Software & Information Industry Association
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March 16, 2007

VIA E-MAIL

Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives
Library of Congress
James Madison Memorial Building
LM-637
101 Independence Avenue, SE
Washington, D.C. 20540

Re: Written Comments Relating to the Copyright Office's 108 Study Group Copyright Exceptions for Libraries and Archives:

Dear Ms. Rasenberger:

Pursuant to the Notice published by the Copyright Office in the Federal Register on December 4, 2006, the Software & Information Industry Association (SIIA) hereby submits its written comments relating to 108 Study Group Copyright Exceptions for Libraries and Archives. If you have any questions relating to the attached comments please feel free to contact me.

Sincerely,

Keith Kupferschmid
Vice President, Intellectual Property Policy and Enforcement
Software & Information Industry Association

Enclosure

WRITTEN COMMENTS SUBMITTED BY
THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
ON THE
SECTION 108 STUDY GROUP'S EXAMINATION OF
COPYRIGHT EXEMPTIONS FOR LIBRARIES AND ARCHIVES

SIIA is the principal trade association of the software and information industry and represents over 800 high-tech companies that develop and market software and electronic content for business, education, governments, consumers, the Internet, and entertainment. The members of SIIA are both copyright owners and users of the copyrighted works of others. As such, they have an interest in supporting the wide dissemination, use and preservation of copyrighted works under established principles of copyright law. SIIA also conducts anti-piracy programs on behalf of its members, and in this context, has witnessed an abundance of abuses by those seeking to pirate copyrighted software and digital content on the Internet by circumventing broadly-drafted exemptions under the copyright law.

Accordingly, in the context of the section 108 study, SIIA and its members are concerned about two primary issues: (1) potential broadening of the section 108 exception in a way that allows libraries and archives to copy and distribute copyrighted works that results in harm to actual or potential markets, and (2) potential broadening of the section 108 exception in a way that makes it easier for individuals to infringe copyrighted works. Therefore, SIIA members have a significant interest in working with the Copyright Office, the section 108 Study Group, and other stakeholders in determining what changes, if any, should be made to section 108 of the Copyright Act to account for new digital technologies.

As requested in the Federal Register notice we attempt to answer the questions put forth in that notice. Before addressing these questions, we wish to address various issues and concerns that relate more generally to the issue of altering section 108 and the process for doing so.

First, as SIIA's members are immersing themselves in this issue, two questions in particular are occurring with frequency: what are the specific types of problems that the library and archive communities are experiencing in the digital age that, in their view, necessitate changes to section 108; and are those problems of a sufficient magnitude to justify the changes to section 108 that libraries and archives are seeking?

These questions are motivated by SIIA's interest in ensuring that the same standards that have been applied in the past to copyright owners proposing legislative change – especially those software and information companies that comprise SIIA's membership – will be applied in the context of this study. For example, because copyright owners have been required to show significant harm in the form of adverse litigation and judicial interpretation of laws in order to justify legislative proposals, we expect that those stakeholders supporting changes to section 108 would likewise have to provide evidence of impairment justifying the need for legislative change.

Of course, as a general matter, SIIA is not opposed to making well-crafted changes to section 108 where the proponents demonstrate that such alterations are necessary, appropriate and make good public policy.

Second, it is also important to recognize that the questions raised in the Federal Register Notice and in the roundtable discussions cannot be considered in a vacuum—they are heavily reliant upon one another and other issues outside of the section 108 context. Consequently, in most cases our answer to one question will depend on how the Study Group and Copyright Office choose to answer the other questions. For this reason, it is difficult to provide definitive responses to the questions.

Recognizing this, our general approach to answering the questions is highly dependent on the level of risk associated with the proposed change. If the question proposes a broad expansion of section 108 then – unless new adequate safeguards to prevent abuse are also included as part of such expansion – we are likely to be opposed for the simple reason of increased risk. If the expansion proposed is narrow, the corresponding risk of abuse may well be less, and our willingness to support an amendment likewise would likely increase.

