adherence to them could be detrimental. She advised taking a liberal approach, assuming permission, where possible.

Barnett admonished publishers for not mobilizing to come up with alternatives ways of providing materials for educational purposes. He indicated that many of them have not caught up with the technology.

SESSION III: Working with the Guidelines

1. Georgia Harper, "CONFU: The Big Picture"

Georgia Harper, Attorney with the Intellectual Property Section of the University of Texas System, introduced what she called a "Good Faith Fair Use" policy. She reported that "Fair Use" is still the best defense against challenges from rightsholders and maintained that the CONFU guidelines, while thorough and precise, are not distilled enough for the user; they should rather serve as a starting point.

Harper also cautioned that these issues can't be ignored by university administrations and counsel as they have been in the past. Scholars are now rightsholders as well, and she doesn't see universities giving that point enough attention.

2. Mary Levering, "Trying out the Guidelines"

Mary Levering agreed that the CONFU guidelines, as they now stand, aren't "perfect," but she believed they help to maintain balance between rightsholders and users.

Levering argued that with the move to the digitization of images--where most questions about Fair Use arise--guidelines can give users confidence to make decisions, not conclusive answers. She emphasized that each situation is unique, and must be looked at individually. The preamble to the CONFU guidelines stated that the guidelines are not conclusive, that they do not cover all situations for Fair Use. Levering said that users may go beyond these guidelines. Staying within the guidelines puts one on stable ground.

Levering reported that at the April town meeting in Atlanta, three representatives of major rightsholder organizations (university publishers) declared that the guidelines are indeed a safe harbor. Levering has seen publishers and other rightsholders warming up to the guidelines over the course of the three years since CONFU was first begun.

Levering advised the audience to "get some real life experience," to become able to provide empirical examples and not just rhetoric. This will strengthen the skills one needs to inform and convince detractors. Levering petitions librarians and administrators to try working with the guidelines for now.

Robert Baron responded by asserting that even a temporary adoption of the guidelines was inadvisable. As they would turn educators into "captured clients" of image disseminators. Baron believed that there was a fundamental problem with setting up Fair Use law by setting scholars on a par with commercial users. Indeed, he felt that the CONFU guidelines would stifle productivity and creativity in education and scholarly work. Imposing the requirement that users obtain permission only fuels the practice of collections retaliating against users who have used print images in the past on good faith. Baron felt that it would also force users to give up using preexisting images, forcing them to commission new reproductions.

Baron further suggested that the guidelines insist that the user examine the "potential" for economic gain of the material. He feels it is ideologically wrong to force a scholar to participate in economic enterprise in this way.

3. Chrysanne Lowe, "Licensing and other Initiatives"

Lowe spoke on the challenges of managing and delivering electronic journals and gave a presentation on several of the projects, online journals and databases, that Academic Press has developed.

Discussion:

In response to several complaints about the expense of academic journal subscriptions (as well as the seemingly random pricing scale) from librarians in the audience, Lowe responded that Academic Press is creating a consortium in which institutions without subscriptions can join and pay a relatively small fee to use all these materials through Inter-Library Loan. The question was also posed as to why electronic publishing should be more difficult or expensive. Lowe responded that storage space and transition costs have been extensive for Academic Press to which an audience member retorted by asking why libraries should pay for publishers' development costs?

IV Open Forum:

The forum opened with questions about how to get faculty and university administration interested in copyright issues and how to get administrations interested in adopting guidelines. Some attendees indicated that they had taken steps to encourage endorsement of guidelines at their own institutions.

Harper made a plea for active advocacy among librarians, administrators, and faculty. She said that creation of multimedia materials sparks faculty interest in copyright law more than any other issue, and suggested that this be used as an entry point for educating scholars.

Sundt called on everyone to read and know the guidelines in order to raise energy levels among colleagues.

