



March 15, 2007

**Comment for Library of Congress Study Group on Exceptions and Limitations  
Applicable to Libraries and Archives under Section 108 of the U. S. Copyright Act**

Mary Rasenberger  
Director of Program Management  
National Digital Information Infrastructure and Preservation Program  
Office of Strategic Initiatives  
Library of Congress

Dear Ms. Rasenberger,

The American Chemical Society (ACS) is the world's largest scientific society with more than 160,000 members. ACS advances knowledge and research through scholarly publishing, scientific conferences, information resources for education and business, and professional development efforts. The ACS also plays a leadership role in educating and communicating with public audiences—citizens, students, public leaders, and others—about the important role that chemistry plays in identifying new solutions, improving public health, protecting the environment, and contributing to the economy.

ACS Publications is a division of the American Chemical Society. The Publications Division strives to provide its members and the worldwide scientific community with a comprehensive collection, in any medium, of high-quality information products and services that advance the practice of the chemical and related sciences. Currently, over 35 peer-reviewed journals and magazines are published or co-published by the Publications Division. Over 220,000 pages of research material are published annually both in print and on the Web. With the introduction of the ACS Journal Archives in 2002, we provide searchable access to over 450,000 original chemistry articles dating back to 1879. Citation information for articles is available free of charge prior to their hardcopy publication via our ASAP Alerts service. Table of Contents Alerts for published issues are also available.

Since the beginning of the transition to electronic publishing in the mid- to late-1990s, ACS Publications has developed, and is continuing to develop, innovative and accessible business models, policies, and practices to support the scholarly communication process and broaden information access. These activities and initiatives include, but are not limited to, the following:

- Freely accessible abstracts, supporting information, and data sets
- Free hardware, software, funding, staff, and technical support to over 200

- editorial offices worldwide
- The implementation of online manuscript submission and electronic (now web-based) peer review systems
  - The adoption of OpenURL standards to improve the discoverability of research and support libraries in cost containment efforts
  - Flexible subscription options including electronic-only, title-by-title pricing, and discounts for bulk and consortia purchases
  - Pay-per-view article access for those unable to subscribe
  - Free, author-directed links, called Articles-on-Request, that allow researchers themselves to share the final published version of their article with 50 colleagues during the first year of publication, and an *unlimited* number of colleagues thereafter
  - Free and unrestricted Web access on publication, through the *ACS AuthorChoice* option, to the final version of a research article in exchange for a fixed, often discounted, fee from the sponsoring author
  - Retrospective digitization, at our own expense, of over 460,000 scholarly communications back to volume 1, issue 1 for every journal we publish
  - The option to access Archive content through progressive pricing options at a cost between \$ 0.003 - \$ 0.01 per article as well as the recently introduced option to make a one-time payment, accompanied by a nominal annual maintenance fee, to secure ongoing access rights
  - The implementation of a XML-based production workflow to improve operating efficiencies and allow for more flexible publishing options

Because of our core values as a society, at a time when our usage is increasing at annual levels in excess of 20%, our prices have increased in single digits. We have made a public commitment to the long-term archiving of our electronic content and are investigating the creation of mirror sites at remote locations. The ACS has already participated in the development of one archiving solution, LOCKSS (Lots of Copies Keep Stuff Safe) from Stanford University and is evaluating participation in others.

In addition to our efforts as an individual society, the ACS, along with other publishers, has donated staff, resources, and funds for the creation and ongoing administration of industry-wide efforts to improve scholarly communication, dissemination, and archiving such as:

- CrossRef – a publisher-initiated, non-profit organization, whose goal is to promote the linking and discovery of original scientific works. This organization has overseen the interlinking of references in over 14,000 journals from hundreds of journal publishers (see [www.crossref.org](http://www.crossref.org)) as well as the creation of innovative searching tools designed to improve the discoverability of research with such global search providers as Google and MSN
- COUNTER – a joint publisher/library initiative to establish an open international set of standards and protocols governing the recording and exchange of online usage data for journals, databases, books, and online reference works
- The establishment of standards and methodologies for electronic preservation,

- including archival linking, through participation in such initiatives as LOCKSS
- The development of PatientINFORM projects with the American Cancer Society and the American Heart Association, and related projects such as the Diabetes Learning Center. This initiative assists patients to expert information on, and free access to, the latest articles on their particular ailment. It will be expanded to other diseases and to other countries

As an organization deeply rooted in the scholarly community, we share the Study Group's interest in ensuring that the impact of new technologies on copyright-related issues is taken into account in continuing to balance the interests of authors, publishers, libraries, and archives. We participated in the Study Group's Public Roundtable discussion on exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act and would like to offer our written comments on this issue as well. Today, as in Chicago on January 31, our comments will address the "interlibrary loan" issues outlined in Topic A of the Section 108 Study Group announcement published on December 4, 2006.

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?

ACS response: We believe there are several beneficial changes which could be made to the provisions governing reproduction by libraries and archives. They are as follows:

- The "single copy restriction" can be relaxed to allow the making of a transient and incidental digital copy from a print original to facilitate transmission of that copy from a fulfilling to a requesting library – i.e. a library to library transmission. The copy should be used only in the course of a fulfilling library scanning a print original and sending that scanned file to a requesting library. The copy received by the requesting library should continue to be delivered to the end-user in print form.
- Guidelines along the CONTU "rule of 5" model should be negotiated to deal with works older than five years, provided that such guidelines recognize the developing market in legacy archive content. We, like most publishers, have gone to considerable efforts to make backfiles available online, and digital copyright exemptions should not undermine the effort that created them in the first place.
- Requesting or borrowing libraries should have more carefully defined user communities for their interlibrary loan requests. We second the definition

suggested by the International Association of Scientific, Technical & Medical Publishers which is as follows:

- Academic libraries - staff, students and faculty,
  - Museums or archives - professional staff, and
  - Public libraries - community residents.
- Objective standards, that safeguard the privacy of patrons, should be created and implemented as part of Section 108 to govern the measurement and reporting of interlibrary loan activity to concerned stakeholders such as lawmakers, the public, and rightsholders in order to ensure that all stakeholders have the data necessary to make informed decisions about the adequacy of copyright privileges and exemptions. Such record-keeping requirements should apply equally to both lending or fulfilling libraries as well as borrowing or requesting libraries. We feel that the CONTU “Rule of 5” could potentially serve as a useful guideline.

