University Libraries
Carnegie Mellon University
4909 Frew Street
Pittsburgh, Pennsylvania 15213-3890
(412) 268-2446
Fax: (412) 268-2793
http://www.library.cmu.edu

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Mary Rasenberger
Office of Strategic Initiatives, Library of Congress
James Madison Memorial Building, Room LM-637
101 Independence Ave. S.E.
Washington D.C. 20540

Attention Mary Rasenberger,

Person making submission: Denise Troll Covey
Organization represented: Carnegie Mellon University Libraries
Address: 4909 Frew Street, Hunt Library, Pittsburgh, PA 15213
Telephone: 412-268-8599
Fax: 412-268-2793
Email: troll@andrew.cmu.edu

Carnegie Mellon University Libraries is pleased with the initiative to study Section 108 in light of the changes precipitated by digital technologies. The public roundtables have been a fruitful venue for exploring the critical issues and discovering the perspectives of the various stakeholders. This document presents our position on significant issues discussed at the recent roundtable in Chicago and our concerns about unintended consequences of possible changes in the law.

ISSUES RELATED TO TOPIC A: SECTION 108(D) AND (E)

Volume of copying activity

Libraries and archives have been making digital copies and delivering them digitally, whenever possible, for some time. Content providers question whether Section 108(d) and (e) currently permit these activities, and are concerned that explicitly amending Section 108 to allow them will lead to a vast increase in the volume of digital copying and delivery. Their primary concern is the many copies made for interlibrary loan (ILL), not the few copies made directly for the library's user community.

Librarians at the recent roundtable explained that they do not expect the volume of digital copying and delivery to increase if Section 108 is amended to allow these activities explicitly. The reasons presented were:

- Libraries make few copies in compliance with Section 108(e). When an entire work or a substantial part of a work is requested, libraries loan the item. Even when only a book chapter is requested, libraries loan the book. This standard practice will not change if digital copying and delivery are explicitly allowed because it is far more cost effective for libraries to loan the items than to copy them, digitally or otherwise.
- Libraries make many copies in compliance with Section 108(d), primarily copies of journal articles. The trend for some time has been to license electronic journals rather than maintain print subscriptions because users prefer electronic access. Licensing agreements trump copyright. Therefore amendments to Section 108 will have little or no impact. Vendor licenses will still be able to prohibit digital reproduction or delivery and to require libraries to print digital files and then fax or mail the print. Granted, not everything is licensed. But as noted at the recent roundtable, most ILL requests are for journal articles published in the past five years. These materials are likely licensed.

Content providers at the roundtable dismissed these statements from librarians and cited Subito as evidence of digital reproduction and delivery run rampant. They also commented that the Association of Research Libraries (ARL) is running a centralized interlibrary loan service similar to Subito, selling articles for $15 each.

The content providers' alarm is unfounded in the context of American libraries and U.S. copyright law. Subito is a private, centralized company composed of German academic libraries acting in concert solely to provide document delivery service. Under German law, Subito is a registered association functioning as a legal entity. ARL is a non-profit organization that educates and advocates for libraries. It does not operate a centralized ILL service for its 123 members. Furthermore most libraries are not members of ARL. American libraries do not act together as a private company or unified legal entity. There is no central source in the United States to which libraries turn for copies. Each library acts individually, contacting other libraries for loans or copies and setting its own cost-recovery fee for making ILL copies. The fees vary widely, from $3 to $15, and are often waived as a result of widespread reciprocal borrowing agreements. Some libraries never charge for making ILL copies. The actions of American libraries comply with U.S. Copyright Law.

Users acquiring digital copies through interlibrary loan

Content providers at the roundtable said that they are comfortable with libraries sharing digital copies with one another, but they are concerned about users receiving digital copies through interlibrary loan (ILL) in a manner that would allow further distribution. They prefer that ILL users receive either physical copies or access to digital copies (stored on a secure library server) that can be displayed, but not downloaded. Thought it would appear that the issue is the risk of copyright-protected articles getting out on the open web, this is not the case. The issue is payments to publishers.

