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DELIVERED VIA E-MAIL

Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure & Preservation Program
Office of Strategic Initiatives
Library of Congress
James Madison Memorial Building
Room LM-637
101 Independence Avenue S.E.
Washington, DC 20540

Re: Section 108 Comments

Dear Ms. Rasenberger:

In response to the Section 108 Study Group's December 4, 2006 request for comments relating to exceptions and limitations applicable to libraries and archives under the Copyright Act, Stanford University Libraries and Information Resources (SULAIR) submits these recommendations. We address each of the three broad topics outlined by the Study Group individually.

**Topic A: AMENDMENTS TO CURRENT SUBSECTIONS 108(d), (e), AND (g)(2)
REGARDING COPIES FOR USERS, INCLUDING INTERLIBRARY LOAN**

In topic A, the Study Group considers the need for and potential impact of changes to subsections 108(d) and (e) of the copyright statute, dealing with interlibrary loan. Interlibrary loan (ILL) is an important part of Stanford University Libraries' function, and directly supports its mission of enhancing teaching, learning and research. It is impossible for any library, even the best funded, to provide its patrons with access to all of the materials they require, and ILL arrangements enable libraries to significantly broaden the base of materials which patrons may access. In the academic realm, this means that individual libraries can collect in greater depth in some subject areas and rely on colleague institutions to do the same in other areas.

Roundtable discussions confirm that the ILL process is not controversial when whole works are being physically loaned, and the 1978 CONTU guidelines have provided an approach to photocopying of materials that is acceptable for both publishers and libraries, if not ideal for either. Thus, while a review of the law in the light of available digital technologies is both important and timely, a primary objective of any such revision must be the maintenance of the current, highly functional, system. ILL does serve a societal good, and the current law has been effective in allowing access without negatively impacting, and perhaps positively impacting, commercial markets.

Stanford University Libraries, like others in the roundtable discussion, rely heavily on sections (d) and (e) in our provision of ILL. Section (d) is used most often, in conjunction with the CONTU guidelines. The CONTU guidelines are integrated into our ILL systems, and our ILL team is fluent in those guidelines. As stated above, maintenance of the current, effective, ILL system is very important to us, partially because ILL statistics are an important guide for us in making purchasing decisions. If a journal is requested frequently through ILL, particularly if we have exhausted the requests permitted under CONTU, we generally attempt to purchase it. Similarly, if books are requested regularly through ILL, we will attempt to purchase. Trends in subject areas for ILL requests provide guidance as to areas of emerging interest among students and faculty.

While not explicitly permitted in the current statute, it is clear from the roundtable discussion that digital transfer of ILL documents between libraries is currently taking place. It is also clear that this type of transfer is generally acceptable to publishers and other content owners, and thus, should be explicitly permitted. Ephemeral digital copies are made in the process of affecting these transfers, and, per question 2, we believe that language explicitly permitting these ephemeral copies should be included in the statute. We agree with the statement, put forward by Kenny Crews during the roundtable, that the creation of these ephemeral copies is a Fair Use under section 107. We would argue strongly for language recognizing that these ephemeral copies, which are created pursuant to a legal purpose and not retained by the libraries in any way, qualify as a Fair Use. Barring that, we do agree that more flexible language 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” is appropriate for subsections (d) and (e).

Digital distribution of materials to patrons is of greater concern to publishers than digital transfer between libraries. Interestingly, digital distribution to patrons is also seen by libraries as less of an advance administratively than digital distribution between libraries, because of the continued need for tracking under CONTU. Nevertheless, library patrons operate more and more in a digital world, and they are requesting digital delivery. We believe that digital distribution to patrons should be permitted, and can be accomplished with minimal market impact if two relatively straightforward restrictions are applied: simple copy protection, and a requirement that patrons receiving materials explicitly acknowledge further distribution is

prohibited. We do not believe that the law should specify the format of copy restriction, in order to allow flexibility in the integration and use of emerging technologies. However, we do believe that restrictions should be able to be integrated into an ILL management software system, rather than requiring another layer of human administration.

We have no objection to revising the language of 108(d)(1) and (e)(1) to indicate that libraries may not retain any digital copies of materials created in the process of digital delivery. This is already standard practice where digital exchange between libraries is currently used.

