

May 8, 1997

Via Fax (703)305-8885

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

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Dear Peter:

Pursuant to your request that parties indicate whether they "endorse" or "oppose" the proposed fair-use guidelines in the Interim Report of the Conference on Fair Use, please be advised that the Advisory Board of the Indiana University Institute for the Study of Intellectual Property and Education opposes the "Proposal for Fair Use Guidelines for Educational Multimedia." Nevertheless, the Board applauds the effort of diverse parties to meet and to discuss the implications of fair use. We hope that opportunities for additional discussion can continue.

The attached statement details the reasons for this conclusion, but in general the Advisory Board believes that these guidelines do not represent an accurate or balanced interpretation of fair-use law as applied to educational pursuits. Moreover, the Advisory Board believes that efforts to develop such guidelines in the abstract would have a detrimental effect on the flexibility of fair use, and that flexibility is a crucial aspect of the law as established by Congress to serve the public interest. We do not take a position on any of the other guidelines at this time. The Advisory Board is submitting this statement with the approval of the President of Indiana University.

Very truly yours,

Kenneth D. Crews
Associate Professor of Law and of
Library and Information Science
Director, Institute for the Study of
Intellectual Property and Education

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cc: President Myles Brand
Lisa Livingston (CCNY, contact person regarding the multimedia
guidelines)

**Statement of Response
to the
Proposal for Fair Use Guidelines for Educational Multimedia
of the
Interim Report of the Conference on Fair Use**

Prepared by the Indiana University
Institute for the Study of Intellectual Property and Education

April 23, 1997

The Indiana University Institute for the Study of Intellectual Property and Education (the "Institute") has reviewed the Proposal for Fair Use Guidelines for Educational Multimedia (the "guidelines") as contained in the Interim Report of the Conference on Fair Use ("Confu"), dated December 1996. We applaud any endeavor which provides diverse parties the opportunity to convene, discuss, and debate their perspectives on fair use in education. Nevertheless, the Institute holds serious reservations regarding the guidelines, and we are therefore not persuaded that these guidelines offer the most appropriate or reasonable interpretation of fair use for the diverse constituencies of Indiana University. For the reasons outlined below, the Institute does not recommend that Indiana University adopt the multimedia guidelines as university policy.

Any Effort by Private Parties to Define Fair Use in the Abstract Undermines the Innate Flexibility that Congress Intended. Fair use evolved from a social policy of balancing the rights of copyright holders against the needs of information users. Congress embodied this social objective in fair-use law by deliberately establishing a flexible, fact-specific analysis, and courts uniformly have followed congressional will and balanced the needs of creators and users. Congress preserved that flexibility for serving important public objectives, including the needs of education. These guidelines would eliminate that crucial flexibility of fair use and are therefore inherently inconsistent with the law. The guidelines are an effort by private parties to displace the law as enacted by Congress. Supporters of the guidelines argue that they are adding certainty to the unsettled law of fair use. We reject that premise. Congress provided workable standards in the fair-use statute, and courts have elaborated on the statute's meaning. Guidelines created by private parties intended for application by the general public will only lead to greater confusion about fair use, as the public struggles with the legal status of the guidelines and the mixed signals about their significance and applicability.

Any So-Called "Portion Limitations" as set forth in the Guidelines are a Radical Departure from Settled Fair Use Law. The guidelines overall are inconsistent with fair use, and the so-called "portion limitations" in the guidelines directly contradict the law's adaptability and flexibility. Courts, for instance, have ruled that brief excerpts may exceed fair use, while extensive excerpts may be within fair use. These cases are not inconsistent,

but rather they demonstrate that fair use is a flexible doctrine encompassing unforeseen circumstances in furtherance of the public good. Rigid quantity limits in the guidelines, however, upset the balance in fair use by preemptively removing the variability of circumstances.

The Guidelines are Based on Unsupported Assumptions about Copyright and Fair-Use Law. The guidelines themselves include many questionable statements that purport to reflect fair-use law. For example, the guidelines impose unwarranted time limits on the ability to exercise fair use, when no such requirement exists in the law, and the guidelines would apply time limits in addition to a most restrictive manifestation of fair-use principles. Further, the supporting documentation accompanying the guidelines reveals fundamental misunderstandings of the law. For example, a document entitled "Background and Summary" that is circulated with the guidelines states that "Educators must prove four conditions or 'factors' exist to legally use portions of copyrighted material." In fact, the law enumerates four factors "to be considered" in fair-use decisions, but those factors are to be balanced overall, and they need not be "proved." We can only assume that such misstatements reflect the perspectives of the endorsing parties and, consequently, led to the development of guidelines that are not necessarily rooted in accurate understandings of the law.

The Guidelines would have the Practical Effect of Eliminating any Realistic Scope of Fair Use. The guidelines would have the practical effect of eliminating even their own small measure of fair use by extracting from well-meaning instructors public declarations of their exercise of fair use. The guidelines would further direct instructors to seek immediate permission for uses, even though they already qualify as fair use under the guidelines.

The Guidelines Declare without Legal Foundation that Private License Agreements Supersede Fair Use Law as Established by Congress. The guidelines state that "Fair use and these guidelines shall not preempt or supersede licenses and contractual obligations." With that statement, the guidelines declare a legal conclusion regarding the enforceability of licenses and contracts that is irrelevant to the meaning of fair use. The statement is therefore inappropriate for inclusion in fair-use guidelines. That legal conclusion is also an issue of extensive debate among copyright experts. The debate is far from resolved in legislation or adjudication, and it ought not be asserted in the guidelines as if it were established law.

For these reasons, the Institute declines to recommend the guidelines to the members of the Indiana University community as a standard of fair use for the creation of multimedia works. At the direction of the President of Indiana University, the Institute is developing a standard for fair use at Indiana University.

This Statement is Endorsed by the Members of the Advisory Board of the
Indiana University Institute for the Study of Intellectual Property and Education.

Fred H. Cate, Professor of Law
Kenneth D. Crews, Associate Professor and Institute Director
Jeremy Dunning, Professor of Geological Sciences
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