Sharing and Transforming Access to Resources Section
A Section of the Reference and User Services Association
A Division of the American Library Association

TO: Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives, Library of Congress
section108@loc.gov

FROM: Tanner Wray, Chair, ALA/RUSA/STARS
Charlotte C. Rubens, Chair, ALA/RUSA/STARS Legislation and Licensing Committee

RE: Response to Section 108 Study Group's Questions

DATE: February 26, 2007

While the Sharing and Transforming Access to Resources Section (STARS) of the Reference and User Services Association (RUSA), a division of the American Library Association (ALA), recognizes that copyright holders are granted certain exclusive rights by the copyright law, we strongly urge balance between these interests and the interests of libraries, archives, and their users, particularly with regard to how those exclusive rights are limited in Section 108. As librarians and library staff we are dedicated to supporting the common mission and social responsibility of libraries to work towards the realization of such values as access, service, and the public good, as these values are defined in the American Library Association's governing documents: access means that all library materials, regardless of format, should be available to library users; service refers to how we strive to offer the highest level of assistance to our users; and finally, the public good represents our belief that libraries are essential to the democratic process. As interlibrary loan (ILL) practitioners, we are especially committed to promoting an understanding of our operations and how these values influence our work.

A foundation of ILL is the recognition that no library is able to be entirely self-sufficient, and resources must be shared among different institutions in order to meet user needs. We therefore have considerable concern about how proposed changes to Section 108 of the copyright law might affect interlibrary loan operations and our users. Interlibrary loan transactions are always made at the request of a legitimate member of the library/archives' traditional or defined user community. These members are generally those whose fees, tuition, or tax dollars entitle them to library privileges, including interlibrary loan. Because most corporate libraries do not qualify for Section 108 exemptions, the focus of this document is on academic and public libraries and their users.

Questions from Topic A

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?

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 […]?

Placing restrictions on the ability of libraries and archives to make digital copies for interlibrary loan users violates the above-discussed values. Library users expect that their requested copies will be electronically delivered to them, and the library community believes Section 108 (d), as well as Section 107, currently permits digital reproduction and delivery. To be required to produce hard copies inhibits service, and to deny electronic copies to a population of a library's users because of its format would deny access. It is advisable, then, to relax the single copy restriction, as is suggested in question 2, so that digital copies can be more readably available. We suggest that language like "such copies as reasonably necessary to provide a single copy to the user" could replace the single-copy restriction.

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?

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?

Most libraries offer interlibrary loan services to their user community in order to meet those users' needs. Although both subsection (d) and subsection (e) are of vital importance for interlibrary loan operations, neither subsection is used very often for direct copies for a library's own users, although this will likely change in the future due to the increased use of remote storage and also to the increased number of remote library users. Regardless, digital reproduction and delivery have been a standard and common part of interlibrary loan operations for some time now, and therefore it is not expected that explicit permission for this activity would increase the number of requests.

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?

All copies of requested materials supplied to users contain the required notice of copyright. We believe that there is no further need for protection measures. Once they have received their requested copy, the onus of adhering to the copyright law properly falls to the users. We believe that it is not, nor should it be, within the purview of a library/archives or an ILL department to monitor the users' subsequent use of requested materials.

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?

Interlibrary loan transactions are always made at the request of a legitimate member of the library/archives' traditional or defined user community. These members are generally those whose fees, tuition, or tax dollars entitle them to library privileges, including interlibrary loan. There are several reasons for this condition. Interlibrary loan departments need to maintain accurate records of their users' contact information such as address and phone numbers to keep better track of returnable materials in cases of lateness or damage. Also, interlibrary loan departments generally are cost centers rather than revenue generators for their institutions: interlibrary loan transactions cost the borrowing institution money, even when that institution has a consortial agreement with the lending institution, through staff time, copy charges, costs of delivery, and other operating costs. Interlibrary loan is an expensive operation and is often treated as a method of last resort in obtaining materials because of this cost. Interlibrary loan departments simply cannot afford to offer their services beyond their primary user community. Therefore, there is no need to "deter online shopping" for copies.

