

January 10, 2007

Mary Rasenberger
Office of Strategic Initiatives, Library of Congress
101 Independence Ave, SE
Washington, DC 20540

Attention Mary Rasenberger,

Carnegie Mellon University Libraries would like to participate in the roundtable discussion of Section 108 issues on January 31, 2007 in Chicago, IL. Here is our contact information:

Name:	Denise Troll Covey	Telephone:	412-268-8599
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Topics in order of priority:

1. Topic A: Amendments to current subsections 108(d), (e), and (g)(2)
2. Topic B: Amendments to subsection 108(i)

Priority #1 – Topic A – Questions about subsections 108(d), (e), and (g)(2) to which we would like to respond:

A-2. Yes, the single-copy restriction should be replaced with a more flexible standard that reflects the practical reality of temporary and incidental copies made in the course of lawful digital reproduction and distribution. The amendment should apply to copies made for a library's own users and for interlibrary loan.

A-3. Carnegie Mellon University Libraries copies materials in our collection for our user community and for interlibrary loan. For the past five years, direct copies for our users have averaged 6% of our total copying activity. The data we collect on copying for our users and for interlibrary loan do not distinguish between copies made in compliance with section 108(d) and copies made in compliance with 108(e), but almost all of the activity is reproduction and distribution of journal articles.

When licenses do not prohibit it, we make digital copies because users prefer them. If digital reproduction or delivery were explicitly permitted by Section 108, it would not affect the copies we make for our users; in the context of interlibrary loan, it might facilitate lending, but would have minimal impact on borrowing. As long as licensing agreements trump copyright, amendments to Section 108(d) 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.

A-4. Our standard practice when a user or library requests an entire work or a substantial part of a work is to loan the item. Typically if a book chapter is requested, we loan the book rather than copy and distribute the chapter. We buy books and other materials that are frequently requested on interlibrary loan if they are reasonably priced and fit our collection development guidelines. We do not expect the volume of this activity or our practice to change if digital reproduction or delivery were explicitly permitted under section 108(e).

A-5. Yes, restrictions should be placed on the making and distribution of digital copies. These restrictions should apply to internal and external users. A warning against further digital copying and distribution should 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 should clearly state the terms of use and require users to check a box to indicate that they agree to the terms. Use of persistent identifiers, copy controls or other technological

Carnegie Mellon University Libraries' request to participate in Section 108 roundtable in Chicago on January 31, 2007 protection measures would be problematic. They would interfere with legitimate fair use rights, endanger user privacy, and be prohibitively expensive to implement, particularly for smaller libraries.

A-6. Yes, digital copying for users should be permitted only upon the request of members of the library or archive user community. User communities are well defined in existing licensing agreements and professional practices.

A-7. No, subsections 108(d) and (e) should *not* be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library or archive on both ends and to prohibit direct electronic requests from, and/or delivery to, the user from another library or archive. Though libraries and archives behave somewhat differently in this regard, the system in both cases is working well as is. There is no compelling reason to change it.

For practical purposes, interlibrary loan transactions in libraries are mediated on both ends and will continue to be, though we expect computers to do more and more of the mediation over time. Computers are already mediating interlibrary loan. 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 the users of the URLs for acquiring their articles. The library's software mediates delivery to users, increasing the speed and convenience of interlibrary loan service and reducing staff costs.

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

- Operating an interlibrary loan service is very expensive. Carnegie Mellon University Libraries, like many libraries, absorbs the cost of interlibrary loan. 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 interlibrary loan service.
- Licensing agreements can and do require compliance with the CONTU guidelines. To keep the necessary records, libraries must mediate interlibrary loan 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 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 interlibrary loan 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.

A-8. Even if the object is digital, it still makes sense to retain the requirement that the 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. In addition, libraries and archives should be prohibited 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 items copied are in low demand, for example, used by one student for one semester. It is unlikely that they will be requested again. There is no need to add low-use items to the collection. Furthermore, though it might sound as if keeping source copies to fill future requests would increase efficiency and save costs, this would not be the case. Given the volume of transactions per year, the effort required to store, secure, preserve, migrate and catalog the source copies would outweigh any possible future efficiency or savings.

A-9. If, before requesting a copy of a portion of a work, libraries and archives were required to first determine that a copy of the requested item cannot be readily obtained at a fair price, the interlibrary loan system would grind to a halt. Given the volume of transactions under subsection (d), ongoing changes in the marketplace, and the lack of centralized services to support such investigations, the time and associated cost of making these determinations would be a serious impediment to scholarship and the public good, and an unsustainable burden on the borrowing library or archive.