SIIA's difficultly in responding adequately to the questions posed in the Federal Register notice stems from the basic lack of information from the library and archivist communities regarding actual, current problems they face with respect to the section 108 exceptions. For instance, what do they want to make copies of now that they can't? how would they like to deliver copies? what kind of limitations on delivery are they willing to accept? are they willing to be held accountable when something goes wrong? It, therefore, may make sense for the Study Group or the Copyright Office to allow for the filing of reply comments after these initial comments are published.

Third, the issue of state sovereign immunity must not be ignored in this discussion. Under current law, a copyright owner's only recourse against an infringing state entity is to seek a prospective injunction that does nothing to compensate the rights holder for harm already caused by the infringing state activity. By all accounts, the present situation is unfair. Nevertheless, despite repeated attempts to enact legislation to address this gross imbalance, state entities have refused to make any concessions that might, in some way, alleviate the situation.

We see no reason to exacerbate the unfairness that exists under the present system by expanding the section 108 exceptions as they apply to state entities. Unless those groups that represent state entities are willing to support enactment of an effective solution to the state sovereign immunity copyright problem, our position is that the section 108 exceptions should not apply to any state entities exempt from monetary damages under current law.

Lastly, given some of the statements made at the Chicago roundtable, it needs to be re-iterated and made absolutely clear that the existing exemptions under section 108 do not override any contractual or license obligations undertaken by a library or archive when it obtains a work or collection of works for its collection. Any proposed amendments to section 108 that would alter this fundamental principle in any way is completely unacceptable to SIIA and its members.

Topic A Questions

Response to Question No. 1: This question is premised on the assumption that the copyright law should facilitate the ability of libraries and archives to make digital copies for users. SIIA is not prepared to accept that assumption.

For years libraries have been making available to their patrons traditional print versions of copyrighted works in their collections and the collections of other libraries. Long ago, this was recognized as an act that should be given special treatment under the Copyright Act. However, the fact that such special treatment was found to be warranted some thirty years ago does not mean the same justifications still exist today to warrant continued special treatment -- and it certainly does not mean the same justifications can automatically be extended to digital works, the making of digital copies, digital distribution and potentially digital displays. Therefore, its important to determine not only whether and (if so) how section 108 should be amended to account for new digital technologies and business models, but also whether section 108 – as it exists today – is still a viable model for treating print copies in a library or archives collections.

When sections 108(d) and (e) were enacted, if someone wanted to obtain a particular article or an entire work for their review, its was likely that their only option was to find the time to trudge down to their local (or not so local) library to get a copy. Today, however, with the advent of the Internet and other digital technologies, that very same article or work is often easily accessible from a variety of online resources from the comfort of their home or office.

This example raises the question – do the purposes and objectives underlying the section 108(d) and (e) exemptions still make sense, and do they continue to justify the present-day version of sections 108(d) and (e)? If not, we have to ask ourselves should these provisions be deleted or replaced by a more appropriate set of exemptions.

In the face of new technologies and business models that make copyrighted works more accessible to the public, libraries and archives have demanded greater leeway and larger exemptions to the copyright law. But – despite the language of this question -- the main objective of the Study Group and the participants in this roundtable should not be to decide whether libraries and archives should be granted expanded powers to better facilitate their ability to make copies for users. Before addressing this issue, we must first determine whether users are able to obtain content easily and efficiently without the need to obtain a copy from a library's or archive's collection.

If users are able to obtain content without resorting to their library or archive, then expanding section 108 to grant libraries and archives better abilities to make content available to users only serves to put the libraries in direct competition with those who are already providing access to the content, namely the owners of copyrighted materials and their designated licensees. If, however, there are specific copyrighted works that are not being made available to users, then we are certainly open to discussing how best to amend section 108 to provide libraries and archives with better abilities to provide those specific works to their users.

Response to Question No.2: As one of the leading associations representing technology companies, we believe that the law should be "in step" with technology. The question does not specifically reference incidental transient copies made in the course of making a permanent copy as permitted under section 108, but we assume that is what is referred to by the phrase "copies reasonably necessary".

If that assumption is correct and subject to the other concerns we raised in Chicago and in these written comments, we would not object to a change in section 108 to reflect the need to make incidental transient copies of a work in the process of making the permanent copy ultimately allowed under section 108, *provided* that these copies are in fact incidental and transient and not

used for any purpose other than as a necessary step in making the final copy. Very good model language to this effect already exists in the DMCA and TEACH Act.

