THEMES IN THE TOWN MEETINGS

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by David Green

The following report is based on an earlier version given at the **NINCH COPYRIGHT MEETING**, November 12, 1997, as part of a number of presentations on copyright-related issues. It gives an overview of the five town meetings held February 1997-February 1998, organized by the College Art Association, the American Council of Learned Societies and the National Initiative for a Networked Cultural heritage and made possible by a grant from the Kress Foundation.

INTRODUCTION

Several of those attending the CONFU meetings were quite aware of the field reactions to the latest iteration of the Guidelines that often demonstrated not only misunderstanding of the CONFU process but also of the actual nature of Fair Use itself. The idea for a series of "Town Meetings" came to Douglas Bennett of ACLS and Susan Ball of CAA on one of their many Shuttle flights last year between New York and Washington, D.C.; a proposal was written and the Kress Foundation funded an initial series of meetings. 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 meetings have had different audiences, venues and foci. Those in New York and Atlanta were organized around the CAA and AAM conferences and focused on the digital images guidelines. Indianapolis & Portland were more general, both titled: "Fair Use, Education and Libraries," were clearly addressed to a university audience and took place on college campuses. The final meeting at the 1998 Annual Meeting of the College Art Association was clearly a post-CONFU meeting, with its focus shifting to legislative activity, the need for scholars to organize themselves and a serious contemplation of educational site licensing by nonprofit museum consortia.

For more detailed reports of individual meetings see the Final Report," (June 25, 1998). Here I'll try to point to six of the more interesting threads:

1. What Fair Use Is
2. Should We Accept or Reject the CONFU Guidelines?
3. Should We Engage with the Commercial World?
4. Fair Use in the Trenches
5. The Role of Licensing
6. Lawyerly Advice

1. What Fair Use Is

Each presented in different ways what current copyright law, Fair Use and the proposed CONFU Guidelines are. Indianapolis and Portland had the luxury of a 2-hour preliminary session on "Copyright, Fair Use & Education," led by the redoubtable Kenny Crews (Associate Professor of Law and of Library

and Information Science at Indiana University): an excellent, even thrilling, basic workshop on Fair Use: its history, quandaries, practical implementation and key legal cases. Perfectly pitched for university audiences, this is the kind of basic education that so many need.

In Indianapolis in April, all five of the CONFU Working Groups were represented by necessarily brief presentations (ranging from the enthusiasm of Joann Stevens for the multimedia guidelines --"a very workable solution to an almost intractable problem" to Chris Sundt's explanation of why the image guidelines were unworkable) and in Portland, guidelines essentially disappeared (this was in September, 4 months after the ambivalent "last" CONFU meeting at which none of the guidelines received majority support). Rather they served as backdrops for three "User Perspectives" in the arenas of electronic reserves, distance learning and digital images.

In contrast, New York & Atlanta focused on the Image Guidelines: in New York a section-by-section walkthrough (projected & in hands) that followed a 30-minute presentation on copyright law and fair use [both received with a barrage of questions] and in Atlanta, a brisk combined presentation of the Image Guidelines in the context of copyright law, fair use and the NII Task Force and its Green and White Papers by Douglas Bennett. Bennett was especially good at synoptic analysis, pulling out essential distinctions (individual v institutional use; regular v spontaneous use; retrospective digitization v future digitization) and two continuing issues (that surrounding the different meaning of the reproduction of the whole versus a part of a work when the work is an image rather than a text; and that of the copyright status of a photograph of a work--i.e. does it deserve a separate copyright).

In Toronto in February, 1998, CONFU was a dead issue. Fair use was finally becoming an issue in the debates about the form and content of copyright legislation that would both ratify the World Intellectual Property Organization Copright Treaty and update US law for the digital age. A big question here was how fair use would fare with the growing popularity of licensing in particular and with the nonprofit educational site licensing by museum consortia.

2. Should We Accept or Reject the CONFU Guidelines?

A second strand was the debate over whether or not to accept, endorse and use the proposed guidelines. This started with the second town meeting, Indianapolis with the ubiquitous Mary Levering of the US Copyright Office, (at three of the four Town Meetings) portraying the Guidelines as a good defense of Fair Use, as a minimum rather than maximum definition of the principle and, imperfect as they might be, deserving to be tested in the fires of "real life experience." Her challenger was Ken Frazier, Librarian at the University of Madison-Wisconsin, who saw no need for institutional endorsement of guidelines that he characterized as premature and limiting, marked as they were by what he described as the greed of commercial publishers.

In Atlanta, Levering's sparring partner was the Smithsonian's Stephen Weill, who adamantly declared that fair use was deeply threatened both by the Guidelines and by the NII legislation and that it was urgent for museums to resist both. Interestingly, he presented museums only as users of images. In Portland, Mary Levering was not billed with an opponent, but I gather that Robert Baron, as angry as Ken Frazier was at the commercialization of the scholarly enterprise and seeing Guidelines stifling creativity and productivity, more than filled the role. This point:counterpoint was perhaps the most engaging aspect of all the town meetings: Mary Levering is no mean performer.

By the February 1998 meeting in Toronto, however, with no prospect of any agreement on CONFU Guidelines, this issue was dead.

3. Should We Engage with the Commercial World?

An underlying strand, that was foregrounded only in Portland, but which I think goes to the root of much of these debates was that on the influence on the scholarly enterprise of commercial interests and how much more scholars and administrators should, or should not, begin to put dollar figures to work produced by scholars.

