



Visual Resources Association

March 7, 1997

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:

Upon the recommendation of the Visual Resources Association (VRA) Ad Hoc Committee on Intellectual Property Rights, the executive board of the VRA voted on February 12 not to endorse the Conference on Fair Use (CONFU) Proposed Guidelines for Digital Image Archives. The committee's report in support of this recommendation is enclosed.

The proposed CONFU guidelines were developed to address the difficulty of applying existing fair use provisions of the copyright law to imaging technologies which did not exist when the law was last revised in 1976. Technologies surrounding digital imagery are in a state of rapid evolution, and their many uses are still experimental. The VRA feels that the proposed guidelines will only serve to limit full development of digital image resources for education, and would seriously impede creative innovation which is essential to the educational process.

The VRA also maintains that the proposed guidelines do not equitably balance among concerned parties the benefits and burdens of allowing fair use and of determining what constitutes fair use. We feel that the guidelines place a greater burden upon educators who have no financial motive in digitizing images than upon parties with commercial and copyright interests.

The enclosed document refers only to the CONFU Proposed Guidelines for Digital Image Archives. The committee is still examining in detail the other sets of proposed CONFU guidelines, and a response regarding the CONFU proposed guidelines for distance learning and multimedia will be forthcoming.

Thank you.

Sincerely,

Joseph Romano
VRA President

enc: recommendation document

A Review of the Conference on Fair Use and Proposed Guidelines

Background

The Fair Use Conference was convened in September of 1994, at the time public hearings were held on the Green Paper entitled Intellectual Property Rights and the National Information Infrastructure. The Green Paper was produced in the summer of 1994 by the Working Group on Intellectual Property Rights, chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman. This was part of a larger effort of the Information Infrastructure Task Force formed by President Clinton in February 1993. Sandra Walker, then President of the Visual Resources Association, attended both the public hearings and the first conference meeting and presented statements. After these initial meetings, Macie Hall was asked to attend the subsequent meetings of the Fair Use Conference in her place.

The CONFU meetings began in October 1994 and the final meeting has been set for May 1997. Attending the conference are representatives from more than sixty different interest groups, commercial, public and educational. At the initial meetings issues to be considered were identified. Smaller working groups then developed issue statements and scenarios. Eventually five areas were identified for developing guidelines: Image Archives, Multimedia, Interlibrary Loan, Electronic Reserves, and Distance Learning. Until February 1996 much of the work was presented to and debated by the entire CONFU group. Progress was slow and many representatives became discouraged. Finally, a decision was made to put the focus on the working groups. These groups began to meet more frequently--several times a month; and reported to CONFU after intervals of two to three months. It was at this point that Kathe Albrecht got involved with the process.

The smaller groups were much more conducive to the process of writing guidelines as the members of each working group had direct interest in the particular subject. The group working on Image Archives issues went from a position of total stalemate in February to anarchy in March to a set of guidelines in mid-April which were agreeable as a starting point to members of the group. The working group refined, reworked, restructured their way through at least twenty different drafts of the guidelines and in November 1996, produced a final version.

During the summer of 1996 the general CONFU sentiment was that the process needed to come to an end. The last meeting of the Conference on Fair Use was set for November 1996. Having reached a consensus on this, the group discussed the logistics of reporting on the process and on the mechanism of the endorsement procedures for completed CONFU guidelines. It was decided that Peter N. Fowler, the Chair of CONFU for the United States Patent and Trademark Office, would write the report, an account of the process which began in October 1994. Ultimately it will be presented to Congress and read into the Congressional Record.

The group has written a common preamble for the guidelines and devised a system to cross-reference the guidelines. On Monday, November 25, 1996, representatives attended what was to have been the final CONFU meeting. However, early in the day of that meeting it was recognized that in order for the process to conclude properly, the current report would be an interim report, and that a reasonable amount of time was needed in order for the proposed drafts for fair use of Image Archives, Distance Learning and Multimedia to be circulated, discussed and endorsed or not by affected organizations. It was proposed that CONFU be reconvened on May 19, 1997 so that the endorsements and non-endorsements for each proposed draft could be reviewed and a consensus reached as to what would be an appropriate final step.

