

LIBRARY OF CONGRESS

Copyright Office

Docket No. 07-10802

Section 108 Study Group: Copyright Exceptions for Libraries and Archives

AGENCY: Office of Strategic Initiatives and Copyright Office, Library of Congress.

ACTION: Notice of a public roundtable with request for comments.

SUMMARY: The Section 108 Study Group announces a public roundtable discussion on certain issues relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act, and seeks written comments on these issues. This notice (1) announces a public a roundtable discussion regarding the issues identified in this notice and (2) requests written comments from all interested parties on the issues described in this notice. These issues relate primarily to making and distributing copies pursuant to requests by individual users, as well as to provision of user access to unlicensed digital works.

DATE: *Roundtable Discussions:* The public roundtable will be held in Chicago, Illinois, on Wednesday, January 31, 2007 from 8:30 a.m. to 4:00 p.m. C.S.T. Requests to participate must be received by the Section 108 Study Group by 5:00 p.m. E.S.T. on January 12, 2007.

Written Comments: Interested parties may submit written comments on any of the topics discussed in this notice after 8:30 a.m. E.S.T. on February 1, 2007, and on or before 5:00 p.m. E.S.T. on March 9, 2007.

ADDRESSES: All written comments and requests to participate in roundtables should be addressed to Mary Rasenberger, Director of Program Management, National Digital Information Infrastructure and Preservation Program, Office of Strategic Initiatives, Library of Congress. Comments and requests to participate may be sent (1) by electronic mail (preferred) to the e-mail address section108@loc.gov, or (2) by hand delivery by a private party or a commercial, non-government courier or messenger, addressed to the Office of Strategic Initiatives, Library of Congress, James Madison Memorial Building, Room LM-637, 101 Independence Avenue S.E., Washington, DC 20540, between 8:30 a.m. and 5:00 p.m. E.S.T. If delivering by courier or messenger please provide the delivery service with the Office of Strategic Initiatives phone number: (202) 707-3300. (See **Supplementary Information**, Section 4: "Procedures for Submitting Requests to

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Participate in Roundtable Discussions and for Submitting Written Comments” below for file formats and other information about electronic and non-electronic submission requirements.) Submission by overnight service or regular mail will not be effective.

The public roundtable will be held at DePaul University College of Law, Lewis Building, 10th Floor, Room 1001, 25 E. Jackson Boulevard, Chicago, Illinois, 60604, on Wednesday, January 31, 2007.

FOR FURTHER INFORMATION CONTACT: Christopher Weston, Attorney-Advisor, U.S. Copyright Office. E-mail cwes@loc.gov, Telephone (202) 707-2592, Fax (202) 707-0815.

SUPPLEMENTARY INFORMATION:

1. Background.

The Section 108 Study Group was convened in April 2005 under the sponsorship of the Library of Congress’ National Digital Information Infrastructure and Preservation Program (NDIIPP), in cooperation with the U.S. Copyright Office. The Study Group seeks written comment on and participation in a roundtable discussion scheduled for January 31, 2007, on the issues described in this notice. The Study Group is an independent committee charged with examining how the exceptions and limitations to the exclusive rights under copyright law that are applicable specifically to libraries and archives, namely those set out in section 108 of the Copyright Act, may need to be amended to take account of the widespread use of digital technologies. More detailed information regarding the Section 108 Study Group and its work can be found at www.loc.gov/section108.

Section 108 was included in the 1976 Copyright Act in recognition of the vital role of libraries and archives to our nation’s education and cultural heritage, and their unique needs in serving the public. The exceptions were carefully crafted to maintain a balance between the legitimate interests of libraries and archives on the one hand, and rights-holders on the other, in a manner that best serves the national interest.

The evolution of copyright law demonstrates that the technologies available at any given time necessarily influence where and how appropriate balances can be struck between the interests of rights-holders and users. As the Copyright Office recognized in 1988, it is important to review the section 108 exceptions periodically to ensure that they take account of new technologies in maintaining a beneficial balance among the interests of creators and other rights-holders and libraries and archives. *See* The Register of Copyrights, *Library Reproduction of Copyrighted Works (17 U.S.C. 108): Second Report*

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128-29 (1988). In that spirit, the Section 108 Study Group is charged with the task of identifying those areas in which new technologies have changed the activities of libraries and archives, users, and rights-holders, so that the effectiveness or relevance of applicable section 108 exceptions are called into question. The Study Group will attempt to formulate appropriate, workable solutions where amendment is recommended.

