Section 108 Study Group

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To: Mary Rasenberger
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Kenneth D. Crews of the Indiana University School of Law-Indianapolis and the IUPUI Copyright Management Center respectfully submits the following comments in response to the request of the Section 108 Study Group for input on issues relating to the exceptions and limitations applicable to libraries and archives under Section 108 of the Copyright Act.

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The Notice of the Public Roundtable, cited below, sets forth a series of specific questions. Other parties are offering responses to those exact questions. Please permit me to submit the following statement regarding an underlying issue. This statement will pose a different question, but it will demonstrate the importance of the question in association with the overall objectives of the Study Group. The following statement will also emphasize the importance of addressing the point before the Study Group can effectively move forward with some of its other priorities. Thank you very much for permitting me to submit the following written comment.

Statement

Question: *Does the current Section 108 permit the application of digital technologies to the making and delivery of copies of works made pursuant to Subsections 108(d) and (e), whether for a user at the library or at another location through interlibrary loan?*

For many reasons, this question is of critical importance to libraries, the public, and to owners of copyrighted works. In the immediate context of the work of the Study Group, this question merits attention because the Study Group appears to have based some of its work on the presumption that these provisions of Section 108 do not permit application of digital technologies. As stated in the Notice of the Public Roundtable, published in the Federal Register:[1]

> The current subsections (d) and (e) were enacted with the Copyright Act of 1976, and, as such, were drafted with analog copying in mind, namely photocopying. Nothing in the provisions expressly precludes their application to digital technologies. However, digital copying under subsections (d) and (e) is effectively barred by subsection 108(a)'s single-copy limit. Subsection (a) states that "it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c)." [citation omitted]. As a practical and technical matter, producing a digital copy generally requires the production of temporary and incidental copies, and transmitting the copy via digital delivery systems such as e-mail requires additional incidental copies. The Copyright Act does not provide any express exception for such copies, although section 107 (which sets forth the fair use exceptions) might apply in some cases, and licenses might be implied in others.

Moreover, during the roundtable, as held in Chicago on January 31, 2007, various parties openly disagreed about the applicability of digital technologies to library services pursuant to the cited Subsections.

This paper will examine evidence related to this question, demonstrating that the language, the practical implications, and the legislative history of the statute support the conclusion that libraries may lawfully use digital technologies in the making and delivery of copies of appropriate works pursuant to Sections 108(d) and 108(e). Moreover, the current law includes ample safeguards to protect the interests of copyright owners, whose works may be copied under the limited conditions of Section 108.

This examination of the issues is not necessarily a full analysis of Section 108, or even of the detailed provisions of the specific subsections in question. Without surveying all details of the law here, this paper is based on the assumption that the library is complying with all relevant aspects of Section 108 not mentioned here. The question here focuses

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[1] Federal Register, Vol. 71, No. 232, pp. 70434-70440 (Dec. 4, 2006).

solely on whether the library may use digital technologies in the context of that compliance.

Importance of the Question

The answer can have profound consequences for any recommendations to revise the current Section 108. For example, should the Study Group recommend adding explicit mention of digital technologies, the following consequences may occur:

- Such recommendation alone will reinforce the proposition that libraries cannot use digital technologies. This paper will argue against such a conclusion, but the likely inference will inevitably arise and persist. Thus, the recommendation alone, without action by Congress, can be harmful to the interests of libraries and all users of libraries.
- Some libraries are already using digital technologies for certain services, based on a sound conclusion that they are within the law. A contrary interpretation by the Study Group may compel many libraries to terminate or curtail services, to the detriment of the public. Moreover, because some libraries are currently using digital technologies consistent with Section 108, a contrary interpretation from the Study Group will erode support from the libraries for the Group's work.
- Such recommendation will call on Congress to take up a potentially complex and contentious issue that it already addressed in the original Section 108 by choosing in 1976 to enact a technologically neutral statute. The potential implications of introducing this issue into legislation may burden and possibly derail congressional review of other recommendations from the Study Group
- Adding explicit language about the application of digital technologies may clarify rights of use, but if the clarification is comparable to the 1998 amendments to the preservation provisions, the clarification may come with additional conditions and limitations imposed on libraries and their users. This paper will demonstrate that the law already includes ample safeguards, and that Subsections 108(d) and 108(e) are in any event fundamentally different from the preservation provisions and should not be subject to additional statutory constraint.

The Language of Section 108

As originally enacted in 1976, Section 108 did not include any reference to digital technologies. Like much of the entire Copyright Act, the new law was intended to be flexible and adaptable to new technologies. The House Report accompanying the new law includes multiple references to what might be described as a "technologically neutral" or even "technologically expansive" stance throughout the Copyright Act.[2] Some examples:

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[2] H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976).

