Guest Editorial

Fair Use after CONFU

About four years ago, the issue of fair use of copyrighted materials in digital form generated a great deal of attention when the Conference on Fair Use (CONFU) was established. Hundreds of meetings later, the CONFU process is at an impasse. For librarians in academic and research libraries, the need for an informed approach to the application of fair use of digital works becomes increasingly critical as use of such works increases.

The term *fair use* refers to a very significant limitation on the exclusive rights of the copyright holder, set forth in Section 107 of the Copyright Act of 1976,[1] which permits legal use of copyrighted materials without permission for certain purposes, including teaching. Four factors—purpose of use, nature of material, amount of use, and effect on the market—are to be considered in determining whether a use is fair. Because the statute goes no further in defining fair use, we are left to make that determination on our own, taking case law into account.

In 1993, President Clinton established the Information Infrastructure Task Force to plan and implement a National Information Infrastructure (NII). In turn, the task force formed the Working Group on Intellectual Property Rights to examine the implications of the NII on intellectual property law. The preliminary draft of the working group's report (the Green Paper) provoked national controversy. Many librarians feared that access to copyrighted digital materials would be severely restricted by the proposed expansion of the exclusive rights of copyright owners, whereas representatives of the commercial publishing world, fearing loss of potential revenue, pressed for greater control as articulated in the legislative rec-ommendations of the Green Paper. The report also suggested convening a conference of representatives of the various stakeholders to try to develop guidelines for digital materials. CONFU began meeting in 1994.[2] By spring 1997, working groups focusing on six specific topics had been struggling for two and a half years to develop guidelines, and nearly one hundred organizations were participating in the CONFU process.

Status of the CONFU Guidelines

In the September 1997 report from CONFU, the status of guidelines for the six topics was:

1. *Digital images:* Guidelines were drafted and included in the final report, with a one-year use period suggested. Consensus was lacking on whether they are workable.

2. *Distance learning:* Guidelines were drafted (but only for real-time performance and display) and included in the final report. They are opposed by those concerned about asynchronous delivery of distance learning over a computer network, but no further guidelines have been drafted.

3. *Educational multimedia:* Based on work begun earlier by the Consortium of College and University Media Centers, guidelines were drafted and included in the final report, with a one-year use period suggested. They continue to be the subject of dissension between advocates for the rights of owners of copyrighted works and those for the rights of users.

4. *Electronic reserve systems:* Guidelines were drafted but not widely accepted, and thus were not submitted for inclusion in the final report. Monitoring

is suggested to determine whether the group should continue its discussions.

5. *Interlibrary loan and document delivery:* No guidelines for the digital delivery of digital documents were drafted because the group decided it was premature to do so. Monitoring is suggested to determine whether the group should continue its discussions.

6. *Use of computer software in libraries:* No guidelines were drafted; rather, the group's "Statement on Use of Copyrighted Computer Programs (Software) in Libraries—Scenarios" illustrates specific applications of general rules and was included in the final report.

What Next?

It is notable that of the three sets of guidelines forwarded with the final CONFU report, none has been endorsed by the ALA, the ARL, or a number of other educational organizations. Proponents argue that in the absence of statutory language prescribing the applications of fair use, guidelines are very useful for educators, scholars, and librarians, who are caught between the pressing need to use digital materials and anxiety over potential threats of legal action.

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It is understandable that some in academia find such "bright-line" guidelines reassuring as a quick answer to their immediate concerns. As members of the not-for-profit educational sector, however, librarians have an obligation to take a broader view of long-term implications. By their very nature, guidelines place restrictions on fair use. For example, the multimedia guidelines give portion limitations on the number of words, minutes, or seconds, depending on the format. Even though the limitations are only *suggested*, it is unlikely that users will feel

secure in venturing out of the safe harbor. If these guidelines become commonly accepted and used, they may take on the "force of law." A real example in the print environment is the case of photocopying limits for interlibrary loan. In 1978, the National Commission on New Technological Uses of Copyrighted Works (CONTU) issued guidelines suggesting a limit of five photocopies of a particular article for interlibrary loan purposes. This practice was widely adopted by libraries, to the point that most library staff today seem to accept it as a legal limit. Would anyone want to challenge that number now? The actual language of the Copyright Act, however, contains no such number.

What Can Librarians Do?

CONFU is meeting again in May 1998 to review the status of the guidelines and to determine next steps. Many are pessimistic, however, about the potential for progress or agreement via the CONFU route. Despite the daunting scope of this issue, there are other actions that librarians can take, as individuals or in their institutions. They can begin by becoming familiar with the Copyright Act. The lack of specificity that some find so frustrating may prove to be farsightedness by its framers: It allows keeping the law flexible to address changing and unforeseen circumstances that guidelines cannot possibly encompass. The ALA, the ARL, and many other organizations filed statements of concern about the proposed guidelines; these and other background documents are widely available on the Web. Georgia Harper's Web site, for example, analyzes the CONFU outcome (at: http://www.utsystem.edu/OGC/IntellectualProperty/confu.htm); she points out the importance of licensing agreements as an "end run" approach to the current stalemate.

Educating campus communities also is critical. The availability of the guidelines as the products of CONFU makes them easy for individuals to use without aware-

ness that they are not universally supported or endorsed. At my institution, we have added an intellectual property attorney to the library staff to help educate and guide the campus in matters relating to copyright. In addition, we inform our faculty that we have not adopted the

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CONFU guidelines. Other libraries are considering creation of such a position as well. Moreover, librarians can act as advocates for fair use in their own campus copyright policies. An excellent model is available at Kenny Crews's Web site (http://www.iupui.edu/it/copyinfo/Fair_Use_Policy.html), where Indiana University states its strong commitment to the full exercise of fair-use rights. Another avenue is to press for change at the legislative level. The Ashcroft and Boucher-Campbell bills are examples of recent attempts to amend the Copyright Act to accommodate the digital environment in a rational way. Librarians can help by writing their representatives in Congress in support of such bills.

Finally, coherence in the presentation of library views is important: The library community should try to come to agreement on basic issues before individuals try to apply any guidelines wholesale. The approach being recommended by the ALA is to define "user community principles." The ARL plans to identify "best practices" in regard to fair use within the library community and to encourage others to consider them in developing local policies. As members of academia, we are all stakeholders in this matter and must become informed and remain engaged.

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Notes
1. For the wording of the law, see section 107 of the Copyright Act, available via the Web at: http://lcweb.loc.gov/copyright/title17/1-107.html.

2. Official CONFU reports can be requested in print from the Patent and Trademark Office or found via its Web site at: http://www.uspto.gov/web/offices/dcom/olia/confu/. The Working Group on Intellectual Property Rights's 1995 White Paper (the final version of the 1994 Green Paper) also is linked to this site.