Robert Baron spoke to this as one of three speakers on "Facing the Challenge." Echoing the points in his article, "Digital Fever, A Scholar's Copyright Dilemma," he presented the big challenge for higher education in the digital world as that of asserting its values and staking out its territory in opposition to the encroachment by commercialization and commercial values. For him, the CONFU experience epitomized the increasing conflict between two sectors that had earlier respected limitations and boundaries. Do we re-build the ramparts, re-configure our forces, or carry the campaign into the enemy's territory? [something that Georgia Harper has a lot to say about, especially in the "Breaking the Circle" section of her essay, "Will We Need Fair Use in the 21st Century?"]. Baron was countered by Mike Holcomb, Director of the University of Oregon's New Media Center, which brings industry and scholars/teachers together to produce new-media instructional products. For Holcomb, (speaking on the challenge to rightsholders) the challenge is precisely to make scholars more entrepreneurial and universities more pro-active in dealing with industry (portrayed as knocking at the door of the university's market).

In Toronto, this issue was quite prevalent. First in Gary Schwartz' paper where the author formulated a variety of strategies for fighting back against rightsholders and for organizing art historians to re-value their own contributions to the cultural knowledge-base: "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 pay of payment for and control of images."

Howard Besser's Toronto presentation was the most explicit attack against the "commodification of information" and he clearly did not advocate any engagement. However, in supporting the endeavor of the nonprofit museum educational site-licensing consortia, he clearly indicated that museums would be reliant on income from commercial licensing of their products to help support their educational licensing activities.

4. Fair Use in the Trenches

A fourth strand was one of "personal testimony" from a variety of professionals on how fair use and the current debates affect their activities. In New York it was presented in a panel of broad intellectual property predicaments: an art historian, for example, frustrated by the increasing complexity of layers of rights that needed to be negotiated, speculating on how an online public domain space might be created; a museum director articulating the fear and uncertainty about posting museums' property on the Web, resulting in the poverty of material currently available.

This strand also included the complementary accounts by Chris Sundt in Portland and Macie Hall in New York of the life of a university visual resources curator. Macie Hall 's account included a history of the longstanding (but suddenly contentious) practice of copy-photography, and her pungent sense of the frustration with CONFU Image Guidelines that (she said) started as an attempt to guide slide curators but which ended as unworkable and unpractical, with universities locking horns with commercial owners. New York also included a panel with stories of practical uses of the Web. Artist Annette Weintraub, for example, told of her experience of witnessing her fear of losing control of her first work on the Web dissolve in her discovery of how this work became a new kind of creation through online collaboration; and a teacher spoke of her confusion about which CONFU Guidelines would apply to which of her

multiple Web-based teaching experiments-- believing each institution should develop its own Best Practices guidelines.

The theme of the CONFU debates criminalizing longstanding accepted practices in the scholarly world was one that ran through the presentations of Gary Schwartz and Peter Walsh as well as the comments of Leila Kinney. Although the costs to institutions of the educational site licenses had still to be finalized, they seemed to offer a much more welcome prospect for working scholars and teachers in giving them immense freedom to use high quality richly documented images.

5. The Role of Licensing

A fifth strand was the presentation of licensing as another increasingly large part of the intellectual property package of the future. In Portland, a representative from Academic Press spoke about that company's experience with licensing electronic journals to libraries. In New York, Geoff Samuels spoke about his developing Museum Digital Licensing Collective, with its roots in the Museum Educational Site Licensing project and in Atlanta, MESL's former director, Christie Stephenson, gave an excellent overview of what site licensing promised the museum and university communities in delivering high quality, richly documented images, on a cost-recovery financial basis between partners with shared values.

This particular theme peaked in the very last session of the last Town Meeting in the advertised debate on licensing between Howard Besser and Max Anderson. In fact, Howard Besser's attack was on the commodification of information that was part of the commercial licensing of digital material. He actually was strongly supportive of the nonprofit educational site licensing that the museums consortia (AMICO and MDLC) are creating.

6. Lawyerly Advice

The last strand I'd like to point out was that of overall advice, that seemed to mostly come from the lawyers. In New York, Kenny Crews, spoke of his approach to advising faculty on copyright issues: working with them to help find their own responsible, fair solutions rather than handing them pre-fabricated answers or what he called alien, intrusive guidelines. Also in New York, Adam Eisgrau, ALA's DC counsel, asked for a momentary suspension of the need for detailed guidance, calling rather for critical thinking and a commitment to work for legislative solutions that would keep fair use as a central component of our digital future.

In Indianapolis and Portland, Georgia Harper's broad message was that we should all do what we could to get as many faculty and administrators involved in the copyright questions--from building bold multi-media programs that would attract their attention to assembling institutional principles and policy about managing intellectual property.

In Atlanta, when Stephen Weil complained that the Digital Image Guidelines didn't meet museums' needs, I (not a lawyer) remarked that perhaps AAM might work on an equivalent of the NHA Principles for museums (or a response in the way that the Society of American Archivists had responded with an addendum to NHA). And at Indianapolis, after a review of broad legislative developments, Peter Jaszi ended his session by saying this was not the time to negotiate but to be eloquent in insisting on fair use as the birthright of this community.

CONCLUSION

In conclusion, my personal view is that these town meetings as a series should continue into their next generation (that some would label as Post-CONFU); that they should stimulate other meetings like them, especially at all of our conferences; that basic education in fair use and copyright as it is now, as well as about legislative proposals, is essential and at the core of these meetings; that there should be more room for hearing what the audience has to say; and, finally that these meetings be considered as part of an even larger educational picture.