For over a decade, users have been downloading articles from licensed databases and there has been no outcry from publishers about broad distribution of these many digital copies, the number of which far exceeds the number users might acquire through ILL. A publisher participating in the roundtable explained that the difference between a user downloading a digital copy from a

licensed resource and a user downloading a digital copy acquired through ILL is that the latter is a substitute for a subscription or article purchase. Publishers are willing to assume the risk of copyright-protected articles getting out on the open web if the resource has been licensed, but not if the resource has been acquired through ILL, i.e., without paying the publisher.

Publishers see ILL as an operation that provides free access to their intellectual property. They object to a law that requires them to give their content away for free if it is available for purchase. They prefer laws that protect their markets, including the new market for individual journal articles, to laws that encourage use of the material.

From the perspective of libraries, the issue is whether the fundamental purposes of copyright and Section 108 will be upheld. The legislative intention of copyright law is to balance providing incentives for authors and creators with promoting progress in science and the arts. Protecting markets provides incentives, encouraging innovation and investment. Maximizing use promotes progress, increasing the return on investment in research and scholarship. Finding the appropriate balance is critical.

As noted above, most ILL requests are for journal articles published in the past five years. These journals are likely licensed. Many vendor licenses require compliance with the CONTU guidelines. According to CONTU, only five articles published in the past five years per journal title can be acquired through interlibrary loan. Thereafter, the articles must be purchased. This established practice is an attempt to balance the interests of the various stakeholders. Amending Section 108 to prohibit users from acquiring digital copies of articles received on interlibrary loan unnecessarily hampers research and scholarship and tips the balance in favor of content providers, who are admittedly trying to drive purchases of individual articles.

Technological protection measures applied to digital copies for users

At the roundtable, a representative of the content industry said that only rights holders can decide what kind of security is needed for digital works. Whatever they decide should be applied to any copies made by libraries and archives. Though the claim sounds reasonable, it is reductive and misleading, based on an incomplete picture of the law and what is at stake.

Carnegie Mellon University Libraries will not purchase materials for our user community if technological protection measures (TPM) render them unusable for teaching, study and scholarship. We are primarily concerned about the following:

- User privacy – Any TPM that invades user privacy is unacceptable.
- Printing – In practice, users tend to print articles available in digital format – whether acquired through interlibrary loan (ILL) or a licensed database – so that they can highlight passages and annotate them. Though not discussed at the roundtable, it is unclear whether preventing ILL users from downloading digital copies that they access on secure library servers will also prevent them from printing the articles. For the purposes of study, research and scholarship, TPM must not prevent users from printing articles accessed or delivered digitally through interlibrary loan.

- Quality – TPM can degrade the quality of digital materials, making them unsatisfactory for scholarly purposes.
- Fair use – Section 107 allows certain uses without requiring permission from the copyright owner. TPM can prevent users from exercising their fair use rights. Ours is increasingly a multi-media culture. There is a compelling need for media literate citizens. Students, researchers and scholars need to be able to exercise their fair use rights with all media.
- Copying and preservation – TPM can make it difficult if not impossible to copy and preserve materials.

Even if copyright law were amended to permit circumvention of TPM for the purposes of education, research, scholarship, and the activities allowed under Sections 107 and 108, all libraries and archives do not have the technical expertise in house or the financial resources to hire someone to do the circumvention or to apply TPM to the copies made. Because the law prohibits trafficking in circumvention technology, no product will be available for libraries and archives to purchase that would enable them to do this work.

The potential unintended consequences of enabling rights holders to fetter content with unwarranted TPM is that they will in effect eliminate all copying under Section 108, which will hamper research, scholarship and the preservation of our heritage, and impede progress in science and the arts – one of the fundamental purposes of copyright law.

