

CONFU Concludes; ARL Rejects Guidelines

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Since September 1994, the Conference on Fair Use (CONFU) has sought to develop guidelines for fair uses of copyrighted works by and in libraries and educational settings. Facilitated by the U.S. Patent and Trademark Office (PTO), CONFU grew to include over 100 organizations, associations, and institutions representing copyright holders and users of copyrighted materials. Early CONFU discussions identified five areas in which participants attempted to develop fair use guidelines: interlibrary loan, electronic reserves, distance learning, digital images, and educational multimedia. For background see *ARL* 178 (January 1995, p. 6) and *ARL* 186 (June 1996, p. 8).

Two of these areas—interlibrary loan and electronic reserves—were eventually dropped as it became apparent that consensus among participants was not forthcoming. Although copyright holders and users did agree that developing guidelines for digital transmission of digital documents on interlibrary loan was premature, members of the ILL working group could not reach an agreement on guidelines for digital transmission of print documents (e.g., Ariel delivery of an article from a bound journal). Thus, no new guidelines were drafted for interlibrary loan in the electronic environment.

Unlike ILL, the discussions on electronic reserves proceeded to the stage of drafting guidelines. This included a draft developed by a group of non-profit organizations after discussions with commercial copyright holders broke off. In spite of these efforts, at the November 1996 CONFU plenary session, a March 1996 draft of electronic reserves guidelines was rejected by the majority of CONFU participants because there was no general consensus that the document represented an understanding of fair use by all participants.

Discussions in the remaining three areas culminated in the presentation of final proposals for fair use guidelines for distance learning, digital images, and educational multimedia at the November 1996 meeting. Participants were asked to circulate the three proposals within their constituencies for consideration and possible endorsement. These proposals were also included in the CONFU "Interim Report to the Commissioner of Patents and Trademarks."

Organizations represented in the CONFU discussions took a variety of approaches to inform their members about the status of CONFU work and to solicit feedback on the series of proposals that emerged during the multi-year process. Within ARL, there were regular reports and opportunities for comment on the draft proposals. Based on review by the ARL membership and recommendations from the ARL Copyright Issues Working Group, the ARL Board of Directors made a series of decisions not to endorse the CONFU proposals.

As early as May 1996, the Board rejected the proposal for educational multimedia and in July of that year decided not to endorse what became the final draft of the electronic reserves guidelines. In May 1997, the Board rejected the final proposals for distance learning and digital images. Responding to the restrictive limitations that recurred in the various drafts and final proposals, the ARL Board affirmed that ARL should not endorse any copyright guidelines that do not fully protect the fair use rights of the scholarly and educational communities.

ARL Concerns with Guidelines

Three themes emerged from ARL member library comments on all of the various draft guidelines:

- the quantitative limitations and restrictions included in the proposals unduly narrow the interpretation of fair use by moving away from the four factor analysis that is specified in section 107 of the Copyright Act of 1976;
- guidelines as rigid and specific as those being proposed were premature given the rapid evolution of new technologies and the lack of experience in the areas in which proposals were being considered; and
- the proposals are technically and administratively burdensome to libraries and their institutions because they add new responsibilities and raise new liability issues.

The accompanying summary highlights ARL's specific concerns with the proposals for fair use guidelines for distance learning, digital images, and educational multimedia. Also included is ARL's statement of concerns about the electronic reserves draft. ARL's [statements](#) were forwarded to PTO for inclusion in the final report to the Commissioner and are also included on ARL's web server.

ARL will join others in the educational and scholarly community to reinforce the principle of fair use by sharing examples of how libraries and educational institutions are responsibly incorporating new technology in library and educational environments, particularly as it applies to the issues discussed within the CONFU setting.

Proposals for Fair Use Guidelines Developed by the Conference on Fair Use: A Summary of ARL's Specific Concerns

Digital Images

The Proposal for Fair Use Guidelines for Digital Images:

- lacks balance between the rights of copyright owners and users of copyrighted digital images (e.g., the proposal appears to go to great lengths to secure the rights of owners with no corresponding assertions about the rights and needs of users, creators, or archiving agencies as they serve society);
- introduces new requirements for educational institutions to comply (e.g., the proposal introduces new responsibilities on the educational institution to research copyright status, apply for permissions, and maintain records);
- narrows fair use (e.g., the proposal cedes rights that might apply under fair use and suggests that the determination of fair use is limited by a finite period); and
- raises technical and process concerns (e.g., the proposal's specificity about network control, coupled with the process of finding the rightholder, are overly restrictive).

Distance Learning

The Proposal for Fair Use Guidelines for Distance Learning:

- is limited to live, interactive courses, and therefore does not address the variety of teaching methods in widespread use;

- introduces new restrictions on repetitive use of copyrighted works (e.g., the proposal limits transmission of a copyrighted work to one-time only and requires permission for subsequent uses);
- introduces new requirements that the institution implement technological limitations to prevent copying (e.g., the requirement to limit reception to a classroom or other site where secure reception can be controlled by the institution); and
- reflects a more limited interpretation of fair use (e.g., the proposal appears to restrict the principle of fair use).

Educational Multimedia

The Proposal for Fair Use Guidelines for Educational Multimedia:

- restricts instructional creativity and the development of in-depth multimedia applications and/or distance education initiatives by defining strict and narrow portion limitations (e.g., 10% or 3 minutes, whichever is less, of a motion media; 10% or 30 seconds, whichever is less, of music; and retention of student projects for 2 years or less);
- sets the stage for untenable precedents that may narrow the interpretation of fair use, and thus not fully protect the public's fair use rights; and
- implies that teachers and administrators are legally responsible for the activities of students.

Electronic Reserves

The March 1996 Draft Guidelines for Electronic Reserves:

- restricts access to students registered in the class (e.g., narrows current access that serves all students in the institution);
- places very restrictive technological limits on access to materials (e.g., limits access from dedicated workstations in the library);
- imposes strict limitations on the proportion of course materials included (e.g., not all course materials assigned for reserve could be included);
- imposes strict limitations on the type of material (e.g., limits materials to only supplemental readings and prohibits inclusion of required readings); and
- limits electronic access to one term (e.g., requires permission for reuse).

Note: Approximately 60 organizations participating in CONFU registered comments on one or more of the proposed guidelines. Virtually all organizations representing commercial copyright holders did not take a position on the proposals for distance learning or digital images; however, they all endorsed the educational multimedia guidelines. Many, but not all, in the higher educational and library community rejected the educational multimedia guidelines, but were quite divided in their response to the other proposals. [A roster of CONFU participants](#) and their positions on the proposals is available on the NINCH web site.

DC: Association of Research Libraries.

[Table of Contents for Issue 192](#) | [Other Copyright Articles](#) | [ARL Newsletter Home](#)



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