- Regarding Section 102: "The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology. . . ."
- Regarding Section 106: "The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides."
- Regarding Section 107: The bill includes fair use, "but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."

The Copyright Act of 1976 wisely included flexible language relevant to the technological scope of the law. That flexibility remains important to owners as well as users. The same policy that has enabled the Copyright Act to protect a rich variety of new works that have come into existence since 1976 is the same policy that serves the public interest through a technologically flexible application of fair use and other exceptions. Where a provision of the Copyright Act is not limited to particular technology, one can safely infer that Congress wisely wanted the law to serve the public's changing needs and not become obsolete with each new invention for creating and using copyrighted works. The lack of technological references is not a limitation in the law; it is a source of openness and adaptability. The original language of Section 108 is similarly technologically neutral, permitting the well-grounded inference that Section 108 is technologically adaptable.

DMCA and the Revision of Section 108

The Digital Millennium Copyright Act of 1998 amended Section 108 in a few important respects. Most significant for this paper was the revision of Subsections 108(b) and (c) applicable to preservation copying. The DMCA struck from the original statute the language requiring that preservation copies be in "facsimile" form. Congress also added an explicit provision, allowing the use of digital technologies for preservation copies, but with the added requirement that access to the digital copies be limited to the "premises" of the library.

The fact that Congress was compelled to add the provision about digital copying might suggest that Section 108 otherwise did not previously encompass digital copying.[3] One might also infer that because Congress made these changes to the preservation provisions, therefore the lack of explicit reference to digital technologies in the other subsections bars the extension of the new technologies. Those conclusions are not valid.

[3] The present author does not believe that the preservation provisions, as originally enacted, could not encompass application of digital technologies. The DMCA amendments may be helpful clarification, but they were not, in this writer's estimation, necessary for the one objective of allowing digital applications. Nothing in this paper should be inferred to support a contrary conclusion.

The preservation provisions are different from Subsections 108(d) and 108(e) in these critical respects:

- The House Report accompanying the Copyright Act of 1976 included this unusual reference that appeared to limit the range of allowable technologies: "a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in 'machine-readable' language for storage in an information system." That passage has been interpreted by some readers to impose a constraint on the law. Of course, a passage in a House Report is important insight, but it is not controlling. Still, some interested parties perceived a need to overcome the influence of that language by statutory amendment. That language about an "information system" is in the report solely with reference to the preservation provisions; no similar language is used in discussion of other provisions.[4] Whatever the language may mean, it refers only to preservation activities.
- The original preservation language of Section 108 allowed libraries to make copies "in facsimile form." These words also have been used to reinforce the interpretation that preservation copies were generally limited to photocopies or microfilm. Congress eliminated these words as a step toward clarifying the use of digital technologies. No such words appear in the other subsections of 108, and thus one cannot make a similar inference limiting technologies.
- Preservation activities in the 1970s were often limited to "brittle" and damaged books; paper and microfilm copies were routinely satisfactory to meet library needs at that time. Copies for users, however, might be made by various means to meet the needs of the library and the public. The law was kept open to fresh possibilities.
- Perhaps most important, preservation copies made under Section 108 become part of the library's permanent collection. Copies for users are inherently ephemeral from the library's perspective. The library makes and delivers the copy, and the task is completed. When the library makes a preservation copy, however, it becomes part of the collection indefinitely for unpredictable future needs. Posting the copy to a server for potentially unlimited user access might have significant repercussions for copyright owners. By contrast, the copies for users are delivered directly to one specific person. Libraries are not using these provisions of Section 108 for either long-term access or for access by multiple users. The concerns that might arise from placing a digitized work on a computer server are simply immaterial under Subsections 108(d) and 108(e).

Therefore, when Congress enacted the DMCA in 1998, it clearly was compelled to amend the preservation provisions, but it had no need to amend the other provisions in a similar fashion.

[4] The legislative history of the DMCA focuses on the need to address this issue. *Section-by-Section Analysis of H.R. 2281*, Committee Print, 105th Cong., 2s Sess. (1998).

Fair Use as Supplement to Section 108

The legislative record includes numerous references assuring that fair use (Section 107) can continue to apply to library activities that may reach beyond the relatively exacting limits of Section 108. In the interests of brevity, this paper will not examine that record in detail, nor offer an elaborate analysis of fair use. The critical point for now, however, is that fair use would likely permit much of the incidental copying that is a normal byproduct of the application of digital technologies.

Digital technologies, from the most ordinary to the most complex applications, often involve the making of multiple copies. Scanning, uploading, storing, transmitting, and even accessing an item at a computer terminal, almost always involve the making of multiple copies. Computer systems are typically structured to make back-up copies, to place copies in cache, and to reserve copies in memory. These copies are usually inevitable, uncountable, and nearly inaccessible by users. Put simply, they are not copies that offer any practical utility to the researcher, and they do not compete with the use or marketing of the work by copyright owners. Moreover, because incidental copies are almost always an inevitable consequence of digital technologies, the entire Copyright Act would impose a dire threat to digital technologies in general, if these incidental copies were not recognized as fair use. Copyright was never meant to hinder innovation.

