

February 26, 2007

## **ALA and ARL Response to the Section 108 Study Group Regarding Interlibrary Loan and Other Copies for Users**

The mission of libraries is to preserve and provide access to information, regardless of format. Thus there is a legitimate societal interest in assuring that these trusted cultural institutions continue to have legal support for undertaking best practices for the preservation of and access to copyrighted content, without regard to the format by which the content is distributed.

Our ability to accomplish this mission is greatly enhanced by the exceptions currently offered in Sections 107 and 108. The American Library Association (ALA) and the Association of Research Libraries (ARL) believe that the combination of Sections 107 and 108 provides libraries and archives with the ability to take full advantage of digital technologies in support of user services. However, we believe that should Congress decide changes to 108 are required, under certain circumstances, there could be opportunities to clarify the intent of selected provisions in Section 108.

Maintaining flexibility in the statute is important in order for libraries to achieve their mission. Thus, any proposed changes to Section 108 should not be tied to the use of restrictive conditions or technologies such as those included in the TEACH Act. Such proposals would undermine the needs of libraries and archives in the digital environment.

ALA and ARL convened a second workshop on January 4-5, 2007 to receive and consider input from members of the library community regarding the continuing deliberations of the Section 108 Study Group. The January workshop focused on the recent *Federal Register* Notice issued by the Copyright Office concerning the Section 108 Study Group work on making and distributing copies for users.

To clarify our response to the *Federal Register* notice, we will briefly review the kinds of reproductions that are requested by library users. These can be categorized as 1) interlibrary loan copies, where the “lending” library makes a copy for a member of the “borrowing” library’s user community upon receiving a request; 2) direct copies, where a library makes a copy from its own collection upon the request of a member of its user community; and 3) copies made by the library for non-community users. The third category—copies for non-community users—is a service that only a few libraries provide. For these copies, a royalty is paid to the rights-holder and libraries charge those users for these costs. Document delivery services, when a library provides copies to users on a fee basis, are also not included in this discussion.

An interlibrary loan copy under category 1 is a “library to library” transaction allowing libraries to make limited copies from their own collections to supply to another library at the request of a library user. Only legitimate community users of the borrowing library are eligible for interlibrary loan service. The CONTU guidelines are widely practiced and control the kind of systematic copying that could interfere with market interests. Interlibrary loan is,

by definition, a *mediated* activity in that library staff or systems screen requests from users before fulfilling them. Most libraries prefer to mediate these transactions (rather than allow the user of the borrowing library to contact the lending library directly) because frequently the user does not realize that the borrowing library already owns or licenses the material being requested. ARL libraries report that their studies indicate that the library already owns more commonly required materials and it is very rare (1-1.5%) that the library ever fulfills the same request twice.

Category 2 copies—a library directly making a copy for a member of its user community—is also a mediated transaction and only involves works that the library already owns. In practice, such activity is minimal because most libraries make available to users reproducing equipment that allows the users to make their own copies pursuant to Section 108(f)(1).

### **Topic A: Amendments to Current Subsections 108 (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan**

General Issue: Should the provisions relating to libraries and archives making and distributing copies for users, including via interlibrary loan (which include the current subsections 108(d), (e), and (g), as well as the CONTU guidelines) be amended to reflect reasonable changes in the way copies are made and used by libraries and archives, taking into account the effect of these changes on rights-holders.

- 1. How can the copyright law better facilitate the ability of libraries and archives to make copies for users in the digital environment without unduly interfering with the interests of rights-holders?*

Currently, libraries take full advantage of the provisions of the Copyright Act, Sections 107 and 108 in particular, to provide lawful access to information resources. The Copyright Act has built in safeguards to balance the interests of authors, users, and owners of copyrighted information.

- 2. Should the single-copy restriction for copies made under subsections (d) and (e) be replaced with a flexible standard more appropriate to the nature of digital materials, such as “a limited number of copies as reasonably necessary for the library or archives to provide the requesting patron with a single copy of the requested work”? If so, should this amendment apply both to copies made for a library’s or archives’ own users and to interlibrary loan copies?*

Yes, a flexible standard is more appropriate and should replace the single-copy restriction. This standard should apply to both library users and to interlibrary loan copies. We suggest the language “such copies as reasonably necessary” over “a limited numbers of copies as reasonably necessary.”