In March 2006 the Study Group held public roundtable discussions in Los Angeles, California, and Washington, D.C., and requested written comments on issues relating to general eligibility for the section 108 exceptions, as well as preservation and replacement copying. Specifically, interested parties were asked to comment on (1) proposed amendments to the preservation and replacement exceptions in subsections 108(b) and (c), (2) a proposal to permit preservation copies of published works in limited circumstances, (3) a proposal to permit preservation copies of certain types of Internet content, and (4) questions on what entities should be eligible to take advantage of the section 108 exceptions. With regard to the latter, the Study Group considered questions of whether to restrict section 108 eligibility to nonprofit and government entities, whether to expressly include purely virtual entities, and whether to include museums. The Study Group anticipates that it will recommend that section 108 be amended to cover museums as well as libraries and archives. Although museums are not expressly addressed in this notice, the Study Group requests that you consider the questions set forth below in light of their potential effects on museums, as well as on libraries and archives. The written comments and roundtable transcripts from March 2006 are available on the Web site www.loc.gov/section108.

Recently, the Study Group examined the provisions of section 108 governing copies made by libraries and archives at the request of users, including interlibrary loan copies, as well as whether any new provisions relating to copies, performances or displays made in the course of providing access are necessary. Specifically, the Study Group seeks public input on whether any amendment is warranted to (1) the subsection 108(d), (e) and (g) provisions addressing copies made for users, including copies made under interlibrary loan arrangements; (2) the exclusions currently set out in subsection 108(i) that prohibit libraries and archives from taking advantage of subsections (d) and (e) for most non-text-based works; and (3) allow libraries and archives to make copies of unlicensed electronic works in order to provide user access and to provide access via performance or display.

Note that any amendments to section 108 must conform to the United States' international obligations under the Berne Convention to provide exceptions to exclusive rights only "in certain special cases" that do "not conflict with the normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests" of the rights-

holder. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9(2), 25 U.S.T. 1341, 828 U.N.T.S. 221.

Nothing in this Federal Register notice is meant to reflect a consensus or recommendation of the Study Group. Discussions are ongoing in the areas of inquiry described below, and the input the Study Group receives from the public through the roundtable, the written submissions, and otherwise is intended to further those discussions.

Pursuant to 2 U.S.C. 136, the Study Group now seeks input, both through written comment and participation in the public roundtable described in this notice, on whether there are compelling concerns in any of the areas identified that merit a legislative or other solution and, if so, which solutions might effectively address those concerns without conflicting with the legitimate interests of other stakeholders.

2. Areas of Inquiry.

Public Roundtable. Participants in the roundtable discussions will be asked to respond to the specific questions set forth below in each topic area in this Federal Register notice.

Written Comments. The Study Group also seeks written comment on the topic areas and specific questions identified in this Federal Register notice.

3. Specific Questions.

The Study Group seeks written comment and participation in the roundtable discussions on the questions set forth below in this Section 3, inclusive of Topics A, B and C.

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, to be explained below) 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?

Background

Subsections 108 (d) and (e) provide exceptions to the exclusive rights of reproduction and distribution, permitting libraries and archives to make single copies of copyrighted works for users. Subsection (d) permits the copying of articles or portions of works, and subsection (e) allows the copying of entire works in limited circumstances.

Specifically, subsection (d) allows libraries and archives to reproduce and distribute a single copy of “no more than one article or other contribution to a copyrighted collection or periodical issue, or . . . a copy or phonorecord of a small part of any other copyrighted work” 17 U.S.C. 108(d) (2003). Subsection (e) allows the reproduction and distribution of an “entire work, or . . . a substantial part of it” if the library or archives first determines, “on the basis of a reasonable investigation,” that “a copy or phonorecord of the work cannot be obtained at a fair price” 17 U.S.C. 108(e). Additionally, both subsections require that (1) the copy become the property of the requesting user (so that libraries and archives cannot use these exceptions as a means to enlarge their collections, *see* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.03[E][2][b] (2004)), (2) the library or archives making the copy has no notice that the copy will be used for any purpose other than “private study, scholarship, or research,” 17 U.S.C. 108(d)(1) and (e)(1), and (3) the library or archives displays prominently at the place where orders are accepted a copyright warning in accordance with requirements provided by the Register of Copyrights. This notice must also appear on the order form. 17 U.S.C. 108(d)(2) and (e)(2).