The draft of the Interim Report was reviewed and changes were incorporated. In addition, a statement to the effect that participation by an organization does not mean that the organization endorses the draft was added above the lists of participants. In addition, the term "guidelines" was replaced by "proposals," a more accurate description of what these are, and where we are in the process.

The Issues and the Law

The big questions are what are the pros and cons of these guidelines and what will be the consequences of endorsing or not endorsing them. In order to begin to address these questions, we need first to understand what guidelines are.

Guidelines are guides. They are not "law." They represent a consensus among parties as to what is likely to be considered a reasonable, legal practice. A variety of vantage points among the participants constructing the guidelines helps to assure a comprehensive legal perspective. While there are no guarantees if you follow a set of guidelines, generally speaking the more closely you adhere to the suggested practices, the less likely you are to run

afoul of the law. In this case, the guidelines attempt to negotiate a consensus on what fair use of digital images would be.

The Conference on Fair Use was convened because the proposed amendment to the copyright law concerning "Internet" issues did not adequately address educational fair use. CONFU was charged with dealing with fair use issues in the digital environment. In discussing fair use, it should be noted that, to quote Marybeth Peters, "...the primary purpose of copyright legislation is to foster the creation and dissemination of intellectual works for the public welfare..."¹ The doctrine of fair use evolved from a recognition that the public should be allowed a limited use of copyrighted materials in a socially beneficial manner without the rights holder's permission.² It is, in fact, a limitation on the exclusive rights of the copyright owner. Although the concept was not encoded in law prior to the 1976 Copyright Act, it is not without historic precedent. Court cases involving the philosophy of fair use of copyrighted materials go back to the last century. As set forth in the 1976 Copyright Act, Section 107, fair use is not precisely defined in scope. Indeed, it would be difficult to set rules to cover all situations and it is generally recognized that each case must be decided on its own merits. In guidance, the law offers that purposes such as comment, criticism, news reporting, teaching, scholarship and research may be considered fair uses and sets out four factors to be considered in determining if a use is fair. These are: 1) purpose and character of the use; 2) nature of the copyrighted work; 3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of use on the potential market.³ Lack of specificity aside, it is clear that historically, to quote Kenneth Crews, "...fair use is intrinsically aligned with the notion that education deserves preferential treatment and should not be unduly inhibited."⁴

In addition to the difficulties posed by the imprecise nature of the fair use doctrine, we as slide curators and librarians are faced with the problem of determining who the rights holders are for any given image. Unlike determining the rights attached to texts or music, this is seldom straightforward. A digital image, or even a slide may be several steps removed from the original, underlying work of art which itself may or may not be copyrighted. Each successive stage of reproduction may well have intellectual property rights attached.

This brings us to the subject of copy photography, and we must realize that this is a very touchy situation. First and foremost, these guidelines address the use of digital images not slides. However, slide collections of most academic institutions use copy photography to produce at least some (if not many) of their slides, and it is the slides which are used to make digital images. The debate on the "legality" of copy photography has been tremendously heated. Archiving slides made from copy photography may be a stretch of fair use because the use is repeated and long term. Slide curators and librarians may claim that time constraints are not a consideration in the fair use analysis. However, court cases and precedent in previous guidelines have made time a factor in deciding whether a use might be fair. Arguably, factor one, the purpose and character of the use, includes whether a use is short or long term. On the other hand, there are many who feel that a straight forward reproductive photograph of a work of art in the public domain is not a copyrightable entity. Specifically it is felt that such reproductive photographs, while requiring technical expertise, are not sufficiently original to qualify for copyright protection. In any case, the issue of copy photography remains unresolved both for analog (slide) use and in translating slides to digital images and is not addressed in the proposed guidelines.

At this point it will be useful to examine the proposed draft document and comment on the advantages and disadvantages it will afford. Following is a summary of the proposed draft.

¹ Peters, Marybeth, General Guide to the Copyright Act of 1976, Washington, D.C., Copyright Office, Library of Congress, 1977, 1:1.

² Crews, Kenneth D., Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education, Chicago and London, The University of Chicago Press, 1993, p. 22-23.