However, the library community believes that digital reproduction and delivery is currently permitted under Section 108(d) and (e) and 107. Section 108(d) provides that “[t]he rights of reproduction and distribution under this section apply to a copy ....of more than one article...” We believe that a court would interpret this phrase to permit incidental copies—those copies that are temporary and have no monetary consequence—necessary to distribute a copy to a user. And if the court did not interpret Section 108(d) in this manner, we are confident that the court would treat these as fair use copies that otherwise met the criteria of

Section 108(d) (i.e., they became the property of the user, they were used for private study, scholarship or research, and they met the requirements of section 108(g)).

*3. How prevalent is library and archives use of subsection (d) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?*

Interlibrary loan is a fairly common activity that libraries engage in to meet the information needs of our users. Only a member of the borrowing library's user community can request interlibrary loan service from the collections of other libraries. We anticipate that due to the use of remote storage and its functional equivalent - a library serving multiple campuses - making copies directly for library users will increase. We do not believe that digital reproduction and distribution will increase the use of interlibrary loan or other lawful copying. Most libraries currently provide copies in digital format, and the number of requests has not increased from when the copies were provided in analog format. We do not anticipate the number of requests increasing if digital reproduction and delivery were explicitly permitted.

*4. How prevalent is library and archives use of subsection (e) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?*

Rarely do libraries or archives use subsection (e) for direct copies or for interlibrary loan copies. Digital reproduction and distribution would not increase this already uncommon occurrence.

*5. If the single-copy restriction is replaced with a flexible standard that allows digital copies for users, should restrictions be placed on the making and distribution of these copies? If so, what types of restrictions? For instance, should there be any conditions on digital distribution that would prevent users from further copying or distributing the materials for downstream use? Should user agreements or any technological measures, such as copy controls, be required? Should persistent identifiers on digital copies be required? How would libraries and archives implement such requirements? Should such requirements apply both to direct copies for users and to interlibrary loan copies?*

In current practice, libraries already restrict further copying and distribution of digital copies by placing those works on a secure server that only the requesting user can access. Access to the copy is eliminated entirely after the "loan period" for the work has concluded. This method works best for libraries because it allows us to act in the spirit of the law, is secure, and is efficient for libraries. This approach also works well for our users. Sending an email attachment of a work directly to a requesting user is not practical because of the size of files. Additionally using attachments is more labor intensive, is not as secure, and many systems do not accept such files. We support the continuation of current practices rather than the use of technological protection measures that could be used to monitor and invade the privacy of our library users. Libraries routinely inform their users about copyright law implications, include the required notice on order forms (108(d)(2) and 108(e)(2)), include the original Copyright Notice on documents when available and the message, "No further reproduction or distribution of this copy is permitted by electronic transmission or any other means." This practice is so common that library supply vendors sell ink stamps and other materials for this very purpose.

*6. Should digital copying for users be permitted only upon the request of a member of the library's or archives' traditional or defined user community, in order to deter online shopping for user copies? If so, how should a user community be defined for these purposes?*

Libraries currently provide copies to their defined user communities, or to that of a borrowing library under an interlibrary loan. This is long-standing practice and should not be codified. Interlibrary loan and direct copying is both time consuming and costly for libraries. Libraries have no incentive or desire to serve users beyond their existing client base. The number of libraries offering document delivery services to users outside of their user base (or the user base of a borrowing library) is quite small, and in these instances libraries pay royalties and seek cost recovery from the requester to offset costs.

*7. Should subsections (d) and (e) be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library or archives on both ends, and to not permit direct electronic requests from, and/or delivery to, the user from another library or archives?*

Typically, interlibrary loan transactions are by definition mediated so there is no need to change the law. It may appear that user initiated requests via an electronic form are unmediated, but in fact these requests are routinely reviewed by interlibrary loan staff to ensure that the user is not requesting something that the library already owns.

*8. In cases where no physical object is provided to the user, does it make sense to retain the requirement that "the copy or phonorecord becomes the property of the user"? 17 U.S.C. 108(d)(1) and (e)(1). In the digital context, would it be more appropriate to instead prohibit libraries and archives from using digital copies of works copied under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling future requests?*

In making copies for users who request materials for research, scholarship and personal study, libraries follow the practice not to retain digital copies of works copied under subsections (d) and (e) not only because it is an infringement of copyright law, but also because it is not feasible technically or financially to retain the copies, and because the likelihood that the same work will be requested twice is slim.

