

# TIME WARNER

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## **BY FACSIMILE AND REGULAR MAIL**

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United States Department of Commerce  
Patent and Trademark Office  
Attorney Advisor  
Office of Legislative and International Affairs  
P.O. Box #4  
Washington, D.C. 20231

Re: Copyright - Fair Use - CONFU

Dear Peter:

I am sorry that illness prevented me from attending the CONFU Meeting on Monday, May 19, 1997. I understand that, at least with respect to some of the proposed guidelines, our efforts to arrive at a resolution will continue. I might say that I was happy to learn of that plan, because I believe the goals are worthwhile and, on a personal level, I derive much pleasure from meeting and working with you and the other CONFU participants.

I was told that you would like to have any comments about proposed guidelines submitted directly to you, and by this letter (although I have sent you copies of my comments previously submitted), I am providing some comments with respect to the proposed Distance Learning Guidelines and the proposed Guidelines for Digital Images.

As to the Distance Learning Guidelines:

- (1) I am concerned that the reference to "covered uses" in the second sentence of Section 2.1 is slightly ambiguous. Because of the previous sentence, those words may be taken to mean uses covered by Section 110(2). Accordingly, I suggest substituting "uses covered by the Guidelines".

- (2) With respect to Section 5.2.1, I suggest that it be made clear that only one record or copy may be made. It already is at least implied by the reference to retaining “*the* recording or copy” (emphasis supplied), but we should go from implication to explicitness.
- (3) It remains far from clear to me why, in Section 5.2.2, there is permission for the transmitting institution to “exercise reproduction rights provided in Section 112(b)”. Assumedly, the transmitting institution already has a “copy” of the work transmitted. Section 112(b) allows the making of copies only of a “particular transmission program embodying the performance or display” that is transmitted under Section 110(2) or Section 114(a). Section 110(2) allows performances of a non-dramatic literary or musical work, or a display of a work under certain conditions, and Section 114(a) emphasizes that sound recordings do not enjoy a right of performance -- this latter, of course, prior to the Digital Performance Right Act of 1995. A “transmission program” is defined (Section 101) as a “body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public ...”. I think it is common ground among us that the material that is the subject of these guidelines is not “produced for the sole purpose of transmission to the public” and, accordingly, is not a “transmission program”. It follows, I suggest, that the reproduction rights provided in Section 112(b) have no relevance here, and the reference should be deleted from Section 5.2.2.

**As to the Digital Imaging Guidelines:**

- (1) Section 5.5 which suggests awareness “that fair use limits the number and substantiality of the images that may be used from a single source” is not a sufficient statement for the purposes of the proposed guidelines. This does no more than reference the fair use concept, and does not give potential users the certainty that guidelines should provide, and does not offer copyright owners the protection they need. This is best exemplified by referring to “motion pictures or other audio-visual works”: the proposal arguably would permit digitizing and using a substantial part, or even all, of a motion picture. What we need is a provision for “portion limitations” similar to that included in the Multimedia Guidelines.
- (2) Secondly, Section 2.3.2 properly and adequately provides for “technological limitations (such as a password or pin) restricting access [to the institution’s secure electronic network] only to students enrolled in the course”. What is lacking, however, is a requirement for technological prevention of downloading, copying, and modification. The provision in Section 2.3 for “notice” prohibiting those activities is not sufficient. As you know, a requirement for such technological protection has been included in the Multimedia Guidelines and in the proposed Distance Learning Guidelines.

- (3) Section 5.3 raises a question. In dealing with “crediting the source” it offers as an example citing the “electronic address if the work is from a network source”. That section deals with “all images digitized by educators, scholars and students”. The proposed guidelines deal (Section 1.3) with the creation of digital images and their use for educational purposes” and they “do not apply to images acquired in digital form ...”. Because only analog images may be digitized pursuant to these guidelines, it appears at best puzzling to have a reference to have “an electronic address if the work is from a network source”.

I look forward to being in further touch with you and the other participants.

Kindest regards.

Very truly yours,



Bernard R. Sorkin

BRS:cvj

cc: Fritz E. Attaway, Esq.  
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