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 of another library or archives?

The term "unmediated" is a misnomer when applied to interlibrary loan transactions, for interlibrary loan transactions are mediated by definition. "Unmediated" requests may not necessarily be processed by a human, but ILL personnel still set the parameters and conditions under which requests are sent to other institutions to be filled. Interlibrary loan departments are often part of consortial relationships, and these formal relationships influence ILL departments' decision in choosing where to direct their requests, because they can get requested items faster and/or at a lower cost. ILL departments may also prefer certain Lenders based on known policies, or because of past service. However, consortial membership often also allows "unmediated" requesting by the user, resulting in faster service, as a request can go "directly" to a potential lender. This system-mediated model is coming into common use because of advances in national and international standards and internet protocols. In any ILL scenario, the user's home (requesting) library must comply with copyright law, as well as ILL codes and protocols, whether each request is mediated by staff or not, and automated systems provide tools to assist in such compliance. In short, there is no need to require that ILL requests be mediated because mediation is inherent to the ILL process.

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"?[...] 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?

ILL departments only make copies for users in response to a submitted request. Libraries and archives do not add digital copies obtained through ILL to their own collections except under special arrangement, because it is costly to do so, and because ILL departments rarely receive multiple requests to obtain the same material. Furthermore, libraries do not retain digital copies for their own collections because to do so is a copyright violation under current law. If the prevailing opinion is that the language in

question should be updated, perhaps something like "the copy or phonorecord is delivered or made accessible only to the user who requested it."

9. [...] [S]hould 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"?

From a service and cost point of view, this modification should not be adopted. The copyright law does not need to treat hardcopy and digital materials differently. Libraries and archives do not ask their users to determine that books cannot be purchased at a fair price before they allow ILL, for example. Indeed, ILL practitioners know that interlibrary loan is not a replacement for purchase at a reasonable cost, but is rather a use that is supported by the copyright law, regardless of availability for purchase. Therefore, no additional changes to the law are necessary. Were this suggested requirement adopted (that libraries determine whether the requested material were available at a fair price before making a copy), interlibrary loan would cease to exist, and furthermore, other rights guaranteed to libraries in Section 108 would be limited.

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 portions 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?

We see no reason to alter the CONTU Guidelines in any of these ways, nor for ILL records to be accessible to anyone outside one's library, except as currently provided in existing laws. The CONTU guidelines, and guidelines in general, work best for libraries when they are broad and flexible. Making the records accessible to people outside the library violates library ethics, users' privacy, and, in many cases, state statutes.

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

Separate rules for international electronic interlibrary loan transactions are not needed. IFLA (International Federation of Library Associations) guidelines already address how institutions should handle requests going across borders.

Questions from Topic B

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?

It is in the best interest of scholarship and of the public good that there are as few exclusions as possible to subsections (d) and (e). Libraries purchase materials in many different formats, and they should be able to make those materials available to all their legitimate users. Subsection (i) unfairly penalizes scholars working with non-text materials, and we recommend that it be completely eliminated.

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?[...]

Libraries should not be limited to just one kind of technology to manage request fulfillment for non-text-based works, including subsequent reproduction of a work. For example, libraries should not be forced to implement restrictive software, such as would only allow one opening of an image. In such a case, if the ILL department opens it the user cannot. Because technology is always changing, it is best for the law to allow libraries to provide requested materials to their users without detailed restrictions which would most probably be soon outdated. Thumbnails would be inadequate for ILL purposes, since they provide little detail and would therefore hamper scholarship. Persistent identifiers are also an inadequate solution when they obscure part of the image. It is not within the purview of libraries or archives to monitor user behavior.

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 that on making interlibrary loan copies? Would applying the interlibrary loan framework to non-text-based works require any adjustments to the CONTU guidelines?

Treating different groups of legitimate users differently again hampers access and service and would create confusion overall. We feel that the CONTU guidelines require no further changes.

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 or such works?

Scholars, researchers, and students benefit by allowing the application of subsections (d) and (e) to musical or audiovisual works embedded in textual works, because their understanding of their scholarly materials and their educational mission would be more complete. We support the elimination of the subsection (i) exclusions.