As noted above, Carnegie Mellon University Libraries, like many libraries, absorbs the cost of interlibrary loan. We also absorb the cost of document delivery service. To support the scholarship of faculty for whom time is a critical factor, we are already absorbing increased costs by purchasing articles through rapid document delivery services – at a cost per article that is *not* a fair price – rather than acquiring the materials through the slower, less expensive means of interlibrary loan. We have established a maximum cost that we will pay to fill a user request, and that maximum has increased over the past four years. In cases where the cost exceeds our established maximum, we ask the users to pay the overage. They will not pay. They say that they will do without the item or find something else. Similarly, a study we conducted in spring 2006 revealed that Carnegie Mellon faculty will not walk to nearby libraries to use their journals because it takes too long. Instead they will use something else or do without. As the market learned with iTunes, if a service is not convenient and affordable, customers will not buy.

Like our users, libraries want speed and convenience. Time and affordability are critical factors for us. We will pay for quality service from vendors and publishers in order to deliver quality service to our users *if* the price is reasonable. Current pricing structures are a barrier. The cost per article through document delivery services is *not* a fair price. When our users opt to do without, we as their helpers will also choose to do without. The impact of “doing without” on research and innovation is unknown. We can only surmise that the more we “do without,” the more they will be affected. There can be no doubt that adding burdensome requirements to subsection (d) will hinder scholarship, hamper libraries, and impede progress.

The requirement of investigating whether requested items can be obtained at a reasonable price is acceptable in subsection (e) because there are far fewer transactions of this nature. In addition, the materials are more likely to be available for purchase and centralized services are available to help make this determination.

The requirement in subsection (e) now or if applied to subsection (d) should be clarified to indicate that “obtained” means by purchase. It should *not* also mean by license. Users do not have the time to wait for a licensing negotiation; they will use something else or do without. Recall that we are talking about copies of low-use items that cannot be used to enlarge collections or to serve as source copies for fulfilling future requests. The effort to negotiate and thereafter manage potentially thousands of licenses for individual or partial works could not be sustained. The transaction costs would likely exceed the licensing fees, which – given our experience with document delivery services – will probably *not* be fair or reasonably priced. As noted above, when a service is not convenient or affordable, customers will not buy. Ultimately research and scholarship will suffer.

A-10. 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 and the public roundtable. 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 a conversation about the CONTU guidelines take place, Carnegie Mellon University Libraries’ position is adamantly no. 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

Carnegie Mellon University Libraries' request to participate in Section 108 roundtable in Chicago on January 31, 2007 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.

A-11. We see no compelling reason to apply different rules to international electronic interlibrary loan transactions.

Priority #2 – Topic B – Questions about subsection 108(i) to which we would like to respond:

B-1. We prefer to be guided by fair use when seeking digital reproductions of the categories of works specified in subsection (i) rather than eliminate the exclusions and address the many concerns that would be raised. Users do not always come to libraries to obtain digital copies of non-text based works and the markets for these materials are different from the market for traditional scholarly works. However, if subsections (d) and (e) are applied to non-text based works, the number of images and length of sound and audiovisual materials should be high to support classroom teaching, research and scholarship. Our stated position under Topic A would apply.

B-2. Digital copies of non-text based materials should be freely available for research and study, though permission should be required to include these materials in a new work if the use exceeds fair use. 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 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. Persistent identifiers should not be required to identify the digital copy of a non-text-based work and any progeny as having been made by a library or archive under Section 108. Persistent identifiers would be prohibitively expensive to implement and endanger user privacy. Copy controls would interfere with legitimate fair use rights. It is reasonable, however, to prohibit further digital reproduction and distribution 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 should clearly state the terms of use and require users to check a box to indicate that they agree to the terms.

B-3. From the point of view of an academic library, no, the restrictions on making copies of non-text based works for members of our user community should not be different from the restrictions on making interlibrary loan copies. Scholarly and educational use of this material should not be tied to or limited by the specific location of the scholar, teacher or student needing the material. Applying the interlibrary loan framework legally established in Section 108 to non-text-based works would not require an adjustment to the CONTU guidelines because the guidelines are not part of Section 108. There would be no real advantage to quantifying or creating guidelines when fair use is working as intended. Giving the CONTU guidelines the force of law undermines the careful case-by-case interpretation and judgment required by the law of fair use.

B-4. If the subsection (i) exclusions are not eliminated, then yes an additional exception should be added to enable digital reproduction and distribution of musical and audiovisual works embedded in textual works. As the volume of text-based multimedia works increases, scholars, researchers, teachers and students should not be prevented from using such materials for the creation of new knowledge and furthering the public good. These scholars and educators should not be disenfranchised by the law by virtue of their area of study and the type of material they require to do their research and teaching.

Thank you for considering our request to participate in the section 108 roundtable discussion.

Sincerely,

Denise Troll Covey
Principal Librarian for Special Projects