*9. Because there is a growing market for articles and other portions of copyrighted works, should a provision be added to subsection (d), similar to that in subsection (e), requiring libraries and archives to first determine on the basis of a reasonable investigation that a copy of a requested item cannot be readily obtained at a fair price before creating a copy of a portion of a work in response to a patron's request? Does the requirement, whether as applied to subsection (e) now or if applied to subsection (d), need to be revised to clarify whether a copy of the work available for license by the library or archives, but not for purchase, qualifies as one that can be "obtained"?*

No. The proposed requirement that libraries first investigate whether a requested item under subsection (d) is readily obtained at a fair price before creating a copy in response to a user request would eliminate interlibrary loan altogether. Libraries pay institutional subscription fees for journals in order to account for the many people the library serves and these uses are also included in the license agreements. No additional changes are required.

*10. Should the Study Group be looking into recommendations for revising the CONTU guidelines on interlibrary loan? Should there be guidelines applicable to works older than five years? Should*

*the record keeping guideline apply to the borrowing as well as the lending library in order to help administer a broader exception? Should additional guidelines be developed to set limits on the number of copies of a work or copies of the same portion of a work that can be made directly for users, as the CONTU guidelines suggest for interlibrary loan copies? Are these records currently accessible by people outside of the library community? Should they be?*

No. We do not recommend any revision to the CONTU guidelines. The CONTU guidelines, while not law, have served libraries well as a useful “best practice” document.

*11. Should separate rules apply to international electronic interlibrary loan transactions? If so, how should they differ?*

No.

### **Topic B: Amendments to Subsection 108 (i)**

General Issue: Should subsection 108(i) be amended to expand the application of subsection (d) and (e) to any non-text-based works, or to any text-based works that incorporate musical or audiovisual works?

*1. Should any or all of the subsection (i) exclusions of certain categories of works from the application of the subsection (d) and (e) exceptions be eliminated? What are the concerns presented by modifying the subsection (i) exclusions, and how should they be addressed?*

The exclusion of certain categories of works from the application of subsection (d) and (e) is an antiquated way to deal with content and therefore we recommend that subsection (i) be eliminated. Today, libraries purchase works that are multi-format – for example, books that include a CD. These titles are enhanced by the addition of multi-format content and it should not matter in what form that content appears. Subsection (e) would continue to prevent the copying of entire works that are readily available in the market place.

*2. Would the ability of libraries and archives to make and/or distribute digital copies have additional or different effects on markets for non-text-based works than for text-based works? If so, should conditions be added to address these differences? For example: Should digital copies of visual works be limited to diminished resolution thumbnails, as opposed to a “small portion” of the work? Should persistent identifiers be required to identify the copy of a visual work and any progeny as one made by a library or archives under section 108, and stating that no further distribution is authorized? Should subsection (d) and (e) user copies of audiovisual works and sound recordings, if delivered electronically, be restricted to delivery by streaming in order to prevent downloading and further distribution? If so, how might scholarly practices requiring the retention of source materials be accommodated?*

Libraries are willing to use technologies that would limit further reproduction or distribution of non-text based works such as streaming. We believe, however, that libraries and archives should not be limited to one technological method as new and innovative means of delivery will likely emerge. Thus, flexibility will be key in order for libraries to lawfully distribute digital copies.

With regard to thumbnails, these do not provide enough detail for scholarly research. Fidelity to the original work is important to research. Finally, persistent identifiers do not

appear to be the right approach at this point in time. Libraries do not support any active monitoring of user behavior.

*3. If the exclusions in subsection (i) were eliminated in whole or in part, should there be different restrictions on making direct copies for users of non-text-based works than on making interlibrary loan copies? Would applying the interlibrary loan framework to non-text-based works require any adjustments to the CONTU guidelines?*

No. In addition, no changes are required to CONTU.

*4. If the subsection (i) exclusions were not eliminated, should an additional exception be added to permit the application of subsections (d) and (e) to musical or audiovisual works embedded in textual works? Would doing so address the needs of scholars, researchers, and students for increased access to copies of such works?*

If subsection (i) were not eliminated, then an additional exception for embedded works would be desirable. We anticipate that authors will create more works with embedded content in the future and keeping the nature of the whole work as the author intended is essential for scholars, researchers and students.

### **Topic C: Limitations on Access to Electronic Copies, including via Performance or Display**

General Issue: Should section 108 be amended to permit libraries and archives to make temporary and incidental copies of unlicensed digital works in order to provide user access to these works? Should any exceptions be added to the copyright law to permit limited public performance and display in certain circumstances in order to allow for user access to unlicensed digital works?

