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**The State of the Question Regarding
Copyright, Fair Use and Intellectual Property in the Arts**

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In retracing our progress since we first began discussing copyright, fair use, rights and permissions, guidelines, licenses, the public domain, and the arts publicly, we should be reminded that the issues and problems facing us today are probably not new. During the past five years, beginning with the publication of the NII white paper (Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights. Washington, DC. September 1995) followed by the Washington odyssey known as CONFU -- the Conference on Fair Use -- and through the first series of Town Hall Meetings, we have been diligently working and mining what appeared at first to be a vast wasteland of information ownership, legalese, rights, and tradition, remarkably with some success.

For many of us now actively engaged in copyright issues -- and many including myself are not lawyers -- the first Copyright Town Meeting series was a long overdue eye-opener and a catalyst for events that followed. The meetings facilitated dialogues, publications, and not surprisingly, because of their success, this second round of funded meetings, with more publications in the works.

Success has been measured largely in what we have been learning from each other and how through our collective efforts, we have inspired others to become involved. However, as a veteran and survivor of the first series of Town Hall Meetings I also know a pattern when I see one. Each meeting draws a new audience but each new audience arrives with many of the same questions and concerns that their predecessors had and for exactly the same reasons. Which leads me back to why I thought my title, **BEEN THERE, DONE THAT!**, fit so well. Here's what I see as patterns. Let me have a show of hands for how many of you in the audience came to today's program eager to find answers to any of the following questions:

- Why do I have to mortgage my house just to have illustrations in my book?
- Why can't I make slides from the pictures in this book?
- Why must we get permission & pay fees to have our students read an assignment in their coursepacks?

- Why can't I use your art and transform it into my own creation and then put it on the web?
- What rights do I as an artist own?
- What's in the public domain and how can I use it?
- Is the fear of flashbulbs really the reason why museums won't allow me to bring a camera into the galleries?

Now let's flip the coin for a moment. With the flip, another viewpoint comes forward:

- How dare they use my website or photo and not tell me -- or pay me!
- No, you can't publish that article and photo: it's out of context and unflattering! I forbid it!
- If you really want to use this photo, here's the price; it's not negotiable: take it or leave it!

Once again, some of us have BEEN THERE & DONE THAT!

In the past five years, if I have learned one thing it is this: knowledge is power and power is what it takes to move mountains. So where do we begin to gather this knowledge? Let's explore our options.

CONFU

The first mountain we as CAA members moved was called CONFU. In the end CONFU was a failure, but oh, what a wonderful failure! The purpose of CONFU, two and a half years of monthly meetings for representatives from professional organizations, publishers, and media agencies, was to develop guidelines that were supposed to help us take steps into the digital millennium without fear of falling into deep and dangerous copyright pits. The guidelines were supposed to show us how to use 'safe harbors' in determining actions that might otherwise be construed as infringements (continuing with the marine analogy, the copyright sharks). At the conclusion of the meetings, three guideline documents emerged from their subcommittees: Educational Multimedia, Distance Education, and Digital Images, while three others were abandoned in committee before they reach final form: Electronic Reserve Systems, Interlibrary Loan and Document Delivery, and Use of Computer Software in Libraries.

Even though guidelines were produced and approved by the CONFU body, they ultimately failed to receive endorsement from their intended users and representative organizations. When the votes were finally in and the outcome apparent, many of us collectively breathed a sigh of relief. Our relief came from knowing that if the guidelines had been ratified, fair use would have been unnecessarily minimized and

compromised, replaced instead by licensing requirements, an option not obligatory under the law. What became clear in the course of these deliberations was that fair use could be employed just as efficiently and perhaps with more individual latitude without the guidelines than with them. There is no denying that exercising fair use requires knowledge and work, but we began to feel up to the task. We celebrated a victory for fair use or more accurately for a revival in our confidence and comfort with the doctrine of fair use.