From our perspective, rather than cripple digital content with TPM, it makes more sense to retain the requirement that the digital copy "becomes the property of the user," who is then responsible for complying with the terms of the user agreement that prohibits further digital copying and distribution. A warning against further digital copying and distribution can be attached to the digital material similar to the warning affixed to interlibrary loan photocopies. Printed or online forms completed by users to requests copies can clearly state the terms of use, including that use is allowed only for private purposes, research or scholarship. Users can be required to check a box to indicate that they agree to the terms.

Mediated and unmediated interlibrary loan

Publishers and libraries define "unmediated" differently. Publishers apparently perceive unmediated interlibrary loan (ILL) to be a practice where the user submits an ILL request directly to a lending library and the lending library sends the item or copy of the item directly to the user with no involvement by any library with which the user is affiliated. This is *not* what libraries mean by unmediated ILL.

For libraries, unmediated ILL is a practice where the library, working with a consortium of libraries, provides software that enables *only members of their user community* to submit an ILL request to a lending library in the consortium. The lending library sends the item to the borrowing library or perhaps directly to the user. There are three key points that content providers need to understand:

- At the borrowing end of the transaction, the request is not mediated by library staff (hence the expression "unmediated"), but it *is* mediated by software provided by the library with which the user is affiliated. Only users affiliated with this library have a user ID and password to use the software. The parameters of the software are negotiated by the consortium and implemented by the library. For example, the software prevents users from requesting books currently available for checkout in their own library and from requesting non-circulating materials.
- The request *is* mediated by staff at the lending library that fulfills the request.
- The software is integrated with library catalogs and is therefore used primarily for borrowing and lending books, *not for acquiring digital copies of journal articles*.

For practical purposes, ILL transactions in libraries are mediated on both ends and will continue to be, though we expect technology to do more and more of the mediation over time. As noted above, computer software is already mediating interlibrary loan of books. It is also mediating interlibrary loan of digital copies. For example, the ILLiad Odyssey software at the borrowing library receives electronic copies from lending libraries, records that the requests have been filled, and automatically notifies users of the URLs for acquiring their articles from a secure library server. Library-provided software mediates delivery to users, increasing the speed and convenience of interlibrary loan and reducing staff costs.

The practical reasons why ILL transactions will continue to be mediated include:

- Operating an ILL service is very expensive. Carnegie Mellon University Libraries, like many libraries, absorbs the cost of ILL. The service is and will continue to be restricted to members of our user community because of the cost of operation. We do not envision a time when any user, anywhere, will be able to request a free copy through our ILL service.
- Licensing agreements can and do require compliance with the CONTU guidelines. To keep the necessary records, libraries must mediate ILL transactions.
- From a customer service perspective, while library users might prefer to request and receive materials without mediation, they often submit requests containing incomplete citations or requests for materials held by their library. Having the borrowing institution (or its software) mediate and bear the burden of checking citations and local holdings is fair. If users could submit requests directly, this burden would shift to the lending library, in which case requests with incomplete citations would not be filled and requests for items available in the user's local library would incur unnecessary ILL transaction costs.
- Without mediation on both ends, there would be no way for the library to know whether requests had been filled and no way to track the volume of activity.

The situation is different for archives. There is currently no mediation at the users' end of the transaction and no compelling reason to require it. Unlike libraries, archives collect primarily unique, unpublished works. Individuals all over the world contact archives to request copies of these materials. While copyright does apply to unpublished works, there is a limited commercial market for them. Standard practice is for the archive to make copies of items requested directly by users and to send the copies to them – charging for cost recovery.

Subsections 108(d) and (e) should *not* be amended to require that ILL transactions of digital copies require the mediation of a library or archive on both ends or to prohibit direct electronic requests from, and/or delivery to, the user from another library or archive. The current system is working well as is. There is no compelling reason to change it.