In addition to these changes, we feel that it is essential to maintain the principle of mediation between requesting/borrowing libraries and lending/fulfilling libraries. In our view, this is fundamental to the difference between scholarly interlibrary loan and commercial document delivery.

We are concerned that permitting digital delivery to end users would have serious and potentially irreversible, harmful effects on a system of scholarly communication that, although still evolving, is effectively serving the interests of researchers and the American public. The delivery of a file or copy in digital form (regardless as to whether the original is in digital form or it is scanned from a print copy) to an end-user should continue to be clearly identified as being outside the scope of Section 108.

Very truly yours,

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### 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?

ACS response: The general recommendations we have made above are the only changes we believe could be made without unduly interfering with the development of the free market for subscriptions, purchases, and individual journal article transactions. We know from experience that it requires large capital and operating expenses to peer review, edit, disseminate, and maintain a permanent archive of daily expanding volumes of scientific information. The financial support that makes this activity possible should not be undermined.

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?

ACS response: We believe that the “single copy restriction” can be relaxed to allow the making of a transient and incidental digital copy from a print original – but only to facilitate transmission of that copy from a fulfilling to a requesting library. The copy should be used only in the course of a fulfilling library scanning a print original and sending that scanned file to a requesting library, provided the copy delivered to the end-user is in print form only. This principle has been accepted by the Subito academic consortium in Germany where the end-user collects a print copy, even though the Subito transmits a digital image to speed the process.

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?

ACS response: There is a regrettable lack of measurement and reporting requirements for disclosure about such activity to concerned stakeholders. ACS believes that, in a digital era, greater information, at levels that safeguard the privacy of patrons, is needed to ensure that key stakeholders such as lawmakers, the public, and rightsholders have the data necessary to make informed decisions about the adequacy of copyright privileges and exemptions. We are concerned that permitting digital delivery to end users would have serious, and potentially irreversible, harmful effects on a system of scholarly communication that, although still evolving, is effectively serving the interests of researchers and the American public.

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?

ACS response: Please see answer to question 3.

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?

ACS response: We believe that the “single-copy restriction” can be modified to allow the making of a transient and incidental digital copy from a print original – but only to facilitate transmission of that copy from a fulfilling to a requesting library. The copy should be used only in the course of a fulfilling library scanning a print original and sending that scanned file to a requesting library, provided the copy delivered to the end-user is in print form only. As noted earlier, this principle has been accepted by the Subito academic consortium in Germany where the end-user collects a print copy, even though Subito transmits a digital image to speed the process. We share the view that DRM protection (preventing alteration and further distribution) for digital copies is a useful element of rightsholder-licensed document delivery activity.

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?

ACS response: As in our previous responses, digital copying should be restricted to the fulfilling library to assist its interlibrary loan exchange to a requesting library. It should only encompass the right to make a transient and incidental digital copy from a print original to facilitate transmission of that copy from a fulfilling to a requesting library. The copy received by the requesting library should be delivered to the end-user in print form only. We share the view of many publishers who believe that library user communities need to be responsibly defined in the context of copyright privileges and exemptions. We second the definition suggested in the International Association of Scientific, Technical & Medical Publishers response which is as follows:

- Academic libraries - staff, students and faculty,
- Museums or archives - professional staff, and

- Public libraries - community residents.

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?

ACS response: We support clarification of this point and believe that the mediation of a library or archive for an interlibrary loan request is essential. It is an important differentiator between interlibrary loan activity and document delivery activity.

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?

ACS response: We support a clarification that does not permit libraries and archives to use digital copies of works copied under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling future interlibrary loan requests. We do not support the delivery of digital files to end users through interlibrary loan.

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”?

ACS response: We welcome the Study Group’s recognition of the market which has developed for the purchase of digital copies of individual articles. It is a market now firmly established, and revenues from this activity provide an additional source of funds used to support society activities which are not self-funding. We believe that testing whether a requested item can be readily obtained should be incorporated into law. We share the sentiment that it is not the role of government to determine what is, or is not, a “fair price”. We suggest a more practical and effective term here would be “competitive”.

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?

ACS response: We do not believe that a general revision of the CONTU guidelines is required. However, clarifications of user communities and the creation of objective standards, with adequate safeguards to protect the privacy of patrons and including record-keeping by "lending" libraries, should be considered to govern the measurement and reporting of interlibrary loan activity to concerned stakeholders. Such standards could ensure that all stakeholders have the data necessary to make informed decisions about the adequacy of copyright privileges and exemptions. With respect to the five year limitation, we do believe that guidelines should be negotiated to deal with works older than five years, provided that such guidelines recognize the developing market in "back-files". We, like most publishers, have gone to considerable efforts to make back-files available online, and digital copyright exemptions should not undermine the effort that created them in the first place.

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

ACS response: It is our understanding that that copyright law is a matter of national practice and we believe that copyright exceptions can only be limited to national territories. In our view, the concept of transnational interlibrary loan cannot be the subject of U.S. copyright law. Deliveries beyond U.S. borders can only be effected under licensing arrangements between rights-holders and their agents.