CONFU was one of the main reasons for the Copyright Town Meetings. With the ratification process imminent, it was apparent to those of us within CONFU representing the arts communities that we could be promoting a position and direction for fair use that did not fairly reflect our members' viewpoints. We needed validation or we needed redirection. The Town Hall Meetings, the brainchild of Susan Ball of CAA & Doug Bennett then of ACLS, commenced with the CAA annual conference in New York in 1996 and continued with help from both the Kress Foundation and NINCH in Indianapolis, Portland, Atlanta (AAM), and Toronto (CAA). CAA, along with the Visual Resources Association and the American Association of Museums, provided personnel, labor, and in Atlanta space for the meetings while members of the legal community, especially Kenneth Crews from Indiana University and Georgia Harper, University of Texas System, gave us much needed and invaluable direction and leadership. Reports of the meetings, available online, and two recent publications, one in the journal *Visual Resources* and the other in *JASIS*, provide excellent documentation of the discussions that ensued between and among the speakers and our audiences.(1)

BEYOND CONFU: PRINCIPLES & POLICIES

On the heels of the failed CONFU guidelines, new published resources related to copyright & fair use emerged. Among the first of these was [BASIC PRINCIPLES FOR MANAGING INTELLECTUAL PROPERTY IN THE DIGITAL ENVIRONMENT](#), a document produced by the National Humanities Alliance in 1997. Basic Principles offers 10 standards against which coalitions and individual institutions can evaluate new legislative proposals affecting intellectual property rights. The development of basic principles as broad concepts rather than narrowly focused and precise guidelines enjoyed instant success among academic and scholar communities in the wake of the narrowly restrictive CONFU draft guidelines.

Universities soon followed, crafting policies or guidelines for copyright and fair use concerns specific to their home campuses. Georgia Harper's web-friendly Copyright Crash Course serves as a resource and model for an audience much broader than her

Texas charges and Kenny Crews' online copyright courses have allowed thousands to become familiar with the law and its interpretation, through meaningful examples from court cases and decisions, presented clearly, briefly, and sometimes even with humor. For a selected list of university policies and guidelines, I invite you to visit my website and proceed to the section where these links are listed. You will discover a gamut of opinions, from broadly liberal to narrowly conservative. These are tailored to the needs of their home campuses and reflect the philosophy and degree of risk that each institution is willing to offer its constituents.

Among recent publications of note are the American Association of Museums's A Museum Guide to Copyright and Trademark, (2) and the Visual Resources Association's Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections. AAM's publication offers insights into the law and its interpretation based on the use of scenarios typical in today's museum. These include, for example, how to calculate the duration of copyright for an artwork, how fair use can be applied in using work still under copyright, and what is involved in bringing an infringement claim in light of a violation -- for example, someone else making tote bags similar to those already being sold in the museum's gift shop. Understanding how museums are approaching copyright and fair use will be illustrative to everyone else whose art or research involves working with museums and their collections. The AAM guide is clear in acknowledging that museum interests work both ways: as users and possessors of rights and that their dilemma is the same as our -- a tug of war between these two camps.

The VRA's Image Collection Guidelines will be instructive to anyone wondering how to continue the tradition of illustrating art & art history lectures with images. What should we know or do in deciding to take a slide or make a digital image from a published source instead of acquiring a good quality image or digital file from those vendors who make their living selling these for educational use? The VRA guidelines are rooted in the NHA good practices in that they offer principles for responsible behavior instead of itemizing quotas as benchmarks for daily practice.

CNI-COPYRIGHT: IT DEPENDS

Perhaps for me the most stimulating source for creative exploration of issues has been participating in the on-line copyright discussion list known as CNI-Copyright. The breadth of copyright covered by this group is well beyond the needs of anyone interested only in art. However, occasionally through the floodgates comes a question involving art or artistic practice that makes wading through the hundreds of messages that reach my mailbox weekly worthwhile. Most instructive to me, typically a quiet lurker peering into what in my mind's eye is box full of lawyers, are the varied and

sometimes wildly divergent opinions that emerge from what seem on the surface to be simple and straightforward questions. Here is an example of one:

In March of 1999, an artist posed this question:

"I make collages. If I use a copy of a work in the public domain, am I infringing on copyright?"

Among the first responses to this query was one from an old friend of the Town Meetings, Tyler Ochoa, Professor of Law at the Whittier Law School. Citing the recently-decided case, *Bridgeman v. Corel*, he affirmed that "a photograph of a public domain art work cannot be copyrighted (based on lack of originality), so this would not be an infringement." He continued, however, to caution the artist that this didn't mean that someone might not attempt to sue her, purporting to own copyright in the image. He then went on to explain that the process of determining what is a public domain image of a work of art is not as easy as it might appear.