Checking to see if articles are available for sale at a reasonable price before requesting copies on interlibrary loan

A publisher at the roundtable claimed that if individual articles are available for purchase at reasonable prices, then Section 108 and the CONTU guidelines "do not apply." His claim begs the very question under debate: whether libraries should be required to purchase or license, rather than make interlibrary loan copies of, articles available in the marketplace at a reasonable price. It assumes as evidence one possible outcome of the discussion.

Libraries do not have the human resources to check the availability of every article requested on interlibrary loan (ILL) or the financial resources to purchase every article requested on ILL that is available in the marketplace.

There are no centralized services to facilitate checking the availability of articles. Given the pace of change in the marketplace, library staff would also have to work to keep abreast of new places to check for the availability of articles. Under such circumstances, how could staff be trained and how could libraries be confident that they had done sufficient checking? Even a publisher at the roundtable conceded that it would be difficult to check for everything.

Most libraries absorb the cost of ILL transactions. Consortium arrangements enable libraries to make copies in compliance with Section 108 at no charge for one another. Nevertheless, providing ILL service can cost a hundred thousand dollars or more annually in cost-recovery fees in addition to labor costs. If libraries are required to check the availability of every article requested on ILL, labor costs will go up because each transaction will take considerably longer to process. Requiring libraries to purchase or license every article requested on ILL that is available in the marketplace will increase costs even more. Managing hundreds or thousands of licenses for individual articles would be untenable.

Who determines what constitutes a fair or reasonable price for an article? Based on what criteria? A publisher at the roundtable in Chicago said that $25 was reasonable. When asked under what circumstances $25 was reasonable, he responded that the content industry financed the infrastructure that enables online access and digital delivery – then sheepishly admitted that the cost had been passed to libraries in subscription pricing.

In our experience, articles cost more than $25 each. The cheapest we have found is $30, but the price for an article can exceed $100, costing more than a hardback book or an individual subscription to a journal. American Scientific Publishing recently raised copyright permission fees for articles in their journals from $118 to $250 per article. Even if an article could be purchased for $25, we do not think this is a reasonable price. Current pricing is neither fair nor reasonable, particularly when you take into account that ILL requests are often speculative. Users read an abstract, submit an ILL request because they think the article might be relevant to

their work, then discover upon receiving the article that it is not. This is valuable information for the user to know, but is not worth $25.

In addition to the resource problems that would be created for libraries, the change being considered would cause serious problems for students and faculty. Having to check the availability of articles in the marketplace would greatly increase the time between submission and fulfillment of ILL requests. Having to negotiate a license, rather than simply purchase a copy, would take even longer. Students and faculty often cannot wait for materials because they work with deadlines. Their time is a critical resource. A study we conducted in the spring 2006 revealed that Carnegie Mellon faculty will not walk to nearby libraries to use their journals because it takes too long.

Frankly, if Section 108 were amended to require libraries to locate and purchase or license every article requested on ILL that is available in the marketplace, Carnegie Mellon University Libraries would stop providing ILL service for journal articles still protected by copyright. We could not absorb the cost of locating and purchasing the articles and therefore would have to pass the cost to the user, in which case it would make no sense for us to mediate the transaction – an ironic outcome given the content industry's push to require library mediation. Our users do not have the time or the expertise to check the marketplace themselves, and they do not have the money to purchase every article they want to see. We know from experience that they will not even pay the overage when the cost of an interlibrary loan transaction exceeds the established maximum that we will absorb. Instead, users will get a copy from the author or a colleague, use something else, or do without.

The requirement of investigating whether requested items can be obtained at a reasonable price is acceptable in Section 108(e) because there are far fewer transactions of this nature, the materials are more likely to be available for purchase, and centralized services are available to help make this determination. Applying this requirement to making copies under Section 108(d) would increase labor costs and decrease fulfillment rates and patron satisfaction. Operating an ILL service under these circumstances would not be sustainable.

