

*Electronic Reserves and the Failed CONFU Guidelines: A Place to Start Negotiations.*

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Intellectual property is seldom a matter of hard-and-fast rules. In most library-related copyright disputes, both sides rely upon real legal principles but with different interpretations. One example of these differences involves the legality of electronic reserves in libraries.

Academic and school libraries base the legality of their reserves on the Fair Use provisions of section 107 and the library exceptions in section 108 of the 1976 Copyright Act.<sup>1</sup> Fair Use by necessity involves a balancing act between the property rights of the author/publisher and the First Amendment rights of the individual to comment, criticize, and use the material for scholarship.<sup>2</sup> Yet a use that is fair is in the eye of the beholder, and what a reader sees as Fair Use may be copyright infringement to the publisher. Section 108(b) of the Copyright Act allows libraries to create a copy for purposes of preservation and security as a surrogate for the actual journal issue. Section 108(f) also allows individual patrons to make a copy for themselves.

The legality of reserves also relies upon the provisions of a publishers' agreement on multiple classroom use that was included in the House of Representatives' report accompanying the 1976 Copyright Act.<sup>3</sup> According to the agreement, a teacher can make multiple copies for classroom use as long as each student only receives one copy. The copy must be brief and must contain a notice of copyright.<sup>4</sup> If the professor wishes to reuse the material on reserve, the library must obtain a license.

The problem is that the publishers' agreement is now 30 years old, was never enacted into law, and does not mention electronic reserves. Similarly, section 108(b) is based on physical rather than electronic copies. Thus, there are questions about the legality of e-reserves.

The position of the Association of American Publishers (AAP) is that there is no difference between an e-reserve system and a course pack.<sup>5</sup> In two cases—*Kinko's Copies*<sup>6</sup> and *Michigan Document Services*<sup>7</sup>—the U.S. Supreme Court ruled that the creation of course packs required copyright licenses. It did not matter that the materials were being put to an educational use; the commercial nature of the businesses, and the fact that these copies were subsequently sold, meant that the copy shops needed permission to duplicate in order to avoid copyright infringement.

However, the American Library Association (ALA) believes that section 108 and the publishers' agreement should still apply, regardless of the medium. There were some differences between the facts of these cases and the library e-reserve model. The ALA contends that nothing is being sold, and there is no commercial transaction taking place. The ALA and AAP are currently negotiating to resolve this impasse.

One possible solution lies in the guidelines of the Conference on Fair Use (CONFU), which met monthly between 1994 and 1996. The goal of CONFU was to create guidelines for libraries, including reserves.<sup>8</sup> Because there was not agreement by all of the conference members, the guidelines never took effect legally. However, many libraries voluntarily follow the guidelines, which provide much valuable direction.

According to the CONFU proposal, e-reserves would use similar guidelines to those included in the 1976 publishers' agreement. There would be a brevity requirement, allowing "short items (such as an article from a journal, a chapter from a book or conference proceedings, or a poem from a collected work) or excerpts from longer items . . . [such as] chapters, poems, and other works that are of such length as to constitute a substantial portion of a book, journal, or other work of which they may be a part."<sup>9</sup> The electronic image must contain a copyright notice and be

made from a copy that was legally owned by the institution or the instructor. In addition, the suggested CONFU provisions specified that the material on e-reserve "should be a small proportion of the total assigned reading for a particular course."<sup>10</sup>

Another provision of the suggested guidelines was that the works be limited by password to students enrolled in the course. As is the case with classroom copies and paper reserves, a license should be obtained if the material will be reused. According to Kenneth Crews, "Although the guidelines are not explicit on the following points, drafters also anticipated that students would access the materials from remote locations, and would be allowed to download and print individual copies for private study."<sup>11</sup>

The reason the proposed guidelines failed is that each side felt that they were giving too much away. This was not a case of publishers versus libraries; in fact, there were publishers who supported the guidelines and library associations who opposed them. The chaotic and controversial nature of the CONFU e-reserve negotiations is shown by a list of supporters and opponents.<sup>12</sup> (Notice that the AAP was one of the opponents of the proposal.)