Ochoa's message spawned another that brought forward examples of recent appropriation and another question, "is this fair use?" The first involved the photography of Lauren Greenfield that was used by the painter Damien Loeb. Loeb juxtaposed images from one of Greenfield's photos with another in his painted version of the two that changed the context and message of Greenfield's original work. The images from the photos were transformed, but still individually recognizable.⁽³⁾ Another example of appropriation was mentioned, the famous *Rogers v. Koons* (960F.2d 301 (2d Cir. 1992) case in which Jeff Koons used the image from a copyrighted photograph (puppies) and had it transformed by Italian woodworkers into a three-dimensional work. Claiming that the transformation was a parody of the original, Koons attempted to use fair use as his defense. The Second Circuit rejected Koons' claim.

As you can readily see, the original question has already been stretched a bit. The question regarding a public domain image has turned into one about any image of an artwork. The reason is that the *Bridgeman* decision speaks to the reproductive aspect of photography in capturing the underlying artwork or image, not just the fact that the underlying object might not be eligible for protection if it has already entered the public domain. As a faithful rendition of the original underlying artwork, herein lies the problem: lacking sufficient originality and uniqueness it does not merit separate protection under copyright. Merely changing the medium, from a photograph to a 3-D object, was not enough to convince the court in this case.

Next Duchamp's famous ready-mades and Warhol's Pop Art glorification of cultural icons (Coca-Cola, Marilyn Monroe, Campbell Soup, Elvis) were brought into the

discussion. Had these artists obtained permission for their appropriations, asked someone? Did anyone object at the time?

The fabric of this discussion is already showing promise. New threads woven in continued to add dimension and color to the original question. The question soon developed into one about originality v. skill and the US concept of public welfare regarding access v. natural rights that are inherent in many other countries' copyright laws. The argument then moved into the difference between creative expression and useful articles (we're now back to Duchamp's ready-mades) and the first-sale doctrine that would have allowed Duchamp to use a lawfully-acquired article as an object for public display.

For the next few days, the discussion centered on the question of faithful reproduction v. photographic (i.e., creative) reproduction. Participating at this stage were our own Robert Baron and our colleague Amalyah Keshet from the Israel Museum. Amalyah argued strongly against the Bridgeman decision, using her experience with artworks and reproductions to suggest that there is much more involved than mere sweat of the brow in photographing artwork. What followed was more discussion on the issues of access to objects in museums and collections, especially objects that are no longer protected under copyright.

Eventually the discussion returned to Professor Ochoa's statement regarding the difficulties of determining public domain status, since the conditions under which copyright was granted between 1909 and 1978 were more regularized and rigid than they are under the now revised law. Also the requirement of publication as a condition for copyright is not as clear with an artwork as it would be for a traditional print work, like a book. On the other hand, we were reminded by a discussant from France that there are other means to protect cultural icons and the French are using them. The light show created for the Eiffel Tower is copyrighted in France. Therefore this venerable monument is in the public domain only during the daytime. At night it is protected under copyright and one can also be sure that the copyright will be renewed as needed, as soon as a new lightshow is installed, thereby ensuring perpetually protection.

The next topic in this thread argued that the high cost of making images justifies the high cost of fees associated with the use of museum-owned photographic reproductions of their public-domain objects. We then returned to a discussion of museums, public access, and how policies prohibiting access begin to look like strategies for canceling public domain rights and fair use opportunities.

This thread lasted for over a month and in the end, there was no clear answer to the artist's original question, despite the lengthy discussion that it spawned.

In April another art-related question came forward:

"A faculty member wants to digitize the art slides that he has been showing in class for years. After the slides are digitized, they will be mounted on his WebCT site for his students to access in their studies. What procedures must he follow to comply with current copyright law? Incidentally this professor feels this is a fair use."

I suspect you can all guess how this discussion played out and it was not surprising to me that in the end a lawyer proclaimed "This is, in short, an extremely complex question -- although an increasingly common one -- which cannot really be answered without considerably more information about the nature of the slides, nature of the class, and nature of the use. (Dan L. Burk (BURKDANL@shu.edu), April 24, 1999, CNI-Copyright, Re: Digitizing art slides?)