The collapse of ILL for copyright protected journal articles could be one unintended consequence of the proposed amendment of Section 108. Another unintended consequence could be the collapse of the very markets that content providers are trying to preserve by advocating the requirement. The fact of the matter is that by the time an article is published, many faculty and graduate students have already had access to the material by reading a preliminary technical report or working paper or hearing a conference presentation. In many fields the published article serves primarily as the archival copy. The new market for journal articles "by the drink" could collapse from the weight of its own pricing or, if prices were affordable, kill the currently lucrative market for journal backfiles.

National interest

The position of the content industry is that the national interest is served "not by maximizing use, but by protecting markets." The issue of whether any particular library or user can afford to purchase articles "by the drink" is not a concern. Carnegie Mellon University Libraries thinks it

should be the concern of the Section 108 Study Group. Adding burdensome requirements to Section 108(d) will tip the tenuous balance in favor of rights holders and in the process hamper libraries, hinder scholarship, impede progress, and thus have unintended consequences for the public good and the national interest.

We think it is in the national interest and in the interest of copyright to provide affordable access to information. In higher education, individual academics will not pay. The only profitable way to serve this market is through academic libraries. At the roundtable, a representative of the content industry cited the "huge increase in access and availability" as a sign of market success. From the library perspective, the routine of cancelling journals, precipitated by the 302% increase in journal prices since 1986 (while the consumer price index went up 78%) does not signal success in the marketplace. A study published by the Association of Research Libraries (ARL) in April 2006 reports that 60% of the responding ARL libraries had journal cancellation projects in two out of the three preceding years. The situation is similar if not worse for smaller libraries. What we have is not market success, but an economic crisis with profound implications.

If academic libraries cannot afford to provide access, students and faculty will do without. The impact on research and innovation when students and faculty "do without" because they cannot get what they need quickly and affordably is unknown. We can only surmise that the more they "do without," the more they will spend valuable time and resources reinventing the wheel. Research and innovation will suffer. Progress will slow. The United States will lose its competitive edge.

Revising the CONTU guidelines

According to the website (http://www.loc.gov/section108/), the Section 108 Study Group "is charged with updating for the digital world the Copyright Act's balance between the rights of creators and copyright owners and the needs of libraries and archives." The CONTU guidelines are not part of Section 108, Title 17, or any law of the United States. Discussing guidelines or recommendations for revising guidelines is inappropriate and out of scope for the Section 108 Study Group. Doing so would appear to give the force of law to that which is not law, a tendency that has already had a chilling affect on interpretations of fair use.

However, should the Study Group seriously consider recommending the revision of the CONTU guidelines, Carnegie Mellon University Libraries' position on the issues raised in the Notice of Inquiry is:

- The guidelines should *not* be revised to apply to works older than five years.
- The number of copies of materials in our collection that can be made directly for our users should *not* be limited because the copies are not lost sales.
- Lending libraries should *not* be given guidelines for record keeping because they cannot make a fair use determination on a borrowing request from another library.
- The notion that records currently kept by borrowing libraries should be accessible to people outside of the library community is offensive and illegal.

- The suggestion that "a broader exception" could be administered if both borrowing and lending libraries kept records mistakenly assumes that the CONTU guidelines have the force of law rather than simply an endorsement of reasonableness. The law of fair use requires case-by-case interpretations based on the application of four factors. To the extent that the CONTU guidelines bypass or override such case-by-case interpretations, they have had a chilling effect on the application of fair use.

ISSUES RELATED TO TOPIC B: SECTION 108(I)

Excluding musical, pictorial, graphic and sculptural works and motion picture and other audiovisual works from the application of exemptions in Section 108(d) and (e) is arbitrary and disenfranchises students and scholars of non-text based media. Section 108(i) should be eliminated from the statute because all categories and formats of creative works are suitable for study. The law should treat copyright owners of all media types and users of all media types equitably, and enable libraries to offer the same services to users regardless of the category or format of the material. Attempts to protect commercial markets can inadvertently prevent copying and use of non-commercial material, much of which is of interest to students and scholars and the general public.