*1. What types of unlicensed digital materials are libraries and archives acquiring now, or are likely to acquire in the foreseeable future? How will these materials be acquired? Is the quantity of unlicensed digital material that libraries and archives are likely to acquire significant enough to warrant express exceptions for making temporary copies incidental to access?*

We do not envision a future where all digital materials are licensed, and reject the premise implicit in many of these questions that if materials are in digital form, access to them must be controlled in some way. In fact libraries acquire digital materials that are not bound by license agreements. When a license is associated with a particular digital work, libraries comply with the terms of that license. Therefore, when libraries receive donated materials, we comply with the terms of the donor agreement when acquiring the work. If there is no agreement, the library may deem it appropriate to make a copy for the user. Any temporary, incidental copies made as a result of making the user copy are not retained. As stated earlier in section A, any temporary incidental copies made as a result of meeting a user request are inevitable and of little consequence since they have no economic value. We maintain that the only copy that is of consequence is the copy provided to the user.

*2. What uses should a library or archives be able to make of a lawfully acquired, unlicensed digital copy of a work? Is the EU model a good one namely that access be limited to dedicated terminals on the premises of the library or archives to one user at a time for each copy lawfully acquired? Or could security be ensured through other measures, such as technological*

*protections? Should simultaneous use by more than one user ever be permitted? Should remote access ever be permitted for unlicensed digital works? If so, under what conditions?*

The EU model is too restrictive. It is not reasonable to insist that a user be tethered to a dedicated computer in the library in order to access the copy requested. In those cases where agreements with owners require some limitation on access, we prefer placing the copy on a secure server that only the requesting user may access.

*3. Are there implied licenses to use and provide access to these types of works? If so, what are the parameters of such implied licenses for users? What about for library and archives staff?*

Yes, there are implied licenses to use and provide access to these types of works. When libraries receive a user request for access to unlicensed digital material, they do everything legally within their power to meet the user's need.

*4. Do libraries and archives currently rely on implied licenses to access unlicensed content or do they rely instead on fair use? Is it current library and archives practice to attempt to provide access to unlicensed digital works in a way that mirrors the type of access provided to similar analog works?*

It depends. If a donor agreement is linked to the work, then the donor agreement terms are followed. If there is no agreement, libraries provide access in the lawful ways available to them under Section 108. When Section 108 exceptions do not apply, the library turns to Section 107 and makes a fair use assessment to determine if the user requests can be met. Additionally, certain uses may be permitted under an implied license. Yes, it is the goal to deliver information electronically and to take advantage of the benefits of the technology, and not restrain technologies to "mirror" the print environment.

*5. Are the considerations different for digital works embedded in tangible media, such as DVDs or CDs, than for those acquired in purely electronic form? Under which circumstances should libraries and archives be permitted to make server copies in order to provide access? Should the law permit back-up copies to be made?*

Not really. The library again would turn to 108 and then 107 to meet the user request. Making back-up copies is not necessary to provide access to a digital work.

*6. Should conditions on providing access to unlicensed digital works be implemented differently based upon the category or media of work (text, audio, film, photographs, etc.)?*

No. Copyright law is intended to be technology and format neutral.

*7. Are public performance and/or display rights necessarily exercised in providing access to certain unlicensed digital materials? For what types of works? Does the copyright law need to be amended to address the need to make incidental copies in order to display an electronic work? Should an exception be added for libraries and archives to also perform unlicensed electronic works in certain circumstances, similar to the 109(c) exception for display? If so, under what conditions?*

Yes, public performance or display rights might be exercised in order to provide access depending on the category of work. Obviously, audiovisual works cannot be accessed unless

they are perceptible to the user and this may implicate the public performance right. The Study Group seems to be attempting to suggest modifications in the law that we believe are too specific. Congress and the Supreme Court have long recognized the need to maintain flexibility in the law, especially during times of rapid technological change. We cannot anticipate what situations may arise in the future and so recommend that the Study Group not be bogged down by specifics that may unintentionally prevent the law from achieving its purpose.

In conclusion, we believe that if Congress determines that changes to Section 108 are necessary, we recommend that:

1. Subsection (i) should be eliminated.
2. Temporary and incidental copies should be allowed with language like “such copies as reasonably necessary”.

If Congress does decide to consider changes to Section 108, we believe that it will be critically important that Section 108 retain its current flexibility that permits libraries and archives to effectively provide needed services to their users.