Subsections (d) and (e) apply where a user makes a direct request of the library or archives providing the copy, as well as where copies are provided by another library or archives through interlibrary loan. Interlibrary loan is the practice through which libraries request material from, or supply material to, other libraries. Its purpose is to obtain, upon request of a library user, material not available in the user's own library. Where an *entire* work, such as a book, is sought, the library's copy of the book itself is usually delivered to the requesting user's library, called the borrowing library. There are cases, however, where it is unsafe or impractical to ship the work, such as if the copy is particularly fragile, rare, or unwieldy. In such cases, the fulfilling library or archives may create and deliver a copy instead, provided a copy cannot otherwise be obtained at a fair price and the other conditions of subsection (e) are met. Where just a *portion* of the work is sought, the library or archives may provide a copy under the conditions set out in subsection (d).

The scope of subsections (d) and (e) is limited by subsection (g), which states that the section 108 exceptions apply only to “the isolated and unrelated reproduction and distribution of a single copy or phonorecord of the same material on separate occasions.”

17 U.S.C. 108(g). Subsection (g)(1) further mandates that the provisions do not apply where a library or archives, or its employee

is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group

17 U.S.C. 108(g)(1). In addition, interlibrary loan or other user copies of articles or small portions of larger works under subsection (d) are limited by subsection (g)(2). This subsection states that section 108 does not permit the “systematic reproduction of single or multiple copies or phonorecords of material described in subsection (d),” and clarifies that copies made for interlibrary loan purposes do not violate the prohibition against systematic copying provided they “do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.” 17 U.S.C. 108(g)(2). This provision was included with the intention of preventing certain practices from developing under the rubric of “interlibrary loan,” such as systematic arrangements among libraries to effectively divide up and share subscriptions or purchases (such as where libraries X, Y, and Z all would like to obtain journals A, B, and C, so they agree that library X will purchase a subscription to journal A, library Y to journal B, and library Z to journal C, and they will share each subscription with each other through interlibrary loan). It was agreed in 1976 that these types of consortial buying arrangements should not be sanctioned by section 108 because by tipping the balance too far in favor of the interests of libraries they would materially affect sales.

Guidelines for interpreting the phrase “such aggregate quantities as to substitute for a subscription to or purchase of such work” were promulgated in 1976 by the National Commission on New Technological Uses of Copyrighted Works (CONTU) at the request of Congress and published in the Conference Report on the Copyright Act of 1976. The CONTU guidelines are not law, but were endorsed by Congress as a “reasonable interpretation” of subsection (g)(2). *Conf. Rep. No. 94-1733*, at 72-74 (1976). The guidelines (available in full at <http://www.copyright.gov/circs/circ21.pdf>) state that a library may not receive in a single calendar year more than five copies of an article or articles published in any given periodical within five years prior to the date of the request. The guidelines do not govern interlibrary loan copies of periodical materials published more than five years prior to a request. In addition, the guidelines provide that a library may not receive within a single calendar year more than five copies of or from any given non-periodical work – such as fiction and poetry.

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The CONTU guidelines also include certain administrative requirements. All interlibrary loan reproduction requests must be accompanied by a certification that the request conforms to the guidelines, and libraries and archives that request copies must keep records of all fulfilled interlibrary loan reproduction requests for at least three full calendar years after the requests are made.

Subsection 108(i) further qualifies subsections (d) and (e) by functionally limiting their application primarily to text-based works. Subsection (i) states that copies for users may not be made from

a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to . . . pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

17 U.S.C. 108(i).¹ For brevity's sake, this notice will refer to those categories of works excluded from subsections (d) and (e) by subsection (i) as "non-text-based works," and those currently covered by (d) and (e) as "text-based." A further description of subsection (i) and questions about whether and how it might be amended are set forth in Topic B, below.

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)." 17 U.S.C. 108(a) (emphasis added). 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

¹ Note that subsection (i) does not exclude pantomimes, choreographic works, or sound recordings that do not incorporate musical works from the subsection (d) and (e) exceptions.