Some analyses of Section 108, including the summary in the Federal Register notice, have by contrast viewed the general limitation of single copies as a prohibition against digital copying, because digital copying necessarily involves multiple incidental copies. That narrow reading of Section 108 is erroneous and hazardous. Section 108 is about limited copies that are actually used, whether by the library for preservation or by the user for private study. The incidental copies are not a barrier to the numerical counts in Section 108, and they are typically within fair use. To read otherwise, or to revise Section 108 on a narrow reading of the law, would contradict the flexible and innovative spirit of copyright.

Moreover, to read Section 108 as a bar on incidental copies is to misunderstand the realities of the copying that was sanctioned even in 1976. For example, the preservation provisions were widely applied to microfilm. Microfilm usually involved incidental copying (e.g., the making of a negative and master copy), yet the original Section 108 still referred to single copies. In fact, the making of a single useful photocopy can involve preliminary copies that may be cut and rearranged into clean versions. Congress was evidently not concerned about the incidental copies left in the "back room." The incidental copies that stem from digital applications are merely modern versions of the age-old and harmless "back room." Section 108 should not be revised in a manner that strictly circumscribes technologies, and Section 108 should not attempt to anticipate and encompass all of the possible copies that library services might incidentally generate. The Study Group should defer to fair use for these copies.

Existing Safeguards in Current Law

Much of the concern about digital technologies is expressed with reference to the risks to copyright owners. If the library can make and deliver digital copies, according to this argument, the risks of further copying and dissemination are unacceptably high. Unquestionably, the changing technologies pose new challenges for all interested parties. These technologies are inescapable, however, and the role of the law should be to adapt, rather than to create the appearance of resistance. One of the great virtues of the Copyright Act is its technological adaptability. Section 108, in its existing form offers significant safeguards and adaptability to meet the changing needs of digital applications.

Consider the example of a library making and delivering a digital copy of an article or chapter (consistent in all respects with Section 108) though interlibrary loan. The transaction involves three principal parties: The lending library; the receiving library; and the researcher ultimately receiving the item. Current law includes safeguards and limits on all three parties. Those conditions in the law remain relevant and important, whether the transaction is completed by paper or digital copy.

Constraints on the Lending Library:

- The copy may be made only within the limits and subject to the several requirements of Subsection 108(d) (or Subsection 108(e) if applicable).
- The copy must be a single, isolated copy, and no systematic copying (Section 108(g)).
- The actions of the library are limited to making and delivering a copy; the library cannot engage in any public distribution or display of the work. In other words, the library cannot "post" the item to a server for wide access.
- Incidental copies are limited to the constraints of fair use.

Constraints on the Receiving Library:

- Frequency of receiving copies cannot substitute for purchase or subscription (Subsection 108(g)(2) or CONTU Guidelines).
- Library has authority under Section 108 to receive and deliver the copy. Section 108 does not permit additional copies or wide accessibility of the one copy.
- Incidental copies are limited to the constraints of fair use.
- Many libraries impose voluntary standards of restricted access, and deletion of electronic files, in order to reduce the risk of improper access and dissemination.

Constraints on the Researcher Receiving the Copy:

- Section 108 currently requires warning notices at the place where orders for copies are received.

- Section 108 currently requires warning notices on order forms where users request copies.
- Section 108 currently requires a notice of copyright on the copies themselves.
- All of these warning notices may be highlighted and perhaps revised in order to address any new concerns that result from digital technologies.
- All of these warning notices serve the purpose of cautioning the user about the risks of improper use of the copyrighted works.
- Colleges, universities, libraries, and other organizations often have policies and procedures that apply to researchers and other users, guiding and cautioning them with respect to their obligations under the law. These policies, too, may be adapted to reflect the changing needs that arise from digital technologies.

Summary

The current language of Section 108 permits the application of digital technologies to the making and delivery of copyrighted materials. Changes in the statute to permit new technologies are not essential. Moreover, the statute and the voluntary practices of libraries serve to safeguard the interests of copyright owners. Consistent with much of the Copyright Act, the existing provisions of Section 108 may be adapted through practice to meet the changing needs of libraries, researchers, publishers, and authors with respect to new technologies. For Congress to revise the statute with that objective is not only unnecessary, but also hazardous. Technologies and needs will constantly change. A revision of the law today may actually remove much of the flexibility that Congress wisely endorsed in 1976; revisions made in the context of current technology are also likely to become obsolete in the near term.

Thank you for permitting me to submit these comments.