

Report on the Final Meeting of the Conference on Fair Use

On May 19, 1997 the Conference on Fair Use convened for its final meeting. The morning session was supposed to be divided into three discussion periods, with equal time allotted for each of the sets of proposals. The first item on the agenda was a discussion of the proposed Multimedia Guidelines, and the debated was predictably long and heated. In the interest of cutting to the chase, I will detail the discussion on the proposed Guidelines for Digital Images, first, and return to a summary of the Distance Learning and Multimedia Proposed Guidelines later.

Individuals and organizations were able to send statements and comments to Peter Fowler at the Patent and Trademark Office up until the close of the business day on May 15 in order to be included in the summary presented to the conference on May 19. Of the sixty organizations which responded, 18 voiced a position of non-support, 4 endorsed and 4 specified that they had "no position" on the Digital Images Proposed Guidelines. The remaining letters did not mention these proposals. Of the twenty-four individuals who wrote, only two addressed the Digital Images: one with a vote of yes and one with a stated "no position." The remaining comments addressed only the Multimedia Proposals. All of the letters received will be posted on the USPTO web site at <http://uspto.gov>.

The discussion on the Digital Images Proposed Guidelines was led by Patricia Williams of the American Association of Museums, which had endorsed the proposal. Pat noted that her constituents felt that it would be appropriate to field test the proposals for a one year period. Kathe Albrecht and I made it clear that the Visual Resources Association had resoundingly opposed these proposals and that the next year would not be used to test these guidelines, but rather would provide a time frame to observe how institutions are using digital images and what the problems and concerns are for both users and rights holders. Susan Ball, Executive Director of the College Art Association, reiterated a position of non-support. Doug Bennett of the American Council of Learned Societies stated that current copyright law simply is not tailored to images and this fact makes it difficult to construct meaningful guidelines for image use in analog or digital form. Anita Definis of the American Association of Museum Directors noted that her organization did not endorse the guidelines and represented an overlap with the American Association of Museums.

A number of representatives from the rights holders side urged us to keep working towards acceptable guidelines. It is certainly in their best interests to keep us in the bean-counting mode when it comes to interpreting fair use. We responded by noting that at this point in time we felt it might be more productive for us to work in conjunction with like-minded interested parties towards developing principles for practice or other user oriented guides. This is the same idea that the American Library Association proposed in its recent Conference on Fair Use Joint Statement (see <http://www.ala.org/washoff/confu.html> for the full text of the joint statement

and information about fair use and other intellectual property issues central to libraries and librarianship).

The tally for the Distance Learning proposals was 16 negatives, 7 endorsements and 2 statements of "no position" out of sixty responses. Lolly Gasaway of the Association of American Universities led the discussion. She noted that the goal of the working group had been to extend the classroom guidelines to cover Distance Learning. The major criticism of the proposed guidelines had been the failure to deal with asynchronous delivery over computer networks. However the group had felt that it was simply too early to deal with this issue. As there is a strong feeling that some guidelines are needed, the working group hopes to reconstitute and expand after an unspecified period of time to attempt to grapple with the larger issues. It is clear that the proprietors are very concerned about the possibility of asynchronous computer network delivery.

The discussion on the Multimedia Guidelines was much more politicized and contentious. The number of endorsements received was 24, with 14 negative statements and 2 statements of "no position." Lisa Livingston of the Consortium for College and University Media Centers (CCUMC) who has spearheaded the development of these guidelines took over half an hour of the 45 minutes allotted for discussion to deliver a monologue on the "overwhelmingly enthusiastic response" that these guidelines have received. She stated that it had never been the CCUMC's intent to "foist these guidelines on anyone," yet minutes later announced that the CCUMC had "no intention of pulling them back regardless [of anyone's feelings]." The responses to these comments were equally vehement. Doug Bennett from the American Council of Learned Societies was most articulate in his statement that while individuals from Media Centers may have endorsed the guidelines, organizations representing users--colleges, universities, libraries, primary and secondary education-- have resoundingly said no. He questioned whether CCUMC could really claim widespread endorsement for these guidelines. Although he felt this had been a good faith effort, he stated that any strategy using numbers and counting was a flawed interpretation of fair use. Lisa Livingston's response to those who questioned her interpretation of the level of acceptance of these guidelines was essentially to say that you don't know what you are talking about. In general her complete refusal to hear other viewpoints has frustrated many throughout the process. It is clear that many institutions are adopting these guidelines; it is equally clear that many of the groups opposed represent libraries and institutions of higher learning. Although CCUMC may feel there is "overwhelming support" not everyone was convinced.

The other interesting aspect of this discussion was that several of the representatives of proprietors' groups, notably Carol Risher of the Association of American Publishers and Judith Saffer of Broadcast Music Incorporated stated that they would view these guidelines as a "safe harbor" and would not sue anyone who followed them. However, Paul Aiken of the Authors Guild was quite clear that these guidelines would not necessarily provide such protection.

After the discussion of the proposed guidelines was completed, the assembly moved on to concluding business. Peter Fowler, CONFU facilitator, will prepare a final report for the Patent and Trademark Office on the CONFU process. This report will act as a record, but will have no official or legal ramification. Accordingly, none of the proposed guidelines will be introduced into legislative record by the Patent and Trademark Office. The CCUMC proposals received a non-legislative report from Congress last October. Lisa Livingston said that CCUMC will not take any further action (i.e., will not submit guidelines to Congress for legislative approval of some kind) as "there is no need given the overwhelming support they have received." Peter Fowler also noted that he felt strongly that CONFU had not been a failure. It has accomplished a national discussion on these issues and an increased awareness of the complexities of the problems involved. The Patent and Trademark Office has had 10,000 hits to its web site and over 1700 copies of the Interim Report on the Conference on Fair Use have been distributed.

It was perhaps not too surprising that there were many representatives, mostly on the rights holders' side, who did not want to see CONFU end. After a lengthy discussion of this matter, it was finally resolved to bring the current Conference on Fair Use to an end. However, an expanded steering committee was formed and a meeting date of May 18, 1998 was set for any interested parties to meet to continue discussion on the matters at hand. Kathe and I have entered this date in our calendars and will be prepared to attend that meeting should the Visual Resources Association feel it desirable.

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