Further frustration was expressed that librarians were being forced to make legal decisions. Legal counsel at universities have little time to deal with the murky issues of intellectual property, and they tend to get put aside. Harper emphasized that lawyers with little experience with the guidelines will tend to make them the maximum rather than the minimum requirement. Another attendee cautioned that counsel may be of very little help: "They tend not to know any more than you do--lawyers are loathe to decide on these issues." Some universities are considering the creation of a "Copyright Officer."

Snow: Is anything going on at NACUA on these issues? Have they addressed guidelines? Harper replied that they have wavered and won't take a position and urged the Visual resources Association and librarians to mobilize.

Snow: Is there a foundation or a society that is willing to fund the study of the effect of the implementation of these guidelines? Levering said she has investigated this. She cited the MESL-Getty project, which was concluding and would be reporting in 1998.

AMICO, sponsored by AAMD, was developed based largely on the findings of MESL. AMICO came up with a licensing framework that illustrated museum priorities as well as university priorities.

One attendee familiar with collections projects like MESL noted that the collections of images aren't extensive enough. Teachers and students should also be involved in the creation of these image banks.

Barnett suggested that when students become involved in these issues/discussions, faculty must be sure to educate them that the commercial world is not like the educational world.

Levering indicated that the US Copyright Office will be able to take a more visible role in these issues in the near future. Sundt said that documents should be more available to the public. She indicated that in reading the CONTU report on Inter-Library Loan from the 1970s she saw that librarians and educators were really not all that involved in that conference.

5. TORONTO:

COPYRIGHT & FAIR USE IN THE DIGITAL WORLD: VIEWS FROM THE WORLDS OF SCHOLARSHIP, PUBLISHING AND MUSEUMS.

**1998 Annual Meeting of the College Art Association
Toronto, Canada
Thursday February 26, 1998**

Panelists: (in order of presentation)

Robert A. Baron, Arts Information Consultant
Peter Walsh, Davis Museum and Cultural Center, Wellesley College
Gary Schwartz, Curators of Dutch Art (CODART), Netherlands Institute for Cultural Heritage
David L. Green, National Initiative for a Networked Cultural Heritage
Leila W. Kinney, Department of Architecture, Massachusetts Institute of Technology
Maxwell L. Anderson, Art Museum Network; Director, Art Gallery of Ontario
Howard Besser, School of Information Management & Systems, University of California, Berkeley

Introduction

The last town meeting in this series was organized by the Toronto Town Meeting Committee, co-chaired by Robert Baron, Arts Information Consultant, and Leila Kinney, School of Architecture, Massachusetts Institute of Technology.

Loosely following the model of the Town Meeting at the American Association of Museums, this meeting was presented in two parts: part one consisted of presentations of three papers, followed by discussion; part two consisted of a two-part debate about the issue of licensing and Fair Use of images.

As Robert Baron pointed out in his opening remarks, the subjects for discussion had now moved beyond the Conference on Fair Use, which looked increasingly irrelevant to immediate concerns. As Mr. Baron put it, "After CONFU, we are discovering that the lines of self-interest are becoming more resolutely drawn--and perhaps, in this process, more clearly perceived." While not neglecting to strengthen and confirm the rights and privileges endowed by copyright law, the community of educators and scholars had to discover acceptable new strategies and protocols for securing continued delivery of copyrighted images and other material.

SESSION ONE: Strategies and Technologies

1. Peter Walsh, "The Coy Copy: Technology, Copyright and the Mystique of Images."

Peter Walsh's presentation broadly illustrated the fact and the problem that copyright law was developed originally for printed text and then adapted for other media and thus the law is always somewhat distorted for the visual domain. In particular, he examined the differences in the notion of the copy in text and visual environments, and argued for a clarification in the law over the value of different types of copies in the visual domain.

First, Walsh demonstrated how prevalent and deeply ingrained in artists' practice was the fact of copying and adapting the works of others. A Rubens painting, "after Caravaggio," accepted today as perfectly legitimate, was made in 1611 shortly after Caravaggio's death. Under current U.S. copyright law, this would have been illegal and prosecutable.