³ Peters, Marybeth, General Guide to the Copyright Act of 1976, Washington, D.C., Copyright Office, Library of Congress, 1977, 8:1.

⁴ Crews, Kenneth D., Copyright, Fair Use, and the Challenge for Universities: Promoting the Progress of Higher Education, Chicago and London, The University of Chicago Press, 1993, p. 23.

Summary of Draft Proposals

Section I: Preamble, Background and Applicability, Definitions

This section contains a preamble common to each of the three CONFU guidelines (Multimedia, Distance Learning, Digital Images), a brief description of the complex levels of copyright that can exist for a visual reproduction of a work of art, and a list of definitions of terms used in the guidelines. In addition, it describes the *four fair use factors* listed in the Copyright Law of 1976 and used to determine whether a particular case is "fair use." They are:

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

It is noted that these guidelines apply to the creation and use of digital images from (1) pre-existing analog collections and (2) newly acquired analog visual images. It does NOT cover newly acquired digital images, works in the public domain, or works for which the user has attained the rights for the particular use.

Section II: Image Digitization and Use by Educational Institutions

Educational Institutions MAY:

1. Digitize images if they are not readily available in digital form at a fair price.
2. Display such images on the institution's secure electronic network provided there are technological controls and institutional policies to protect copyright owners. This includes making users aware of protections and restrictions. Images in course compilations must be restricted to students enrolled in the course and displayed only during the term in which the course is given. Although the display of images is permissible for one academic term, retention in digital form is allowed while permission for further use is being sought. If permission is not received, any further use is outside the scope of the guidelines and subject to the *four factor fair use analysis*. Where the rights holder is unknown, the image may be used for up to 3 years, provided a reasonable inquiry is conducted by the institution. If, after 3 years, the rights holder is still unknown, any further use of the image is outside the scope of the guidelines and subject to the *four factor fair use analysis*.

In addition, Educational Institutions MAY:

1. Create small scale, low resolution thumbnail images for use in the visual catalog at the institution. These images are not subject to the time limitations or inquiry process necessary for use of full scale images.

Educational Institutions MAY NOT:

1. Allow access to images (both full scale and thumbnail) digitized under these guidelines beyond the institution's secure electronic network.

Section III: Use by Educators, Scholars, and Students

Educators and Scholars MAY:

1. Display digital images as per section II, for educational purposes, including face-to-face teaching, research, scholarly activities at a non-profit educational institution. They may compile images for display on the institution's secure electronic network to students enrolled in a course during the term in which the course is given.

2. Use or display digital images in connection with lectures or presentations at seminars, workshops, conferences.

Educators MAY NOT:

1. Reproduce digital images under these guidelines for the purpose of publication, including scholarly publications in print or digital form under these guidelines. Permission for such use must be sought.

Students MAY:

1. Use digital images in a course assignment (term paper, thesis).
2. Publicly display their academic work incorporating digital images in courses for which they are registered and during formal critiques at an educational institution.
3. Retain their academic work in their personal portfolios for later use such as graduate school and employment applications.

Section IV: Spontaneous Use

Images may be digitized for spontaneous use to support maximum teaching effectiveness. Images digitized for spontaneous use do not automatically become part of the institution's image collection. The permission seeking process outlined in section II must be followed in order to include such images in the permanent collection.

Section V: Reminders

This section describes "reasonable inquiry," gives recommendation for crediting the source of digital images, reminds the user that any license agreement or contract will supersede these guidelines, discusses portion limitations from a single source, advises educators to exercise care when making any alterations in a work (noting the nature of any changes), and advises users to exercise caution in using digital images downloaded from other electronic sources.

Section VI: Transition Period for Pre-Existing Collections

Following a brief description of pre-existing collections (a.k.a. slide libraries), this section describes a transition period of seven years, during which educators may digitize their collections and begin using such images for educational purposes. At the same time, educational institutions should begin to identify the rights holders and seek permission to retain and use the digitized images for future educational purposes. These guidelines do not permit the systematic digitization of books, periodicals, or films that may reside in slide libraries.

