



UNIVERSITY OF WASHINGTON

UNIVERSITY LIBRARIES

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Thank you for the opportunity to provide comments on questions relating to copyright exceptions for libraries and archives. Copyright law is of crucial importance to the operations of the University of Washington Libraries as it provides the legal framework for accessing and preserving library materials. As higher education makes more use of non-textual formats and digital material it is crucial that copyright law remain flexible and accommodate these new technologies and uses. We strongly support the elimination of subsection (i) so that non-print formats can be treated in a similar manner as analog print materials.

I look forward to the Study Group's recommendations.

I have attached the University of Washington Libraries detailed response to individual questions.

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) 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.

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?

The current copyright law, particularly Sections 107 and 108, have allowed libraries, in most cases, to fulfill their mission of providing information to library users. Current rules that treat media works differently have not allowed libraries to make full use of their collections and provide appropriate services to users.

Extensions of copyright terms have made it difficult for libraries and library users to make full use of older works where the copyright owners cannot be identified. We are aware of proposed Orphan Works legislation that will mitigate these issues but the inability to locate copyright owners is a large problem for libraries who are engaged in digitization projects.

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?

Yes, incidental ephemeral copies necessary for the processing of requests for copies should be allowed. No use is made of the temporary copies so when the process is completed there is one requester with one copy just as previously when all copies were sent in hardcopy via mail. No copies are retained by the library.

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?

Copying for our own users at the Seattle campus is at a low level. There is a higher level of copying from Seattle collections for the branch campus communities. We do expect an increase in activity as we put more material in remote facilities and expand services for distance learners. We already scan most material for digital delivery.

We provide copies to other libraries who in turn would pay copyright fees for requests in excess of the CONTU guidelines.

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?

We do not as a rule copy entire books unless they are in the public domain or we get permission. More clarity on digital reproduction would not change this.

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?

We do not need any further controls on additional distribution of digital works. We are not aware of any problems of users further distributing works that we have provided to them. Copyright notices are currently provided on each document sent.

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?

No, users should be able to request copies from any library. Many of the requests that we fill from outside our user community are for materials that we uniquely hold. Having all requests mediated through a library increases costs and receipt time and would have negative effects on research and scholarship. In reality most users will use their "home" library because most libraries subsidize or cover all the costs for interlibrary loan activities.

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?

No, as with Question 6 this process would have a negative impact on research and scholarship if required. Again, most users will use their "home" libraries because of possible subsidization of costs.

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?

The digital file is a copy so it seems that the existing wording can stand. We do not retain copies nor would we use these copies to enlarge our collection.

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”?

No, this would severely impact our ability to make copies for research and scholarship. We already pay higher subscription rates based on the idea that more people will use our journals and media, so it doesn't seem right that our user community should also have to pay permissions for each copy.

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?

No. No changes are needed in CONTU.

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

No.

Topic B: Amendments to Subsection 108 (i)

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

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?

The section should be eliminated. With more emphasis on media in higher education it would be advisable to remove restrictions on the rights of reproduction and distribution for media. Copying of audio or visual works could follow the guidelines for print in sections (d) and (e). It is doubtful that libraries would compete with existing markets for “small parts” of audio and video content given that most libraries charge a basic fee for copying that would be more than the purchase of a copy from existing sources. So, for example, no library would be able to provide a copy of a song for less than what iTunes charges.

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?

Streaming technologies can possibly be used to limit further reproduction. We do not support the use of digital rights management software as this would add cost and would create difficulties for users.

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?

No and no changes are required to CONTU.

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?

Yes, this will act to preserve the coherence of copies of multimedia 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?

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?

Universities are creating large amounts of unlicensed digital relating to faculty research and scholarship. Digital works should be subject to the same copyright laws as non-digital works. Temporary copies should be allowable.

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?

No, we believe that there should be no distinction between digital and non-digital works.

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?

Again, there should be no distinction between digital and non-digital works.

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?

We provide access to digital works in a manner similar to 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?

Libraries should be able to provide users with copies regardless of format. If a server copy is required to do this it should be allowed.

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.)?

No.

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?

Public performance and display rights might be exercised in order to provide access to some media types. These should be allowed under Section 107 and no additional law is needed.