Carnegie Mellon University Libraries' practices in regard to non-text based media are:

- When materials in our music collection are requested on interlibrary loan, we loan the CD. In the rare case that we only have the requested item on vinyl LP, we make a copy because we do not circulate vinyl records.
- We have a collection of films and movies that we do not circulate except to faculty for classroom teaching. However, if we did circulate the movie collection, an interlibrary loan request would be filled by loaning the videotape or DVD, not by making a copy of the work.
- We have licensed some collections of photographs and other images, specifically Corbis, AP Photo Archive, and ARTstor. Copying of the licensed materials is covered by the licensing agreement, which trumps any copyright exceptions granted in Section 108. We also have photographs in the University Archives. The archival photographs are primarily unpublished rare or unique materials. Copying is governed by arrangements with the copyright owner or donor or, in the absence of such an agreement, fair use.
- We have no collections of graphic illustrations that are not embedded in text-based works.
- We have no collections of sculptures.

Many libraries operate the same way we do. In short, there is no reason to be concerned about libraries copying all or parts of these types of works. With the exception of archival photographs, we will loan these items rather than copy them because it is more cost effective. Furthermore, typically when users want these types of works, they do not submit requests to the library. They go elsewhere for these materials.

If the goals are to reduce the burden on students and scholars of the audiovisual arts and to support the creation of new knowledge, no conditions should be added to Section 108 that would

unnecessarily restrict or diminish research, teaching and scholarship. For example, limiting digital copies of visual material to low resolution thumbnails would not be a workable solution because the thumbnails will likely lack the details needed to support the student's or scholar's work. Similarly, the delivery of digital audiovisual materials or sound recordings should not be restricted to streaming to prevent downloading and further distribution. This requirement would severely limit a scholar's ability to analyze a work fully through repeated viewing or listening and would destroy the long established and essential scholarly practice of retention of source materials.

Our objections to technological protection measures (TPM) are addressed elsewhere in this document. We do, however, approve of prohibiting the user from making and distributing additional copies of these materials without the permission of the copyright owner. As with text-based materials, a warning against further digital copying and distribution should be attached to the digital material. Printed or online forms completed by users to request copies can clearly state the terms of use and require users to check a box to indicate that they agree to the terms.

Conclusions

The American democratic system of government relies on having an informed citizenry. To make informed decisions, people must have affordable access to information. Making and providing access to copies – in limited circumstances that balance the rights of content producers and the rights of consumers – are essential activities to preserve our heritage, to educate our people, and to maintain our competitive edge and way of life.

In a democracy the people have equal opportunity for education. The role of libraries in supporting education must not be underestimated. Libraries must not be thwarted in their mission to provide access by the imposition of unnecessary barriers that, in the interest of market economies, will ultimately harm the public good and the national interest. Promoting the public good – the good of all, regardless of race, ethnicity, gender, or socioeconomic status – requires the sharing of information resources via libraries. The cost per person using shared resources must be less than the cost per person who privately acquires these resources.

One of the fundamental purposes of copyright is to promote progress in science and the arts. For these to advance, knowledge must be shared. Information must be exchanged. Tipping the balance to favor rights holders will undermine the constitutional and historical traditions that are the basis of democracy: respect for knowledge and the commitment to share it. Tipping the balance will breach the compact between the government and the governed.

The following comment by Thomas Jefferson, displayed on the LOCKSS website at Stanford University, eloquently states the case: "...let us save what remains: not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but by such a multiplication of copies as shall place them beyond the reach of accident."[1]

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[1] Thomas Jefferson to Ebenezer Hazard, February 18, 1791. In *Thomas Jefferson: Writings: Autobiography, Notes on the State of Virginia, Public and Private Papers, Addresses, Letters*, edited by Merrill D. Peterson (New York: Library of America), 1984. Displayed in the LOCKSS website banner at http://lockss.stanford.edu/about/about.htm.