Questions from Topic C

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?

Libraries and archives differ from one another in terms of collections and type of users, and with technological innovations, it is difficult to predict what different institutions will find themselves needing to acquire to serve their users most effectively. With a wide variety of digital resources becoming available, some institutions may find themselves being the only holding for a particular digital resource, in which case, those temporary and incidental copies required for access would become even more important. Libraries adhere to the licensing agreements that accompany their digital materials, and they only make copies when the license allows them or when there is no license. Incidental copies made in the process of making the user copy are not retained, and we believe that these copies are lawfully permitted under the current Copyright Act. We feel that the only copy that matters is that which is provided to the user.

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 be permitted? Should remote access ever be permitted for unlicensed digital works? If so, under what conditions?

If the digital copy of the work is lawfully acquired and is unlicensed, it should be treated as any other lawfully acquired and unlicensed materials that the library or archives offers its users if access and service are to be preserved. The EU model is overly restrictive in this regard. Many legitimate users of libraries and archives are not located in the same place as the library or archives. For example, many academic libraries serve on-campus users, but are also obligated to serve distance education students (who might be located anywhere in the world), whose tuition helps to pay for the library resources. Providing equal access to materials and service to such users is already challenging, and digital resources have the capacity to assist in this endeavor by being able to overcome the distance between user and institution. In fact, given the capabilities of digital technology, it seems backward and obsolete to have a digital resource that can only be used on-site. Therefore, while access to digital resources within the institution is necessary, remote access is also essential. If a library or archives wants to ensure that only legitimate users, both local and remote, have access, then standard ID validation techniques should be implemented. Such a stipulation is outlined in §110(2) of the Copyright Act. Furthermore, simultaneous use ought to be permitted, to experience the full benefits of digital technology and ensure full access to all users.

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?

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?

While a solid argument could be made for treating lawfully acquired and unlicensed digital materials as any other materials (such as books, journals, etc.) owned by the library/archives and rely on fair use guidelines, many times these institutions have been over-cautious with their digital resources, since these materials are perceived to inhabit a legal gray area. That is, in order to limit on the side of safety, institutions are sometimes limiting access. However, how much this happens depends upon the institution, and what sort of parameters would apply to users and to library/archives staff would also depend upon the institution. What is clear is that the copyright law should make allowances that would grant full access to digital materials for all legitimate users of the library/archives as they are given access to comparable analog materials.

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?

Because of their tangible natures, digital works such as DVDs and CDs have been more easily dealt with by libraries and archives than those materials that are only acquired in an electronic form, in that it is clearer what can and cannot be done with them, at least from the points of view of those institutions. That is, DVDs and CDs can be loaned to users easily, if the institution chooses to do so, and can be interlibrary loaned as well. Libraries would look to Sections 108 and 107 of the Copyright Law to determine use. Back-up copies are not necessary to provide access to users.

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.)?

Access and service are best supported when all categories or media of work are equally accessible to all legitimate users of a library or archive whenever possible. The answer to this question is 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?

Different categories of works may very well require that public performance or display rights be exercised in order to provide access, and this especially applies to audiovisual works. In the face of technological change, the Copyright Law best serves libraries and archives by remaining flexible, and it therefore seems misguided to propose rigid and

specific alterations to the law.

It is STARS' fervent belief that the public is best served when as few restrictions are placed on the interlibrary loan delivery of digital materials as possible, and we strongly urge the Study Group to consider this as they contemplate possible changes to Section 108. Interlibrary loan operations have no interest in disregarding the rights or concerns of copyright holders. In fact, we are a vital component of libraries and archives and our services are essential to the conduct of scholarship and research which fulfills the end of copyright by "promoting the progress of science and the useful arts." We must be legally allowed to deliver requested materials to all of our legitimate users in any and all available formats. Section 108 exists to allow libraries to function in a sensible manner using the conveniences provided by technology. It is our sincere hope that in any discussion of modifications in copyright law, the essential role of librarians and archivists as agents for users and the common good be reaffirmed.