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May 13, 1997

Mr. Peter N. Fowler
Attorney-Advisor
Office of Legislative and International Affairs
U.S. Patent and Trademark Office
Box 4
Washington, DC 20231

Dear Mr. Fowler:

The Association of American Universities (AAU) and the American Council on Education (ACE) write concerning the proposed CONFU guidelines on fair use. The Association of American Universities is an association of 62 major research universities; the American Council on Education represents all sectors of higher education, with more than 1700 member colleges and universities. As both producers and users of information, our institutions have a strong vested interest in maintaining the balance in current copyright law between the rights of copyright holders and the limitation on those rights for certain educational and research purposes.

The appropriate application of fair use to copyrighted material in the digital environment is an essential step for our institutions to realize the benefits of the digital environment for the teaching and research missions of our institutions. The CONFU process has provided a valuable service in advancing our understanding of fair use in the digital environment. We have studied the proposed guidelines closely and discussed them within our organizations. We have concluded that the adoption of specific guidelines governing fair use of digital information is not useful at this time.

We have reached this conclusion for two reasons that have emerged over the course of the CONFU discussions. First, the pace of change in technology is so rapid and its direction so unpredictable that even the most carefully crafted guidelines may quickly become more misleading than informing. Second, guidelines—particularly in this period of rapid change—are likely to become hardened into prescriptive rules, replacing the creative flexibility inherent in fair use with restrictive certainty.

The tendency of guidelines to become prescriptive is only exacerbated by transforming their status from the informal products of a voluntary process to government-sanctioned rules. Therefore, we believe that the action to incorporate the proposed educational multimedia guidelines into a congressional report was misguided. We request that the CONFU process remain within its initial conception as a voluntary, informal process and that any products resulting from it not be sent to Congress for action.

The application of fair-use concepts to the use of copyrighted material should be determined by judgment rather than prescription. Therefore, we recommend that the various sectors of the copyright community develop guiding principles governing the application of fair use to the digital environment and models of best practices appropriate to those sectors. In contrast to specific guidelines, general principles can apply more usefully to a changing landscape, and exemplary practices can be molded to new circumstances.

As starting points for the development of useful principles and practices, the three sets of guidelines on educational multimedia, digital images, and distance education differ significantly. We believe that the digital images guidelines are inoperatively complex. The educational multimedia guidelines translate the concept of fair use into unacceptably arbitrary and restrictive quantitative limitations. In contrast, the distance education guidelines generally provide straightforward guidance without prescriptive quantification, including guidance on the display and performance of copyrighted material in distance education environments not anticipated by the relevant statutory provisions.

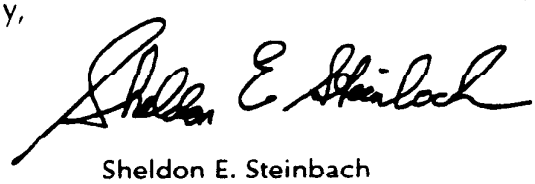
Several fair-use applications on which principles should be developed are not addressed by the proposed guidelines. The distance education guidelines are silent on asynchronous delivery of distance learning over computer networks. Further, CONFU participants tabled the development of electronic reserves guidelines and did not address interlibrary loan and document delivery. These are issues of primary importance to higher education.

We encourage CONFU participants to build on the education and understanding generated by the CONFU discussions to develop, within their sectors, guiding principles governing the application of fair use to the full range of uses of digital information for education and research.

As digital technology stabilizes, all sectors of the copyright community should reconvene to seek a consensus understanding of fair use in the digital environment. AAU and ACE suggest that CONFU rticipants be polled or convened again in 1999 to see whether the stage has changed significantly ıough to pursue further discussions about the need for guidelines or other models of good practice.

Sincerely,

John C. Vaughn
Executive Vice President
Association of American Universities



Sheldon E. Steinbach
General Counsel
American Council on Education