He also briefly followed the life-history of the images on the slides we examined (painting to photograph to multiple copies, to printed plate, to published book illustration to projected slide). Other versions, ranging from student copies to engravings, would have been made from the originals and reproduced as lithographs, postcards, slides, book illustrations in short, as many different kinds of production versions that scholars know and recognize, each, in its own way, bestowing different meanings to its own level and kind of copy. But copyright law only recognizes a fair and an unfair copy (legal and illegal). With literature, whether a copy is fair or not is comparatively clear (it's either under copyright or not).

Today, many maintain that each photographic copy of an original work is itself copyrightable, bestowing on any given work a series of layers of copyright ownership. With literary works, however, copying does not affect the original. In this way, Walsh maintained, a photograph of an original work of art was simultaneously an original, a copy and a derivative because it is based on "pre-existing material." Because the law doesn't distinguish between kinds of visual copies, it becomes, he said, "impossible to untangle these three notions."

2. Gary Schwartz: No Fair! Long-Term Prospects of Regaining Unencumbered Use

Gary Schwartz addressed what he saw as a schizophrenic situation, in which scholars were thrown into a defensive posture over a set of longstanding practices that depend on free or low-cost use of images. Hitherto comparatively invisible in the market place, art historians were ironically being seen now as a source of profit as they found themselves "on the cross-hairs of two antagonistic realms:" the copymakers selling machines and techniques encouraging more profligate copying and the copyright protectors aggressively tracking and charging for use. This was threatening the economics of the discipline of art history that, Schwartz suggested, should be re-named: "The History of Art in the Public Domain."

Contrary to its intent, Fair Use was clearly not viewed by publishers as a social principle, but rather as a mechanism to deal with market failure--an inability to negotiate with the small-scale users of their property. Now that electronic technology can increasingly help track and charge for use, publishers could see no justification for the Fair Use defense and were clearly intent on destroying it: "The more capital is invested in intellectual property, the more pressure is going to be brought to bear on Fair Use, and the more anachronistic it is going to look."

In response, Schwartz called for a more aggressive response from scholars. Given that "the doctrine of Fair Use is too ill-defined to provide us with the right to use, on our own terms, materials controlled by others," scholars should become more demanding in fees for their own products: "Any use of the ideas, knowledge and information we produce, by museums, image brokers, the press or any other party, should be charged for at a rate that would offset--at a premium--what we are being asked to cede by way of payment for and control of images."

Schwartz briefly proposed eight strategies, the first six dependent on contesting current practices of the owners of material and the last two revolving around making counter-claims or organizing to claim financial benefits from the value added by scholars to cultural heritage knowledge:

1. Contesting charges by public institutions
2. Contesting reproduction rights on art in the public domain
3. Contesting reproduction rights based on ownership
4. Contesting claims to copyright on photographs
5. Contesting claims on second-generation reproductions
6. Challenging abuse of power in the management of resources
7. Introducing a system of virtual counter-claims
8. Maximizing our own collective position as holders of copyright.

Regarding art history as a discipline that had met with great success over the last 50 years, Schwartz pointed to the fact that that success has not translated into protections and benefits for its practitioners: "the status of the art historian is legally unprotected and socially undefined." Indeed the chance for art historians to receive public support in conflicts with the lawyers and producers of rock singers and movie stars was minimal.

The challenge that art historians were facing in the recent copyright battles was, in fact, greater than copyright itself: "The history of copyright law is in this regard no different than that of labor law and anti-trust law: only groups which have been able to consolidate their position and convince society of the legitimacy of their rights have been able to achieve a proper level of legal protection. If we can do that, we will have achieved much more than winning a battle with the copyright industry."

3. David Green: "Your Copyright Future is Being Determined Now, or: Public Interest? What Public Interest?"

David Green focused on copyright legislative activity of the 1997-98 Congress, examining two competing visions of copyright underlying various bills before Congress. He presented the current "debate" over copyright as one very much akin to the recent culture wars over public funding for the arts and humanities: "the copyright status of digital media, too, is a war about values, values of a classic American kind that resurfaces throughout our history: culture versus commerce, private gain versus public interest."