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.

Libraries and archives maintain that their missions require them to be able to make and/or provide digital copies to users – both directly and via interlibrary loan – in order to respond to the fact that research, scholarship, and private study are now conducted in a digital environment. There is an increasing amount of so-called “born-digital” material in the collections of libraries and archives, and many users expect to receive materials electronically. There are also increased efficiencies and decreased costs when digital technologies are used. Overall, it is argued that it makes little sense in this day and age to require libraries and archives to print analog copies of requested materials and deliver them in person, by mail, or by fax. The Study Group’s understanding is that, as a matter of practice, some libraries and archives do in fact already engage in digital copying in making copies for users under section 108, and necessarily make incidental intermediate digital copies in doing so, but do not retain those copies and often deliver a non-electronic version to the user.

It is important to distinguish between permitting libraries and archives to *make* digital copies for users and permitting digital *delivery* of those copies. Permitting the making of digital copies for users would provide increased flexibility in how libraries and archives can produce the copies. Those digital copies might be distributed in any number of ways, for instance: (1) a photocopy could be made from an analog source and then sent via fax or mail to the requesting library; (2) a printout could be made from a digital source to create an analog copy, which is then sent via fax or mail to the requesting library; (3) a digital source file could be sent to the requesting library via e-mail or posted on a Web site with a secure URL for access by the user; or (4) a digital scan could be made from an analog source, which is then sent electronically as in example number three. Electronic delivery, as in examples three and four above, would provide increased efficiency and would allow libraries and archives and their users to take greater advantage of digital technologies to enable increased access to those works unlikely to be found in local libraries. Electronic delivery raises distinct issues from digital copying.

Just as digital technologies allow libraries and archives new opportunities to serve the public, the same technologies allow copyright owners to develop new business models and modes of distribution. Rights-holders have remarked that giving libraries and archives the ability to deliver copies to users electronically, unless reasonably limited, potentially could cause significant harm to rights-holders by undermining markets for digital works. Many rights-holders are shifting toward new models of distribution and payment. For instance, markets are emerging for the online purchase of articles or small portions of text-based works. Theoretically, if a user can obtain a copy online from any library through interlibrary loan, he or she might be less likely purchase a copy, even if purchases could be made conveniently. An additional concern is that

copies provided to users electronically are susceptible to downloading by the user and to downstream distribution via the Internet, potentially multiplying many times over and displacing sales.

Rights-holders are also concerned about digital copies being made available by libraries and archives under subsections (d) and (e) to users outside their traditional user communities, without the mediation of the user's own library. Online technologies allow libraries and archives to serve anyone regardless of geographic distances or membership in a community. Many of the section 108 exceptions were put in place on the assumption that certain natural limitations, or inherent inefficiencies in making photocopies, would prevent the exceptions from unreasonably interfering with the market for the work. For example, it was presumed that users had to go to their local library to make an interlibrary loan request. The technological possibility of direct digital delivery did not exist. But if it were to become possible under the 108 exceptions, for instance, for any user electronically to request free copies from any library from their desks, that natural friction would break down, as would the balance originally struck by the provisions. As such, the potential for lost sales could increase from negligible to measurable against the bottom line, and as such "conflict with the normal exploitation of the work." Berne Convention, art. 9(2).

One could, for instance, envision direct-to-user interlibrary loan arrangements – where a user could search for, request and receive a reproduction of a copyrighted work online from any library without having to go through the user's own library – that would directly compete with the rights-holders' markets. It is not clear to the Study Group that the existing provisions of subsections (d) and (e) would prevent libraries and archives from providing this type of universal on-demand access if digital copying and delivery are permitted without further qualification. While subsection (g) and the CONTU guidelines would limit the ability to use subsections (d) and (e) for such interlibrary loan practices for certain materials, they would not necessarily eliminate it. The question then is how to craft rules around digital copying and delivery to enable libraries and archives to service users efficiently, without opening up the exception in a way that could materially interfere with markets for copyrighted works – just as subsections (d) and (e) were limited in 1976 by subsection (g) in order to avoid the potential for those exceptions to be used in a way that would cause material market harm.

