

## 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.

She cited the Northwestern University password-protected, electronic reserve website as one of the best models, a site that is uniformly controlled and operated. 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 alternative 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.