Green reviewed the relevant legislative developments in copyright and Fair Use, including the life and death of the Conference on Fair Use, and the World Intellectual Property Organization's Copyright Treaty, ratification of which underlies current copyright legislation.

He also reviewed three competing concepts to copyright, what lawyer Peter Jaszi has labeled "quasi-copyright" (new database protections); "para-copyright" (encryption technology negating Fair Use); and "super-copyright" (contract law pre-empting federal copyright), which Green saw as allied with the Administration's vision of future copyright.

Against all this, there were poised two companion bills in Congress that offered an alternative vision of the future: a comprehensive and balanced Senate bill introduced last September by Sen. John Ashcroft and a companion House bill introduced in November by Representatives Rick Boucher (D-VA) and Tom Campbell (R-CA). Both address the issues of privacy, Fair Use and liability. Campbell-Boucher also

addresses first sale and the issue of the relation of state contract legislation to Federal Law. (It clearly asserts that negotiated contracts cannot pre-empt one's privileges, such as Fair Use, guaranteed by Federal law).

These two bills are currently the focus of a major campaign organized by the Digital Future Coalition. A useful side-by-side comparison of the Boucher-Campbell Bill (H. R. 3048) with what is now the "Digital Millennium Copyright Act" is available on the DFC website <<http://www.dfc.org/issues/wipo/DMCanal/dmcanal.html>>. This campaign is clearly about which version--which vision--of control and access to copyright material will be dominant in the future.

As far as what to do about the future, Green recommended individuals and organizations contact the College Art Association, the National Humanities Alliance or the Digital Future Coalition to determine how they could best work to effect legislative change. On the educational front, NINCH was encouraging the active development of campus and institutional policies and principles on the use and management of copyright material as well as copyright and Fair Use educational programs.

SESSION TWO: Educational Image Site-Licensing Debated: Will Site-Licensing Eliminate Fair Use?

Leila Kinney introduced a debate over educational site-licensing by making a number of personal observations from the point of view of an art historian. First was her sense of the community's having traveled a long way from the early drafts of the CONFU Guidelines for the Fair Use of Digital Images, in which she felt that many scholars' longstanding practices were virtually criminalized. The rejection of CONFU served to anticipate a new, sophisticated use of high-quality digital images, replete with contextualizing metadata, that could be made available for reasonable prices through educational site licensing consortia.

Second, her perception that in many discussions, the debate seemed to posit two homogeneous communities: that of producers and users, whereas in fact these communities are mixed--the "producers" themselves also needed Fair Use. The prospect of a brilliant digital image library should also imply collaboration and feedback between scholars and curators, universities and museums.

Ms. Kinney welcomed the apparent "zone of freedom" that a user would have with digital images delivered under the AMICO license but worried that it might then be compromised by having to renew contracts annually. This issue of "temporal" portability she then applied to those who could use images at one location where they worked, but not at another that did not license the works, or those who were independent scholars.

1. Howard Besser: "The Erosion of Public Protection: Attacks on the Concept of Fair Use."

Howard Besser, rather than make a case against site licensing, opened a broader discussion beyond AMICO, wanting to give, as he said, a context for intellectual property in the digital age. He began his talk with the basics of copyright and Fair Use, emphasizing that in the mix between commercial gain and public good it should be the public good that gains, but observed that the balance was currently going the other way.

The first round of licensing of digital resources by commercial companies has been rather bumpy and, from Besser's perspective, licensing seems to have been used frequently to make an end-run around Fair Use. Problems exist when libraries enter into licensing arrangements with publishers, for, rather than

being bought outright, material is only leased. Consequently libraries cannot build collections of historical resources, and cannot govern when controversial items might be removed from a licensed resource. Furthermore, if licensed resources are licensed or controlled from a central source that is able to track use, then serious privacy issues may easily arise.

Besser agreed with Schwartz that commercial copyright owners viewed Fair Use as an economic threat and marshaled other evidence to prove that big business was attempting a "copyright grab" of materials that should be more freely available. By this phrase, Besser was referring to the article by Pamela Samuelson published in the January 1996 Wired magazine, available on the Web at <<http://www.hotwired.com/wired/4.01/features/white.paper.html>>.

