November 2013

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Recommended Citation
DOI: https://doi.org/10.7771/2380-176X.5099

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

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ntellectual 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. 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. Yet a use that is fair 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 continued on page 32
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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. 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. 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. In two cases — Kinko’s Copies and Michigan Document Services — 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. 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.” 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.”

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.”

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. Notice that the AAP was one of the opponents of the proposal.

SUPPORTERS

| Association of American University Presses (AAUP) |
| American Association of Law Libraries (AALL) |
| American Council of Learned Societies (ACLS) |
| Indiana Partnership for Statewide Education Working Group |
| Music Library Association (MLA) |
| National Education Association (NEA) |
| National School Boards Association |
| Special Libraries Association (SLA) |

OPPONENTS

| American Society of Composers, Authors & Publishers (ASCAP) |
| American Society of Journalists and Authors |
| American Society of Media Photographers |
| Association of American Publishers (AAP) |
| Association of Research Libraries (ARL) |
| Author’s Guild, Inc./Author’s Registry, Inc. |
| Recording Industry Association of America (RIA) |
| 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 larger 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. [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). 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 CONFU 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 form disorder. And that’s what we need to be doing for our library clients.
et you thought we’d forgotten the survey results this year! Delayed, but not forgotten, here are your 2007 Annual Survey results.

Against the Grain’s Annual Survey is designed to provide readers with library information that is unavailable anywhere else. The survey is an opportunity for readers to give opinions and statistics concerning librarians and libraries around the world. Participants submitted their surveys either online, through the ATG Website, or by sending a hardcopy through snail mail or fax. The results were compiled from data submitted by 46 librarians, a number comparable to past years’ participation (48 in 2006, 49 in 2005).

Budgets, pricing increases and salary decreases topped the list of five things you are most concerned about in the 21st century. 28.3% of respondents listed budget/pricing/salary as their number one concern, followed by accessing 8.7%, access to online non-textual content/collection development/ownership loss as the future role of libraries and/or librarians (6.5%), user’s ability to find information, focus on user as researcher (6.5%), e-resource management (4.3%) and technology/staying current (4.3%). Six respondents did not answer this question (13%). The remaining 19.8% had varying answers, such as consistency in services provided, open access, and mergers/acquisitions in vendors and publishers.

The number two concern was again topped by budgets/funding issues (19.6%), followed by e-resource management (8.7%), access to online non-textual content/collection development/ownership loss (8.7%), the future role of libraries and/or librarians (6.5%), user’s ability to find information, focus on user as researcher (6.5%), e-resource management (4.3%) and technology/staying current (4.3%). Six respondents did not answer this question. The remaining 35.2% had varying answers such as licensing, dark archives, and the decreasing supply of librarians.

Concern numbers three through five were much more spread across the board, with fewer duplicate answers. Again, topping these lists, were budgets/funding/pricing issues, followed by staff training/library education, library relevance, information literacy and mergers/acquisitions in publishers and vendors.

Last year, concerns were topped by 1) budget and pricing issues, followed by 2) digital preservation, 3) search technology competition, 4) loss of experienced personnel and 5) the future role of the library.

Has your library bought eBooks? 67.4% of you have, 6.5% haven’t, and 23.9% didn’t answer. For those who do purchase eBooks, the average budget allocation is $58,800. 45.5% of eBook purchasers said that their budget varies, so they couldn’t respond with a set dollar amount, and 54.5% didn’t answer the question. Compared to the previous year’s results, there is a marked decrease since 85% reported purchasing eBooks. Interestingly, even though fewer people reported buying, the budget allocation has gone way up. The dollar amount was an average of just over $14,000 last year.

What functions has your library been outsourcing? 30.4% outsource your catalogs, approval plans are outsourced by 32.6%, and 26.1% outsource other items (such as binding, physical processing, and ERMS). No one answered that they outsource their acquisitions, and 15.4% didn’t answer the question. These results are comparable to last year’s, with approval plans at 38%, cataloging at 27%, and acquisitions at 4%.

Has your technical services operation been downsized in the past two years? 32.6% said yes, 34.8% no, and 32.6% had no answer. Of those who have been downsized, 15.2% have experienced a professional staff decrease, 17.4% have seen a decrease in para-professional staff, 4.3% have seen teams implementation, 6.5% have been merged with cataloging, and none have seen a merge with ILL. The remaining 8.7% answered “Other” with responses ranging from a decrease in student worker hours to the dissolution of a departmental head position. There was a significant change from previous years’ results here: in 2006 56% were not downsized, and in 2005 that category included 60% of respondents. The effects of the downsizing, however, remain similar. Last year, 17% reported a professional staff decrease, 25% saw a para-professional staff decrease, 2% used teams implementation, and 15% reported merges with cataloging.

The effects of being downsized were split fairly evenly. 43.8% believe the effects have been positive, with comments such as “Greatly increased turnaround time from order to shelf. Higher profile for acq staff.” and “While we have not been downsized, we have conducted extensive cross-training with improvements in efficiency and consistent acquisition practices.” 56.3% says they’ve seen negative effects, with comments like “Increased backlog” and “Many things have been falling through the cracks.”

Now for the budget section! Since they have consistently been first and foremost on the list of concerns, we have a substantial section of the survey devoted to budget issues.

In the past year, has your total materials budget increased or decreased? 50% of respondents reported an increase, 10.9% reported a decrease, and 39.1% did not answer. The average percentage of increase was 8.2%, and average decrease was 5.75% overall.

In the past year, has your materials budget for books increased or decreased? 30.4% saw an increase, 28.3% saw a decrease, and 41.3% did not