If, however, the phrase "copies reasonably necessary" in the question is not limited to incidental transient copies, then we would need to have further information about what additional copies are envisioned here. In general, our primary concerns in regard to sections 108(d) and (e) relate not necessarily to the number of copies being made but rather to the: (1) the conditions that must be met for a copy to be made in the first place, and (2) the technical, legal and other restrictions applied to the copy once it is made by the library. If the conditions for making and using a copy under section 108 are narrowly tailored and satisfied by the library and its users, then the number of copies made will likely be of less concern.

Response to Question No. 5: Regardless of whether the single-copy restriction is replaced or not, technical and legal restrictions that prevent the copying and distribution should be required on any digital copy provided by a library or archive under section 108. Technologies should be used to: (1) ensure that the user cannot make additional copies of the material; (2) prevent distribution of the material by the user, and (3) restrict access to the material to the user, perhaps by requiring a password tied to the user's library identification number.

There are numerous excellent technologies available in the marketplace that can enforce restrictions that control access, copying, and distribution—the software and database companies SIIA represents use and rely on these technologies to enforce their license terms and conditions. There is no good reason that libraries and archives should not be required to use access, copy and use control technologies to protect against misuse of copies of copyrighted works they provide to their users. DRM technologies that limit further distribution of digital copies would not put users at any disadvantage compared to their ability to use analog copies of library material today.

The use of digital watermarking and persistent identifiers by libraries and archives would also be valuable as a means to identify the source of the material in the event the user abuses the section 108 privileges and distributes the material beyond that permitted by section 108. For instance, the copy of the work and/or each page of a work could include a prominent notice that the copy is to be used only for private study, scholarship or research purposes and explain that any use beyond that may result in copyright infringement liability.

In the event that libraries or archives argue that the use of and costs associated with such technologies would be too prohibitive for each library or archive to implement, the law could be crafted in a way to permit libraries and archives to satisfy any statutory requirements relating to technological tools and monitoring systems by use of a centralized repository funded by a number of library or archive consortia members.

It is disturbing to read comments from the ALA and ARL objecting to any amendment that would require the use of technological protection measures, similar to those mandated by the TEACH Act, used to protect against illegal copying and distribution. If these groups want to avail themselves of new technologies that make legal access, copying and distribution easy and convenient then they must also assume the related responsibilities of also using these new technologies to protect against illegal access, copying and distribution.

Likewise, libraries and archives must also respect the technologies used by copyright owners to protect against infringement that are incorporated into their products and services. Therefore,

any revision to section 108 should make it clear that any activity allowed under section 108 must be consistent with, and not circumvent, any digital rights management technology incorporated into a copyrighted product or service when it is placed on the market.

In addition to the technological requirements, libraries and archives should also be required to take additional, non-technical steps to limit the risk of abuse. For example: presently, section 108 merely requires that the library have no notice that the copy will be used for any purpose other than for private study, scholarship or research. Although this requirement may be somewhat helpful in preventing abuse, it encourages a policy of "don't ask, don't tell" by the libraries and does not go far enough to prevent potential abuse.

We therefore urge that section 108 be amended to require that the order form that libraries provide to their patrons who request a copy of a work under subsection (e) or an article under subsection (d) include not only a copyright notice warning, as presently required, but also a statement that must be signed by the patron affirming that that he or she will: (1) use the work only for private study, scholarship or research; (2) not make additional copies or re-distribute a copy other than a print copy used solely for the purpose of verifying or supporting a work of scholarship or research resulting from the use of such work; and (3) accept liability for any downstream infringements caused by redistribution, including specific sanctions, such as a fine, for violating these terms.

Also, with regard to the "no notice" requirement, given the "special" relationship between users and libraries, the library should take some responsibility for keeping records of requests it fulfills and should refuse to "lend" any further materials to those users the library or archive has reason to know have misused the materials in the past – regardless of whether they have "notice" that present or future use may not be consistent with the private study, scholarship or research purposes. These requirements should apply equally to both direct copies for users and to interlibrary loan copies.