Briefly, now, let me mention a few more choice topics that we have explored:

- Sovereign immunity for states -- whether or not a state can be sued for copyright infringement
- Whose permission must be sought: the publisher who originally received the right to reproduce an image as a backdrop on a book cover, or the organization granting the original permission to use the image -- a question of whether the transformation as a bookcover image is now an independent copyright.
- Copyright and student notes taken in class -- whether the words delivered by the lecturer are protected by copyright or does the student who takes them down as notes really hold the copyright? This was first a foremost a question of faculty rights in their lecture content and further about faculty rights in work performed on the job -- the doctrine of work-made-for-hire.
- Copyright ownership in a photo of an artwork that was destroyed by authority of the artist. Does the artist still control the rights to the documentary image and what if the artist denies permission to illustrate the work (a question that actually appeared on CAAH).
- What to do when the author or artist chooses to remain anonymous. What is the copyright status of the work when you can't identify the author or artist?

WHERE TO NEXT?

BEEN THERE? DONE THAT?? Many of us have. Are there any easy answers to these questions? Maybe the only reasonable and certain answer to any of the above is "It depends."

So where do we go from here? Let me ask you one final question. How many of you have discussed your copyright and fair use issues with your institution's or organization's legal counsel? If you haven't, may I recommend that you do so, but before you dash into her office, be sure you have done some homework. Be aware that not every university is fortunate enough to have copyright experts on their staffs. Most universities can only afford a generalist whose job is to deal with all legal questions and problems, and more than likely, the more important questions will have to do with technology transfer, patents, and trademarks. Your mission, if you choose to do it, will be to know what you want and have some thoughts about why and how it can be accomplished. Believe me this works. I will close by offering you an insight into one large university's position regarding the posting of reproductions of works of art no longer under copyright, based on Bridgeman. Of course, you have to get your own counsel to agree, but here's proof that it can be done:

Right now, yes, go ahead and rely on the decision. As you probably know, our preference is to go ahead and push where we think we have a reasonable argument for doing so. The Bridgeman decision means that in posting the photographs we are acting reasonably...photographs of public domain works are not copyrightable. We are also helped somewhat by the fact that your posting of the photographs is not done for a commercial purpose. (here I'd like to recommend that postings be done on an intranet rather than the internet) If someone complains we'll deal with it. I assume you are taking the photos from a published book and not from a database that we've licensed. In the latter case, there would no doubt be a contract provision prohibiting us from making and disseminating copies. If so, we wouldn't be liable for copyright infringement but would be liable for breach of contract." (posted to Consortium of Art and Architectural Historians [CAAH] discussion list, August 17, 1999).

The next time we meet let me know where you are in this process. I'll be interested to hear if you are now among the ranks of those of us who have BEEN THERE AND DONE THAT!

NOTES

1. These reports include the following:

Summary Report: ACLS-CAA-NINCH FAIR USE TOWN MEETINGS

Minutes: Portland, Oregon Meeting

Minutes: Toronto Meeting

Visual Resources Special Issue (XII:3-4): Copyright & Fair Use: The Great Image Debate

"Perspectives on Fair Use, Education, and Libraries," *Journal of the American Society for Information Science*, Volume 50, Number 14 (1999). Online ISSN: 1097-4571
Print ISSN: 0002-8231 (Copyright © 1999 John Wiley & Sons, Inc.)

2. **A MUSEUM GUIDE TO COPYRIGHT AND TRADEMARK**, American Association of Museums, co-authors: Michael S. Shapiro and Brett I. Miller/Morgan, Lewis & Bockius LLP, Edited and introduced by Christine Steiner, **PAPER 225PP. 1999, ISBN 0-931201-63-2 • \$ 25.00.**

3. For more information about Damian Loeb's use of Lauren Greenfield's image in "Sunlight Mildness," see the following: **(links are no longer operational)**

<http://www.artnet.com/Magazine/news/cfinch/cfinch6-10-1a.asp>

<http://www.artnet.com/Magazine/news/cfinch/cfinch6-10-98.asp>

<http://www.artnet.com/Magazine/news/cfinch/cfinch9-9-98.asp>

<http://www.villagevoice.com/arts/9905/saltz.shtml>

http://www.reviewny.com/current/98_99/jan_15/review1.html

<http://www.whitecube.com/exhib/pr-dl.html>