

CONFU Continues? Is It Time to Re-Group?

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What in the world is CONFU (and how is it perceived around the rest of the world)? This was one of the hotly debated questions during the advertised "final meeting" of the Conference on Fair Use on May 19, 1997.

The winning answer is that CONFU is a loosely constructed framework called for in 1994 by President Clinton's Information Infrastructure Task Force Working Group on Intellectual Property Rights. CONFU is designed to enable copyright proprietors and the educational users of copyrighted material to develop guidelines for the fair use of copyrighted works in a networked environment.

CONFU was not a Congressionally-mandated body (indeed it was not a body at all), therefore its results and the forthcoming CONFU Report would certainly not have the force of law or even the status of being read into legislative history. CONFU is simply a discussion process open to all. Its Working Groups, which produced three sets of guidelines, are similarly open to any who wanted and could afford frequent travel to DC to attend.

So what occurred during the final meeting of this informal, non-legislative, non-binding "conference?"

1. Proposed guidelines, shared broadly among the constituencies of those represented since the previous "final meeting" of CONFU, were presented to the group as a whole with a list of participating groups, which, after two years of working together, had endorsed, rejected or had no position on the guidelines.

Of 100 participants, only 60 registered a position on the guidelines and only 25 had commented on the Digital Images or Distance Learning Guidelines. Interestingly, the commercial proprietary community only registered comments on the Multimedia Guidelines, which were the most hotly contested. The nonprofit user community objected to the use of specific portion limitations in the fair use of copyrighted materials included in the Multimedia Guidelines. It was felt this was not in the spirit of the four fair use factors, where context and circumstance play a large part in determining whether a use is fair.

2. It was clarified that CONFU as a mere facilitating framework would not endorse or "adopt" any set of guidelines. The sense at the meeting was that Peter Fowler, facilitator of the process, should only include in his Report to the Commissioner of Patents and Trademarks what the resultant guidelines were, and the level and quality of support they had received.
3. It was clarified that Recommendation Number 5 of Peter Fowler's December 1996 Interim Report would be dropped. That recommendation was "That the Final Report be submitted to Congress by the Working Group on Intellectual Property Rights at an appropriate time as part of legislative history, so that it can be referenced in connection with the Copyright Act provisions on fair use. "
4. It was proposed that CONFU at least the framework continue beyond this "final meeting" to determine if consensus could be achieved in creating generally acceptable guidelines. A date and place were reserved for another plenary meeting: May 18, 1998 at the Mumford Room at the

Library of Congress. An expanded Steering Committee would be formed to guide the process and determine the tone of that meeting. In the interim, the working groups were encouraged to convene and discuss further steps, with instructions to be as inclusive as possible.

5. A Report would be published this summer. For those who had withheld their positions and statements on the guidelines, the deadline was extended to June 30, 1997.
6. The guidelines (endorsed by a minority of participants) were thus accepted as interim documents. Some advocated testing, or field use, of the guidelines so that more concrete data might be gathered on how fair, useable, or burdensome they might prove to be.
7. The Consortium of College and University Media Centers (CCUMC), chief organizer and facilitator of the Multimedia working group, maintained that the multimedia guidelines were fixed and would not be re-opened for "between 3 and 5 years." From the beginning, these guidelines were seen by many as something of a wild child. CCUMC had begun organizing guidelines before the CONFU process had started; some took issue with the purported inclusivity of the group; and the organizers had solicited the approval of members of Congress and other external groups that no other working group had sought. In the words of John Vaughn, Association of American Universities, the multimedia guidelines had been artificially reified by an unprecedented and astonishing media blitz by the proponents.

Although some were figuratively horsewhipped for suggesting that CONFU itself was confusing and brought with it much unhelpful political baggage from the IITF era, it seems clear to this writer that CONFU has been confusing to many and that its continuation or resurrection under the same name might cause further misunderstanding or misrepresentation of its authority.

Many within the nonprofit educational and cultural community are now thinking that it is time to step back and clarify what our community values are in the arena of production, management, and use of intellectual property. What are some bedrock principles that could serve the nonprofit community in the place of broadly accepted guidelines? Perhaps now is the time for the educational community to more actively engage in a national debate about principles and values for the production, management, and use of intellectual property. Some internal discussion and agreement might be good for our collective spirit and to foster more unified collective action when we next engage the commercial proprietors.

We should perhaps also consider whether in the context of upcoming Congressional action to ratify the WIPO Copyright Treaty and pursue further digital copyright legislation having attempted to play fair through CONFU, it is time to reassert fair use at the legislative level.

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