Response to Question No. 6: Yes, digital copying for users should be permitted only upon the request by a member of the library's or archives' traditional or defined user community.

The user community should be defined geographically in the first instance (particularly for libraries), and extend beyond a geographic limitation only for those persons who have a continuing relationship with the institution (*e.g.*, in the case of colleges and universities that might include retired teaching staff, but not alumni). At the very least, libraries and archives should require members who wish to obtain copies to provide basic registration information, including but not limited to verifiable name, address, telephone number, and valid e-mail address.

It is reasonable to anticipate the need to define classes of institutional and individual users, as well as classes of usage and then apply limitations and exceptions accordingly. For the "classes of institutional users," we can identify classes that distinguish between academic institutional users who may include remote workers, and public libraries whose individual users should be limited by membership based on terms of geographical residence or a reasonable equivalent.

We have three primary concerns with broadening this exception to allow libraries to provide user copies to nonmembers. First, if any library or archive were allowed to provide a copy to a

nonmember there is a much greater likelihood that libraries and archives will be competing directly with the publisher and harming the publishers' markets.

Second, allowing users to make a request of any library could result in wide spread abuse of the exception by users, without the library knowing. Users could "shop" for section 108 copies at an unlimited number of libraries. They could accumulate multiple copies of a work or works and distribute them to others -- in direct competition with the publishers or aggregators.

If requests from nonmember individuals were allowed, a user whose privileges were terminated by its library, for abuse of section 108 or some other reason, could simply make a request from another library. For instance, if a library had "notice" under section 108 that the copy was being used for purposes other than private study, scholarship or research, the user could merely make a request from a library that had no such notice.

A similar type of abuse occurs today with ISPs. Under the DMCA, a copyright owner can contact an ISP to take down a website that is making a pirated work available. After the site is taken down, it is common place for the pirate website to resurface through a different ISP. If a user could make requests from any library these same type of abuses could occur.

To help prevent these type of abuses it would be necessary to limit section 108 user-requests to that user's library and require libraries to develop processes for verifying the authenticity of their users. Failure to authenticate could lead to abuses not unlike those that go on today at FTP sites and websites that "share" software serial numbers.

Third, if any library or archive were allowed to provide a copy to a nonmember, there would be no accountability by the libraries and archives and no incentive to curtail or prevent abuse of the exception. As discussed at the roundtable in Washington, DC last year, we support the concept of "trusted" libraries or archives that would be certified by the Copyright Office. Only those certified by the Copyright Office should be allowed to avail themselves of certain expanded exceptions that are added to section 108.

Elements of any certification process would have to be discussed in detail, but as a general matter the certification process should distinguish ordinary activities engaged in by "libraries" and "archives" from ordinary activities engaged in by "publishers." Requiring such certification makes libraries accountable and ensures copyright owners that when a library is contacted about an abuse of the exception or otherwise knows about an abuse, the library will promptly take the necessary steps to combat such abuse or risk losing its certification.

Response to Question No. 7: Yes, for the reasons stated in the answer to question 6.

Response to Question No. 8: We support amending section 108 to remove the requirement that the copy made under section 108 becomes the "property of the user" – regardless of whether the copy is digital or print, and that this requirement be replaced by one that requires that the copy cannot be retained by the library or archive for any purpose.

With the advent of new technologies and new forms of electronic license agreements there is simply no reason to vest ownership of the copy with the user as section 108 presently does. Libraries and archives can provide access to a requested copy through an agreement with the user without vesting ownership of the copy in the user and still achieve the same goals. In fact,

creating such an arrangement between the library or archive and the user would give the institution greater ability to prevent or control misuse of the copy. For example, the agreement could permit the library to revoke the privileges of a user or fine a user who is found to have improperly redistributed the copy.

This rationale applies equally to digital and print copies, as it also make sense to remove the "property of the user" requirement for print copies and instead require the library to effectuate a limited agreement between the user and the library. Far to often, users believe that ownership of a particular copy of a work gives them the right to post the work online or make print copies of it in violation of the copyright owner's rights and in a manner that harm existing and potential markets for the work.