If, after reasonable inquiry, an educational institution is unable to identify sufficient information to seek appropriate permission during the transition period, continued use and retention is outside the scope of these guidelines and subject to the *four-factor fair use analysis*.

The Advantages to Endorsing the Digital Images Guidelines:

- The guidelines provide a structure that clearly states what can and cannot be done in an environment that is new, complex, and unfamiliar to many visual resources professionals. Broad endorsement may lessen the potential of wholesale abuse of copyrighted information and may save educational institutions from future litigation.
- The guidelines are NOT A LEGAL document, but simply a set of suggestions or recommendations for the use of digital information. While not legally binding, they provide useful information for determining whether educational applications are "fair use."

- The term "lawfully acquired slides" is vague and open to interpretation. Many feel this term includes slides acquired through copy photography (a practice many view as "fair use"). If so, the guidelines would not preclude the scanning of copy work.

The Disadvantages to Endorsing the Digital Images Guidelines:

- The guidelines may be a "timebomb" set to explode after the transition period in seven years. Most educational institutions do not have the time, staff, or monetary resources to follow the proposed permission seeking procedures, EVEN WITH A GRACE PERIOD OF SEVEN YEARS. The guidelines put too much of the burden of this process on educational institutions and not on rights holders.
- Many educational institutions provide slide reviews for students outside the classroom. Institutions are not required to seek separate permission for this use of analog images beyond the classroom. Transposing the "slide review" to a digital environment (course web page) should not require added permissions.
- The guidelines may actually reduce student access to digital media because educators will be less likely to experiment with applications using digital media. These projects often involve many hours of work and require continual management. Adding time and labor costs for the permission seeking process would make these projects impossible (100+ hours for a single course web page).
- It is premature to implement guidelines. Electronic networks are not evolved enough to impose narrow regulations. Indeed, the guidelines may prove to be inappropriate in five years because the media may change in ways we cannot predict. It may be more effective for groups of users to develop their own guidelines, using the CONFU drafts as templates and adapting them for their own needs AS THOSE NEEDS BECOME CLEAR.
- The guidelines help ensure a FUTURE market for publishers in the digital environment. However, the VRA role is not to develop potential markets for visual resources, it is to enable the education process through the use of visual resources. It is to the publishers' advantage to develop markets to enhance the education process, not thwart it as these guidelines may do. Educators purchase texts for the classroom and need to access visual resources that support the text. Publishers should keep in mind that textbook images shown in class augment a classroom of textbooks sold.
- The question of whether a slide is available digitally is a complex one. What is a fair price? Is the image available only as a set? Only on CD? By site license? What file format is it? Will it import to the institution's software? Ultimately, being "available at a fair price" does not make a slide worth buying digitally because hundreds of slides are needed each semester for every course. ALL must be available to make purchasing one digital image worthwhile. This problem is not sufficiently addressed in the guidelines.
- It is inappropriate to impose time limitations on fair use. A use permitted as an exemption to the 1976 copyright law as "fair" is deemed so by the *four factor fair use analysis*, and the "fairness" of the use should not arbitrarily expire.

Recommendation

After lengthy deliberation, we have decided to recommend that the Visual Resources Association not endorse the Conference on Fair Use (CONFU) Proposed Guidelines for Use of Digital Image Archives. We feel that it is premature to produce guidelines at this point in time. The technology is in a state of rapid evolution, use is experimental, and guidelines will only serve to limit the creative innovation which is essential to the educational process. It is important for us to point out that the recommendation not to endorse does not signify a failure. We feel that the work of producing guidelines for fair use will be an ongoing process, and one in which the Visual Resources Association is assured of having an important role.



Visual Resources Association

May 7, 1997

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:

Upon the recommendation of the Visual Resources Association's Ad Hoc Committee on Intellectual Property Rights, the executive board of the VRA has voted not to endorse the Conference on Fair Use (CONFU) Proposed Guidelines for Educational Multimedia nor the Guidelines for Distance Learning. In March the Visual Resources Association issued a statement of non-endorsement in regard to the CONFU Proposed Guidelines for Digital Images. It is our belief that to produce guidelines concerning electronic media at this time would be premature. Further discussion among rights holders, content providers and users of copyrighted materials is needed before a consensus regarding these guidelines is possible.

