

March 20, 2006

Ms. Mary Rasenberger
Policy Advisor for Special Programs
U. S. Copyright Office
Library of Congress
Washington, D.C.

Dear Ms Rasenberger:

My thanks to the U.S. Copyright Office, Library of Congress, for inviting public comment on certain issues raised in the context of the Section 108 Study Group: Copyright Exceptions for Libraries and Archives (“Study Group”). The issues under consideration are quite timely in light of the rapid development of new methods of creating and enabling access to protected works expressed in various digital forms. The Study Group seeks comments on a wide range of topics that relate generally to the challenges faced in implementing Section 108 in light of new technical advances. I am writing to respectfully request that I be allowed to participate in the March 16, 2006 roundtable in order to focus on a specific aspect relating to the work of the Study Group, namely, **Topic 2: Amendments to Current Subsections 108(b) and (c)**, in particular, the subpart entitled: “Access to Digital Copies Made under Subsections 108(b) and (c).”

At the end of the discussion relating to Topic 2 in the Federal Register notice dated February 15, 2006, the following question is posed: “Should the rules be different depending on whether the replacement or preservation copy is a digital tangible copy or intangible electronic copy (e.g., a CD versus an MP3 file) . . .?” I suggest that, in formulating a reply to this query, a more fundamental question should be addressed: the meaning of the concepts “digital tangible copy” and “intangible electronic copy.” A similar issue arose at a recent Symposium sponsored by the National Academies on the proposed WIPO “webcasting” treaty (http://www7.nationalacademies.org/biso/Webcasting_Treaty_Symposium.html) concerning the meaning of “fixation” under U.S. Copyright Law and how it differs from the European approach. Since information subject to copyright and related rights made available at various “websites” is of interest to “libraries,” “archives,” “museums” and similar information resources, rules covering the meaning of “fixation” or “electronic copy” should be formulated. There is a need for the copyright law to accommodate more specifically new digital forms of expression.

In a dynamic, distributed network environment, digital forms of creating works subject to copyright are emerging that require a shift of focus away from the “copy” or “fixation” as tied to a physical embodiment of a work. In addition to works sometimes called “born digital,” derivative works are created that are based on or incorporate preexisting works, where there is at best uncertainty whether there has been a first fixation in a “copy” or “phonorecord” as required under the current U.S. Copyright Law. Even where there may be a later fixation in a physical copy of all or parts of a work

expressed in digital form, the manifestation of the work may be distributed, interactive and malleable, generating further works on the fly.

As you are aware, under Section 102(a) of the current U.S. Copyright Law, title 17 U.S.C., “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .” For purposes of copyright protection, a work is fixed in a tangible medium of expression generally when it is embodied in a “copy” or “phonorecord;” and, under Section 101, “copies” are defined as “material objects.” This has implications for many provisions of the law, including the meaning of “publication” and the rights of reproduction and distribution. In my view, the time is ripe to explore an alternative basis for copyright protection to attach that allows for the protection of works expressed in digital form such as a unique and persistently identifiable sequences of bits, or sets of such sequences (called a “digital object”). It should be stressed, however, that, unlike the law in certain other countries where there is no fixation requirement (and this point is a detailed discussion in itself), there needs to be some way to uniquely and persistently identify any such data structures in a way that is logically equivalent to the physical copy. A new paradigm is advisable moving forward. Tying any proposed revisions of Section 108 (b) and (c) solely to what is termed either a “digital tangible copy” or “intangible electronic copy” would appear to be a short-term solution at best.

For several years, as counsel to the Corporation for National Research Initiatives (“CNRI”), I have been exploring alternatives to the requirement of fixation in a tangible medium of expression on which to build new methods for managing information in a network environment, of which digital rights management is a part. I have also explored new digital forms of expression that may be more flexible, especially for works that fall outside the scope of works now covered by Section 108. For example, where audio-visual or musical works are expressed in a digital form of expression, they may be viewed as the same or similar to literary works such as journals, books or computer programs. There are also many works created in a business context that now incorporate a variety of works other than textual material (see, e.g., R.E. Kahn & P.A. Lyons, “Representing Value as Digital Objects,” <http://www.dlib.org/dlib/may01/kahn/05kahn.html>) that may be of interest to libraries and archives.

A specific suggestion that I put forward at a UNESCO conference a few years ago may be of interest to the Study Group in this context. As a requirement for copyright protection to attach, I proposed an amendment to the U.S. Copyright Law as follows:

“In addition to the existing requirement under U.S. law that an original work of authorship be ‘fixed in a tangible medium of expression’ for federal copyright protection to attach, an alternative criteria may prove very useful in a network environment:

an original work of authorship structured in a persistent, uniquely identifiable medium of expression from which it may be reproduced, perceived, performed or accessed by any device or process for a period of more than transitory duration.

For purposes of this proposed new provision, structured may be defined to include digital objects and other equivalent data structures.”

A digital object with its associated unique persistent identifier would thus serve much the same purpose as a material fixation under current U.S. law. This proposal is described further in an article I wrote entitled "Managing Access to Digital Information: Some Basic Terminology Issues." It is available on the Internet at <http://www.asis.org/Bulletin/Dec-97/Lyons.htm>.

Again, I appreciate the opportunity to provide comments to the Study Group on certain aspects of the important issues relating to Section 108 under consideration; and I would be pleased to participate in the roundtable discussion on this matter to be held at Washington, D.C. on March 16, 2006.

Respectfully submitted,

Patrice A. Lyons

Law Offices of Patrice Lyons, Chartered
910 17th St., N.W., Suite 800
Washington, D.C. 20006