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The Museum of Modern Art

Glenn D. ...
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CONFIDENTIAL

April 14, 1997

Bruce Lehman
Commissioner of Patents and Trademarks
United States Patent & Trademark Office
Washington, D.C. 20231

re: The Conference On Fair Use

Dear Mr. Lehman:

I am writing on behalf of The Museum of Modern Art to comment on the recent draft guidelines entitled, "A Proposal for Educational Fair Use Guidelines For Digital Images," developed by the participants of the Conference On Fair Use ("CONFU").

CONFU must be commended for providing a forum for a very broad range of participants, with conflicting viewpoints. However, The Museum of Modern Art has several major concerns with the proposed guidelines. We are primarily concerned that these guidelines espouse a licensing concept that gives little credence to existing judicial determinations on fair use and to current museum practices in this area. Accordingly, we believe that museum interests were not adequately represented at the CONFU discussions.

Many of the uses covered by the guidelines have been to date freely allowed as being educational both on the part of museums and other scholars. We question whether as a matter of policy, museums and other educational institutions or individual scholars, with limited resources, should be required to now pay for such uses. Moreover, we believe that museums should encourage educational uses by providing other educators with access to the images in their collections without undue expense and restriction. Additionally, we believe that these guidelines will particularly affect those museums with modern and contemporary art collections, where the works are largely subject to copyright.

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In elaboration, by requiring museums to locate the source of images and to pay for their use, the guidelines will change current industry practice and place an unreasonable burden on museums in terms of time and resources. As you no doubt know, museums have not traditionally, nor do many currently, pay licensing fees for the use of works in their own collections, for internal uses such as for collection management systems, or for many other educational purposes, such as for use in lectures and publications. If some institutions comply with the CONFU guidelines, the industry practice will change and it will become more difficult, if not impossible, for any individual museum to assert fair use for those educational uses set forth in the guidelines. The result of this may be to inadvertently force museums to negotiate for all uses. This is certainly a departure from the free access currently available to museums to make many uses of copyrighted works within the scope of fair use.

In our view, those museums which wish to do so, should be able to continue to rely on fair use for the types of uses anticipated by the guidelines. For example, a museum, as a nonprofit educational institution should be able to select and display images in the form of slides as part of an on-site lecture. Similarly, it should be allowed to post digital images on its own secure network for collection management and educational purposes. It should also be able to continue to provide teachers at schools and universities with slides for their educational programs, at a modest one time production fee. Rather than encouraging this continued educational role of museums and open access to their collections, the CONFU guidelines in their present form would severely erode such educational uses. Not only would the guidelines limit the educational use of digital images, but they may effectively weaken the fair use defense for many other uses made by museums.

As you know, the proposed guidelines deviate sharply from the existing guidelines for fair use, the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions (H.R. Rep. No. 94-1476, at 68-71). Those Classroom Guidelines merely provide a numerical minimum for clear cases of fair use copying by educators. In contrast, the CONFU guidelines require institutions to make due diligence to locate the owner and severely limit fair use even on the institution's secure internal network. This is a significant departure from our current notions of fair use.

We understand that one of the purported reasons that the guidelines are about licensing is that there is some concern that the use of digital images on an informational infrastructure, which projects images worldwide, necessitates a narrower view of fair use, given the variations in foreign laws. We would agree that if the guidelines dealt with the projection of images worldwide, then one would have to consider the international law issues and a licensing system might be recommended. However, such worldwide projections, and thus issues of international law, are not within the scope of the guidelines and need not be considered.

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A second purported reason for the licensing emphasis is that there is the belief that museums will recover through licensing any amounts lost through clearance of rights. While we cannot speak for other museums, requests from educational institutions currently make up a very small portion of our permissions' revenue. If, following the draft guidelines, we were to clear rights for use in our collection management system, etc., these costs could greatly exceed the fees received.

Museums and other educators would no doubt benefit from a new set of guidelines that assist in maintaining lawful use of copyrighted works. As the White Paper acknowledges, we must develop a workable framework to deal with developments in computer technology, which is changing the way we access, create and use information. However, these guidelines should not ignore actual museum practices and the application of the fair use doctrine, which recognizes that an inflexible copyright law system does little to encourage creative expression and scholarship.

Contemporary art museums would be severely affected by the proposed guidelines given the number of works in their collections that are subject to copyright. We believe that serious issues involving fair use in the museum context remain contentious. Accordingly, we recommend further study of these issues prior to the final CONFU meeting, scheduled for May. We would urge the participants of the CONFU working group on digital images to wait until more is known about the consequences of the new digital technologies on fair use before any guidelines are issued.

We would welcome an opportunity for discussion and hope that you will feel free to contact me, or my counsel Beverly M. Wolff at (212) 708-9768, to discuss this further. We would be pleased to talk with you about both the legal and policy issues pertaining to fair use. We would also welcome your comments and response to the issues raised in this letter.

Sincerely,



Glenn D. Lowry

cc: Beverly M. Wolff



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
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Washington, D.C. 20231

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Mr. Glenn D. Lowry
Director
The Museum of Modern Art
11 West 53rd Street
New York, New York 10019-5498

Dear Mr. Lowry:

Thank you for your letter concerning the recent draft guidelines dealing with digital images and digital archives entitled, A Proposal for Educational Fair Use Guidelines for Digital Images, developed by the participants in the Conference on Fair Use (CONFU). As you know, our agency acted as a facilitator of the CONFU process, but did not become involved in the negotiation of the substance of the proposed guidelines. The CONFU participants who developed the guidelines on uses of copyrighted digital images felt it important to draft workable guidelines for educators and the museum community. We appreciate your observations on the possible ramifications and impact such guidelines, if adopted, would have on the museum community.

While I understand your concerns, it is for the CONFU participants, and in particular those representing the museum community, to determine at the meeting on May 19, 1997, whether sufficient consensus exists to adopt the proposed guidelines or whether further study and discussion are warranted in the interest of achieving guidelines with wide acceptance in both the copyright owner and user communities.

Sincerely,

Bruce A. Lehman
Assistant Secretary of Commerce and
Commissioner of Patents and Trademarks