One major concern with the proposed Multimedia Guidelines is the strict limitations on the number of images that may be used for teaching purposes. The Distance Learning Guidelines cover only a very narrow area of use, and avoid any reference to asynchronous delivery over computer networks. All three of these proposals require users to seek permissions for the use of materials which were previously considered to be fair use. One of the factors in the VRA decision not to endorse these guidelines is that the overlap of the three sets of guidelines is not very clear and could further restrict our use of networked information.

Despite the fact that the process did not yield workable guidelines, we feel that CONFU has been successful in advancing the dialog between content providers and users. Indeed, CONFU has been a vital educational experience for all those concerned with emerging issues of copyright in the digital arena. Enclosed is the letter of recommendation received by the VRA executive board from the IPR committee acting on behalf of the entire VRA membership.

Thank you.

Sincerely,

Joseph Romano
President
Visual Resources Association

Joseph Romano, President
Visual Resources Association
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Oberlin College
87 Main Street
Oberlin, OH 44074

April 24, 1997

Dear President Romano and Members of the Executive Board,

After lengthy deliberation, we have decided to recommend that the Visual Resources Association not endorse the Conference on Fair Use (CONFU) Proposed Guidelines for Distance Learning or the CONFU/CCUMC Proposed Guidelines for Multimedia. The Visual Resources Association's recent statement of non-endorsement of the CONFU Proposed Guidelines for Digital Images was taken into consideration in making our decision. By choosing not to endorse any of the three sets of proposed guidelines, the Visual Resources Association sends a strong message that further discussion among rights holders, content providers and users of copyrighted materials is necessary before the acceptance of any set of guidelines is feasible. It is our firm belief that it would be premature to produce guidelines concerning electronic media at this time. The technology is in a state of rapid evolution, use is experimental, and guidelines will only serve to limit the creative innovation which is essential to the educational process.

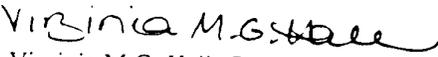
This decision is the result of much thought and discussion. Although each set of proposed guidelines covers a specific application of digital information, our constituents stand to be affected by all three. Obviously, the proposals for Guidelines for Digital Images have the broadest application to our day to day practices, yet both the Distance Learning and the Multimedia proposals are relevant to our missions as visual media professionals. A major concern with the proposed Multimedia Guidelines is the strict limitations on numbers of images that may be used. The Distance Learning Guidelines cover only a narrow area of use, avoiding all reference to asynchronous delivery over computer networks. These proposals, as well as those for Digital Images, require users to seek permissions for use of materials which were previously considered to be fair use. One of the factors in our decision not to recommend endorsement is that the overlap of the three sets of guidelines is not clear and could prove to further restrict our use of networked information.

Although Section 107 (the fair use exemption) of the Copyright Act has been called vague and murky, it is in fact a brilliant piece of legal code which allows each case to be evaluated on its own merits. The Visual Resources Association and other groups representing the interests of education, should and must resist all attempts to devise guidelines which rely on "bean counting" methods to restrict fair use. While the assurance which comes with such guidelines may seem comforting, it serves only to limit our full legal rights and to restrain the progress of the sciences and arts which copyright law was designed to protect and promote. As individuals and as members of university communities, we respect and adhere to copyright law. We also believe in a balanced copyright policy. Fair use is a key component to that balance and must be recognized as such.

The recommendation not to endorse these guidelines does not signify a failure of the CONFU process. Nor do we feel that the past two years have been work in vain. The opposite is true. Although it would have been wonderful to have produced a set of guidelines we felt were workable, we view this as an ongoing process. We also feel strongly that the Visual Resources Association has gained much by being involved in CONFU, including building a political presence, facilitating the education of the rights holder community and raising the awareness of intellectual property issues in our own constituents.

We have both enjoyed having the opportunity to represent the Visual Resources Association at the CONFU proceedings and look forward to remaining involved in intellectual property rights issues in the future.

Sincerely,


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