The primary issue for comment and discussion in Topic A is whether and under what circumstances digital copying and distribution under subsections (d) and (e) should be allowed. In responding to the questions posed in Topic A, please note that the Study Group is seeking responses regarding the application of subsections (d) and (e) as currently limited by subsection (i) (i.e., principally restricted to *text-based* materials). Questions about applying subsections (d) and (e) to non-text-based works will be

addressed in Topic B. Also note that the Topic A questions address copies made for a library's or archives' own users, as well as interlibrary loan copying.

Specific Questions

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?

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?

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?

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?

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?

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?

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?

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?

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”?

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?

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

TOPIC B: AMENDMENTS TO SUBSECTION 108(i)

General Issue

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

Background

As noted in the background to Topic A above, subsection (i) excludes most categories of non-text-based works from the exceptions provided to libraries and archives under subsections (d) and (e).

Questions have been raised as to why this exclusion was written into the law. The relevant House, Senate, and Conference Reports are silent on the matter, beyond the House Report's emphasizing that libraries and archives are free to avail themselves of the section 107 fair use factors in copying non-text-based materials for users. *See H.R. Rep. No. 94-1476*, at 78 (1976). One likely reason for the exclusion is that the principal copying device of concern in 1976, when section 108 was enacted, was the photocopier. Most libraries and archives did not possess the technology to make quality copies of non-text-based works and so may not have pressed for the right to do so.

As more material is generated in digital media that blurs the lines between traditional format types, subsection (i)'s exclusion of most non-text-based categories of works is being called into question. Increasingly, works are produced in multimedia formats, including some traditionally text-based works, such as presentations, papers, and journals. It has been argued that excluding these categories of works from some accommodation under subsections (d) and (e) hampers scholarly access to a critical and growing body of intellectual and creative material. In addition, restrictions on copies for users for non-text-based works are seen by some as placing a greater burden on researchers, scholars, and students of music, film, and the visual arts than on those who study text-based works, in that there are greater obstacles to obtaining research materials.

Eliminating the subsection (i) exclusions would raise a number of challenges, however. The subsection (d) and (e) exceptions were drafted to address text-based works; there are legitimate questions as to whether the provisions' respective conditions can be applied successfully to non-text-based materials in a digital environment. For instance, the current subsection (d) boundaries of "an article or other contribution to a copyrighted collection or periodical issue," 17 U.S.C. 108(d), do not neatly apply to non-text-based works. In the context of section 108, is one song on an album equivalent to an article in a journal? Is one photograph an entire work by itself or part of a larger copyrighted compilation? What if the song or photograph is available individually? In addition, business models used to market and distribute content may be affected differently depending on the media. Given evolving online entertainment business models, the ability to make and/or distribute digital copies could have different effects on markets for recorded sound and film, for instance, than on markets for text-based materials. Each of the issues raised previously in Topic A should be reconsidered in light of non-text-based media, as it is possible that views may change depending on the media.

Specific Questions

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?

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?

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?

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?

**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?

Background

Access to digital materials – particularly those that exist in purely electronic form – is generally granted pursuant to a license. There are, however, instances in which libraries and archives have lawfully obtained copies of electronic materials for which they have no license, and it is expected that this may increasingly be the case. Examples include donated personal or business files such as e-mails or other documents (where the donor agreement is silent on use rights), electronic manuscripts such as drafts of novels or notes, and legally captured Web sites. The mediation of a computer or other machine is necessary to perceive these works, and in the course of rendering the works in perceivable form, temporary and incidental copies are made. Libraries and archives have no clear guidance on whether they may make the copies – incidental or otherwise – required to perceive digital works.

In some cases, a license to make temporary, incidental copies of unlicensed digital works can be implied. For instance, it is commonly accepted that there are implied rights to make the incidental copies necessary to play a DVD or CD on a computer. The question is what, if any, implied rights exist for libraries and archives to facilitate access to other kinds of materials? What about works acquired in purely electronic form that are stored on a library's or archives' servers from which they must be copied and transmitted to a terminal for user access? In addition, display and/or performance as well as reproduction rights may be implicated in accessing these works.

The Study Group seeks input on how significant an issue this is – whether libraries and archives have and are likely in the future to have a sufficient number of unlicensed digital works to merit legislative attention.

