

VIA E-MAIL: section108@loc.gov

Ms. Mary Rasenberger

Director of Program Management

National Digital Information Infrastructure and Preservation Program

Office of Strategic Initiatives

Library of Congress

RE: Section 108 Study Group: Copyright Exceptions for Libraries and Archives (71 Fed. Reg. 70,434 (Dec. 4, 2006))

Dear Ms. Rasenberger:

The Recording Industry Association of America (RIAA)¹ appreciates this opportunity to comment on the activities of the Section 108 Study Group. Most of the following comments pertain to issues raised in the above-referenced Federal Register notice of December 4, 2006, although some touch on broader issues.

The recording industry has a real stake in the Study Group's recommendations, including those that may be made on topics covered by the Federal Register notice. To some extent, the impact on the recording industry of Section 108 has been minimized in the past because of section 108(i), which excludes musical works from the operation of some of the provisions of Section 108. We understand that the Study Group is considering what changes to recommend to section 108(i), and to the extent that the exclusion of musical works is abandoned, the impact of Section 108 on recording companies will surely increase. The impact will also increase to the extent that any recommendations are made that facilitate digital copying of works by libraries, archives and museums. (Note that sound recordings are today commercially released in the U.S. almost exclusively in digital formats, whether on CD or other tangible media, or via download or streaming online.)

As a general matter, RIAA urges the Study Group to pay careful attention, as it prepares its recommendations, to the risks of unintended consequences. Study Group participants are very familiar with how Section 108 has been applied in the past, and by whom, to the kinds of subject-matter on which these provisions have traditionally focused (as the Notice describes it, "text-based works.") However, any new or revised Section 108 could be applied in new ways, by entities outside the traditional understanding of the terms "libraries, archives or museums" ("LAMs"), to non-traditional subject matter (including sound recordings). In its

¹ The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

recommendations, the Study Group needs to take into account these new uses, new users, and new subjects of use. It must also anticipate, to the extent possible, the ways in which these expanded applications of Section 108 could run afoul of the international standards to which the U.S. is bound in its recognition of exceptions and limitations to copyright protection, notably the requirement that exceptions and limitations be restricted to special cases that do not conflict with the normal exploitation of copyright works (including sound recordings) and that do not unreasonably prejudice the legitimate interests of authors, producers, or performers. See TRIPS Art. 13; WIPO Performances and Phonograms Treaty, Art. 16.2.

The Study Group could also take specific steps in its recommendations to reduce the risk that a revised Section 108 will be applied in unanticipated ways that unduly interfere with legitimate markets for copyrighted materials, including sound recordings. Some of these steps include:

- Proposing statutory definitions of the beneficiaries of the exception – libraries, archives, and (presumably) museums (LAMs) – to ensure that the exception is focused on promoting scholarship and research, and to reduce the risk of abuse by those presenting themselves as “virtual” LAMs.
- The categories of “private study, scholarship and research” as justifications for LAMs providing copies to patrons under section 108 should be re-examined. In particular, “private study” should be eliminated because it presents a high risk of abuse, and the legitimate aspects of this use are already covered under scholarship and research.
- Regarding section 108(i), if the category-based exclusions that it now contains are to be altered or abandoned, consideration should be given to an exclusion aimed at commercially-released entertainment products. This change alone would substantially reduce the risk that the exception will be applied in ways that exceed international standards.
- Whether or not commercially-released products are categorically excluded from coverage in a revised section 108(i), the requirement that a library, archive or museum make a “reasonable investigation” whether the item can be acquired commercially before it resorts to section 108(e) to make a copy should be fleshed out, to take account of the myriad new channels of commercial distribution now available. For example, a LAM should certainly be required to see if a legitimate copy of a sound recording is available for download before it resorts to copying under section 108. The thriving marketplace for used music CDs should also be consulted where appropriate. Finally, regarding the section 108(e) criterion that the copy be obtainable at a “fair price,” the price of a copy located in the marketplace should be presumed fair unless the contrary can be demonstrated.
- Any uses allowed under section 108 must be consistent with technological protection measures that have been applied (by or on behalf of the copyright owner) to the copies in the collections of the LAM in question.

- Any digital dissemination of materials under section 108 should not extend to commercially-released entertainment products, nor to sound recordings owned by commercial record labels.

RIAA appreciates your consideration of its views. Please contact the undersigned if there are any questions or if you need further information on any of the points above. We look forward to reviewing the further work of the Study Group.

Respectfully submitted,

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