We emphatically do not support a revision of subsection (d) to require libraries to search for journal articles that may be available for purchase on an individual basis. We would argue that ILL is not a substitute for one-off purchasing. Even if digital copying is explicitly permitted, ILL is not an instant gratification system. Requests must be reviewed individually by both the requesting and the lending institutions. Requests must be matched, and copies must be made, and whether those copies are digital or analog, human input is required. Where one-off purchasing serves the purchaser with limited time and accessible funds, ILL serves the low-cost, but willing-to-wait, market. We regularly turn to document delivery services for patrons, typically in the sciences, who have significant funding and value speed of delivery. At the other end of the spectrum, the grad student working on a modestly-funded project in a field where our collection is not extensive, will often depend on ILL. The CONTU guidelines ensure that these low-cost retrievals occur on a limited basis within an institution. In this respect, ILL serves a clear societal good.

Finally, we strongly agree with the discussion in the roundtable session that the CONTU guidelines are out of scope for the Study Group, and that no recommendations for changes in these long-established guidelines should be made by the group at this time. The “rule of five” established in the CONTU guidelines and used by almost all libraries in determining what is appropriate to request in ILL can still be applied effectively in a digital environment, and the existing guidelines can and should remain in place. We do NOT believe changes to the CONTU guidelines are appropriate for the Section 108 study group to suggest at this time, both because the guidelines are outside of Section 108, and therefore outside of the group’s purview, and because it is not necessary to alter this accepted standard.

Topic B: AMENDMENTS TO SUBSECTION 108(i)

Subsection (i) of Section 108 excludes most categories of non-text works from the exceptions provided to libraries and archives under subsections (d) and (e). In the library today, copying of non-text materials is undertaken only when a clear Fair Use is demonstrated. However, an increasing amount of scholarly discussion and exchange is composed of or incorporates pictures, video, and other excluded formats, and we therefore support the proposal addressed in Topic B, to amend or rescind subsection (i) in order to expand (d) and (e) to cover additional classes of works.

The inclusion of additional classes of works under (e) would have limited market impact, as the statute already includes a test of commercial availability. The application of subsection (d) to non-text works does become problematic, as the definition of “portion” would be subject to interpretation. However, in many cases a “portion” can be readily defined, and is similar to what would be permitted under Section 107 (e.g. a short clip for use in research in film studies). In these cases subsection (d) can be effectively applied. Since only a small portion of the work is being reproduced, the market impact should be even less significant than is currently the case with journal articles. Nevertheless, we advocate the establishment of CONTU-like guidelines for each of the content classes specified in subsection (i) in order to clarify the level of reproduction that is permitted. We feel separate work groups should be established for each class of material under consideration, as these CONTU-like guidelines would be out of scope for the Study Group.

Because of the need for clarity in the type of materials appropriate for delivery under this system, we anticipate that application of subsection (d) to these additional classes would be limited until CONTU-like guidelines are available. Libraries will generally not be willing to take the risk of establishing a standard. However, we would expect to see the immediate application of subsection (e) for these additional classes of works by our Special Collections team. Special Collections holds significant quantities of non-text materials that are not commercially available, which currently require a Fair Use assessment each time a reproduction request is received. Expansion of subsection (e) to these materials would greatly simplify that process. Again, we do not anticipate a market impact, as these pieces are unique and not commercially reproduced.

It was noted in the roundtable discussions that some AV materials go into “dormant” periods, and that enforced scarcity is used as a marketing tool. However, this enforced scarcity is all the more reason that ILL access to the materials should be available to those who require access to the materials for private study. Again, a basic level of copy protection and a requirement that users acknowledge the use limitations on the material should be efficient for eliminating commercial impact. Should the status of a work change, a new ILL request will need to be handled differently. However, the small number of researchers whose work or project is taking place during that dormant period should not be hamstrung, and eliminating legal access to a copy for study is more likely to drive a user to an illegal copy. Provision of an ILL copy is NOT the same as making the work commercially available.

Topic C: LIMITATIONS ON ACCESS TO ELECTRONIC COPIES, INCLUDING VIA PERFORMANCE OR DISPLAY

Finally, we note that the inability to develop a consensus of understanding about the scenarios for Topic C, under which libraries would provide access to unlicensed digital material, implies that it is inappropriate to engage in rulemaking at this time. In the absence of a clear scenario in which such new rules would be applied, or cases where the current law is inadequate, it seems that new rules are premature.

Thank you for your consideration of these recommendations. We appreciate the efforts of the Section 108 Study Group to address this complex issue, and look forward to continued discussion and debate.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Keller".

Michael A. Keller
University Librarian
Librarian

A handwritten signature in black ink that reads "Mariellen F. Calter".

Mariellen F. Calter
Executive Assistant to the University