2. Max Anderson: AMICO & Fair Use

Max Anderson is Director of the Art Gallery of Ontario and of the Art Museum Network, a project of the Association of Art Museum Directors, that is parenting the Art Museum Image Consortium (AMICO).

AMICO is a nonprofit cooperative of art museums founded to create a collective library of digital images with rich contextualizing metadata to be licensed for educational use on a cost-recovery basis. A separate session explaining how AMICO worked was offered the following day at the conference.

Anderson was a little nonplused since the advertised "debate" about site-licensing had failed to appear, and he had no intention to defend licensing as a whole. AMICO, he claimed, is quite different from commercial licensing operations in a number of important ways. It was nonprofit; it is based on cost-recovery; it was formed to enable the fullest possible use of material by the educational community. Unlike dealing with a commercial company like Corbis, where a museum might not feel that it was controlling its own destiny, AMICO offers a nonprofit community-based solution to marketing digital images.

AMICO was formed to solve a number of problems: one of these was the inability to find and use affordable, high quality digital images from art museums; another was the difficulty that museums have had with dealing with a high volume of individual requests for digital material. AMICO solves both by creating a centrally administered collective library of images. The current 23 museums that have joined AMICO have had their own collection information systems, their own databases and will continue to market their own collections, but finding material across such a number of museums is a nightmare that only a collective library can successfully solve.

Anderson assured the audience that the AMICO license allowed uses far beyond those traditionally allowed under Fair Use, including, for example, features like remote access, manipulation for study purposes, retention in a portfolio, and regular use in curricula.

Anderson answered a variety of questions both from the floor and from the Town Meeting Web site <<http://www.pipeline.com/~rabaron/ttm/TTM.htm>>. Many of these inquiries concerned the financial viability, not only of AMICO, but of the project of networking cultural heritage materials in general. While Anderson maintained that AMICO was seeking minimal cost-recovery in a project that museums were using as a way of furthering their public educational mission, Besser, reporting from a study he was involved in, claimed that museums would be lucky to truly recover their costs in digitizing their collections from such an enterprise and would have to depend on traditional commercial markets to make any kind of income. Anderson agreed that a combination of fundraising and licensing income would have to be at the heart of AMICO's future viability.

All agreed that substantial funding still had to be raised from government and foundations to seriously tackle the task of networking cultural heritage materials: this was a task that was not being confronted head on.

CONCLUSION

The Town Meetings were conceived as mixing the presentation of fact and the provision of a forum for discussion. The range of questions, spanning present reality and future possibilities included: what is copyright law, what is fair use, what are the fair use guidelines, how do they apply to your situation, how does the digital environment change the equation, what do we do without CONFU guidelines, what do we require from new legislation, what are the guiding values of this community and, finally, what are new economic models for access to intellectual property that we need to contend with, or imagine, in our digital future?

The meetings met with very warm and active receptions around the country. There was clearly a need for information and advice on copyright and fair use issues and a need to discuss the present and future scenarios that members of the educational community found themselves in. Much changed even over the one year of the meetings. At the beginning the proposed CONFU Guidelines were the hot topic. By the end they were dead, and audiences and panelists were focusing on other issues: legislation, licensing, organizing and new forms of guidance in the classroom and the study.

In this rapidly developing environment, the needs are broadly still those of:

- making the case that these issues are important for those producing and using cultural materials and will become increasingly critical as more distribution and use of cultural resources occurs online;
- explaining the basics of copyright law and fair use;
- explaining the current state of intellectual property legislation and what is changing;
- explaining, considering and speculating on the impact of digital networking on the use and management of intellectual property;
- exploring new, additional economic and social models;
- discussing specific cases, issues and problems.

There is much more to be done on these issues in many different forums and we are ready for organizing a second generation of town meetings that will build on the strengths of this first series and incorporate what many of have learned in the process of taking these town meetings to our communities across the nation.