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 alsoincreasingly 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.