The European Union's Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society provides one potential model for addressing these questions. It directs that member states may enact copyright exceptions permitting publicly accessible libraries, museums, educational institutions, and archives to communicate or make available "for the purpose of research or private study, to individual members of the public by dedicated terminals on the[ir] premises . . . works and other subject-matter not subject to purchase or licensing terms which are contained in their collections." Council Directive 2001/29/EC, art. 5(3)(n), 2001 O.J. (L 167) 10, 17. Would a similar exception be appropriate in the U.S?

Certain digital works can be accessed only through display or performance. In providing access to these works, libraries and archives that are open to the public (as they must be to qualify under subsection 108(a)) may need to publicly display or perform the works. For instance, if a library, archives, or museum publicly exhibits a work of audiovisual art, a motion picture, or a musical work, the exhibition would normally

constitute a public performance. There are currently no express exceptions in section 108 that address public performance or display. Section 109(c) of the Copyright Act provides an applicable exception to the display right:

[T]he owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owners, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

17 U.S.C. 109(c) (2003). This provision gives libraries and archives some leeway in displaying copies that they own, but it does not address the issues of any incidental copies that may be necessary in order to achieve this display. There is no parallel exception in the Copyright Act for public performances.

Note that for purposes of this discussion it is assumed that where the work was acquired through a license, the terms of the license govern and trump the section 108 exceptions, per subsection 108(f)(4).

Specific Questions

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?
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?
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?
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?

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?

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.)?

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?

4. Procedure for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments.

Requests to Participate in Roundtable Discussions. The roundtable discussions will be open to the public. Persons wishing to participate in the discussions must submit a written request to the Section 108 Study Group. The request to participate must include the following information: (1) the name of the person desiring to participate; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a written summary of *no more than four pages* identifying, in order of preference, in which of the three general roundtable topic areas the participant (or his or her organization) would most like to participate and the specific questions the participant wishes to address in each topic area.

Space and time constraints may require that participation be limited in one or more of the topic areas, and it is likely that not all requests to participate can be accommodated. Identification of the desired topic areas in order of preference will help the Study Group to ensure that participants will be heard in the area(s) of interest most critical to them. The Study Group will notify each participant in advance of his or her designated topic area(s).

Note also for those who wish to attend but not participate in the roundtables that space is limited. Seats will be available on a first-come, first-served basis. All

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discussions will be transcribed, and transcripts subsequently made available on the Section 108 Study Group Web site (www.loc.gov/section108).

Written Comments. Written comments must include the following information: (1) the name of the person making the submission; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a statement of no more than 10 pages, responding to any of the topic areas or specific questions in this notice.

Submission of Both Requests to Participate in Roundtable Discussions and Written Comments. In the case of submitting a request to participate in the roundtable discussions or of submitting written comments, submission should be made to the Section 108 Study Group by e-mail (preferred) or by hand delivery by a commercial courier or by a private party to the address listed above. Submission by overnight delivery service or regular mail will not be effective due to delays in processing receipt.

If by e-mail (preferred): Send to the e-mail address section108@loc.gov a message containing the information required above for the request to participate or the written submission, as applicable. The summary of issues (for the request to participate in the roundtable discussion) or statement (for the written comments), as applicable, may be included in the text of the message, or may be sent as an attachment. If sent as an attachment, the summary of issues or written statement must be in a single file in either: (1) Adobe Portable Document File (PDF) format, (2) Microsoft Word version 2000 or earlier, (3) WordPerfect version 9.0 or earlier, (4) Rich Text File (RTF) format, or (5) ASCII text file format.

If by hand delivery by a private party or a commercial, non-government courier or messenger: Deliver to the address listed above a cover letter with the information required, and include two copies of the summary of issues or written statement, as applicable, each on a write-protected 3.5-inch diskette or CD-ROM, labeled with the legal name of the person making the submission and, if applicable, his or her title and organization. The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format, (2) Microsoft Word Version 2000 or earlier, (3) WordPerfect Version 9 or earlier, (4) Rich Text File (RTF) format, or (5) ASCII text file format.

Anyone who is unable to submit a comment or request to participate in electronic form (either through e-mail or hand delivery of a diskette or CD-ROM) should submit, with a cover letter containing the information required above, an original and three paper copies of the summary of issues (for the request to participate in the roundtable

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discussions) or statement (for the written comments) by hand to the appropriate address listed above.