Supporters	Opponents
Association of American University Presses (AAUP)	American Society of Composers, Authors & Publishers (ASCAP)
American Association of Law Libraries (AALL)	American Society of Journalists and Authors
American Council of Learned Societies (ACLS)	American Society of Media Photographers
Indiana Partnership for Statewide Education Working Group	Association of American Publishers (AAP)
Music Library Association (MLA)	Association of Research Libraries (ARL)
National Education Association (NEA)	Author's Guild, Inc./Author's Registry, Inc.
National School Boards Association	Recording Industry Association of America (RIA)
Special Libraries Association (SLA)	Software Publishers Association

One way of dealing with this issue is to use appropriate language in database licenses. As more material becomes available electronically, these licenses will cover an increasingly large portion of our materials. By setting up our license agreements properly, we can not only avoid potential problems, but also create solutions to the e-reserve situation. For example, Georgia Harper recommends:

Users describe what they want to do with a copyright owner's work, and the copyright owner states a price for that use. There may be negotiation over the permitted uses and the prices, *but not over what is or is not fair use*. This is why licensing matters. This is the future. This is not to say that mentioning fair use in a license agreement is unimportant. But, it is to say that it probably will not affect the bottom line and it should not affect the description of permitted uses. It should be **CLEAR** what users can do, and a statement like, "fair uses are permitted," is **NOT CLEAR**. Go for clear.<sup>13</sup> [Emphasis in original.]

One way of dealing with the language of licensing agreements is to use suggested language from groups such as the International Coalition of Library Consortia (ICOLC).<sup>14</sup> If the license agreement allows full access to students it can alleviate the issue of e-reserves. The most important detail is to ascertain whether the license allows a copy to be loaded in the e-reserve system, or whether the library needs to place a link to the database.

It is my hope that ALA and AAP will be able to agree on a set of principles for e-reserves. I believe that the CONFU electronic reserve proposal, despite never being adopted, provide a fair and effective method of dealing with the issue. The CONTU proposal should be the starting point for further negotiations. I also believe that tightly-worded license agreements, which are in the interest of both publishers and libraries, can help to lessen the uncertainty of ambiguous laws. Intellectual property law may not have any hard-and-fast rules, but licenses can create an agreed-upon set of rules for both parties. In other words, licensing, like cataloging and classification, helps to create certainty from uncertainty and order from disorder. And that's what we need to be doing for our library clients.

## Endnotes

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1. 17 U.S.C. § 107 and 17 U.S.C. § 108.
  2. For more on Fair Use balancing and its First Amendment implications, *see*, Bryan M. Carson, Chapter 4 “Fair Use and Intellectual Property Rights,” *The Law of Libraries and Archives*. Lanham, MD: Scarecrow Press, 2007.
  3. House Report No. 94-1476, U.S. House of Representatives (1976), available at <http://www.rbs2.com/copyr2.htm>.
  4. For more information on the brevity requirement, see Chapter 4 of *The Law of Libraries and Archives*.
  5. Association of American Publishers, *Frequently Asked Questions about E-Reserves* ( May 17, 2004). Available at: <http://www.publishers.org/about/pdf/E-ReserveFAQ.doc>.
  6. Basic Books, Inc. v. Kinko’s Graphics Corp., 758 F. Supp. 1522, 1991 U.S. Dist. LEXIS 3804, Copy. L. Rep. (CCH) at 26709, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991).
  7. Princeton University Press et al. v. Michigan Document Services, Inc., 99 F.3d 1381; 1996 U.S. App. LEXIS 29132; 1996 F.E.D. App. 0357P (6th Cir.); 40 U.S.P.Q.2D (BNA) 1641; Copy. L. Rep. (CCH) at 27,579 (6th Cir. 1996).
  8. National Information Infrastructure Task Force Working Group on Intellectual Property Rights, *Conference on Fair Use Final Report*. Available at: <http://www.utsystem.edu/ogc/intellectualproperty/confu.htm>.
  9. Georgia Harper, "Fair-Use Guidelines For Electronic Reserve Systems," *Copyright Crash Course* ( March 5, 1996). Available at: <http://www.utsystem.edu/ogc/intellectualproperty/rsrvguid.htm>.
  10. *Id.*
  11. Kenneth D. Crews, "Electronic Reserves and Fair Use: The Outer Limits of CONFU," *Journal of the American Society for Information Science* 50 (December 1999): 1343, 1344.
  12. *Id.*
  13. Georgia Harper, "CONFU: The Conference on Fair Use," *Copyright Crash Course* ( March 5, 1996). Available at: <http://www.utsystem.edu/ogc/intellectualproperty/confu.htm>.
  14. The International Coalition of Library Consortia (ICOLC), *Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information* ( March 25, 1998). Available at: <http://www.library.yale.edu/consortia/statement.html>.