In the event that libraries argue that users need a permanent copy or permanent access for their records to support their research, we would point out that users do not need to permanent access to a digital copy. If necessary, the statute could make clear that users are allowed to print excerpts from the copy for their records to be retained and distributed for the sole purpose of supporting the resulting private study, scholarship or research for which the copy was used.

If the "property of the user" requirement is removed, then there must be additional language added to section 108 to accomplish the original purpose underlying the "property of the user" requirement. The "property of the user" requirement was added to ensure that the section 108 (d) and (e) copies were not used to enlarge a library's or archive's collection. This purpose can be satisfied rather simply by requiring that the library or archive not retain the copy.

Response to Question No. 9: Yes, we feel very strongly that a provision should be added to subsection (d), similar to that in subsection (e), requiring libraries and archives to first determine on the basis of reasonable investigation that a copy of a requested item cannot be readily obtained at a fair price before creating a copy or a portion of a work in response to a user's request. Of all the issues raised in the Federal Register notice this time, this is the most crucial to SIIA.

At the time 108 was enacted, individual articles were not being made generally available to the public. Today, with the advent of the Internet and other digital technologies, there is a huge and burgeoning marketplace for the sale of individual articles, as well as excerpts and abstracts from articles. Thirty years ago such articles may have only been accessible at your local library. Today, however, articles are now accessible from a variety of online resources from the comfort of their home or office.

Allowing a library or archive to provide copies of articles or portions of works under subsection (d) without first determining whether others are already making these items available has and will continue to harm publishers and aggregators by putting them in direct competition with libraries and archives who provide these same items for free. Libraries and archives should not be allowed to compete with the many publishers and aggregator services already in the marketplace, and more that will be entering the market as demand grows. Consequently, for the same reasons that the "reasonable investigation" and "fair price" requirements were included in subsection (e), these requirements ought to be now included in subsection (d).

At the Chicago roundtable, representatives from the library and archive communities attempted to make the case that searching for articles is much more difficult and time consuming than

searching for periodicals. The rationale and support for this position proved to be utterly unconvincing. With all the digital and non-digital search tools and databases now available, it is faster and easier then ever before to find articles. As a result, articles are just as easy (if not easier) to find then other works. Thus, there is simply no good reason that subsections (d) and (e) should not be made consistent by requiring under both provisions that the library or archive first undertake a reasonable investigation that a copy of a requested item cannot be readily obtained before creating a copy of a portion of a work.

Furthermore, instead of the "fair price" standard we believe the standard should be a "made available" standard. We are concerned about how libraries and archives, not to mention the courts, might interpret what is and what is not a fair price. After all, the consumer rarely believes the price is fair. At the very least, the burden of proving that a work or article was not available at a fair price should remain with the library and the burden should be a high one.

Lastly, to the extent the word "obtained" in subsection (e) does not now encompass works obtained through licenses, as opposed to purchases, we agree that this needs to be clarified. The mere fact that a work can be obtained through a license as opposed to a purchase does not affect the underlying purpose of section 108 – to provide access to the work to requesting users. Consequently, it should make no difference whether the work can be obtained by a license or by sale, because in both instances the library is able to provide access to the work to its users. This is especially true if the "property of the user" requirement is removed from the statute.

Response to Question No. 10: Given that advances in digital technologies and the new markets that use digital works is opening for publishers, guidelines should not be tied to the age of the work. There is no longer a need for treating publications older than five years differently than newer publications – all should be subject to the restrictions on the number of copies that can be made or received by any library or archive within a year's time, record-keeping requirements for institutions providing and receiving copies, as well as record-keeping requirements in regard to individual requestors.

If section 108 is amended, the legislative history ought to make very clear to what extent the CONTU Guidelines remain valid. Failure to do so, would lead to confusion among owners and users about whether the Guidelines should still be used as a tool to direct libraries conduct. In particular, it should be made clear that the CONTU Guidelines were explicitly for photocopying and do not automatically cover digital copying or digital works. If the Guidelines are to be extended to apply in the digital environment, a specific guideline review process would be required and it is likely, indeed, that there will be changes (such as eliminating the five year period and imposing certain recordkeeping requirements on the lending library).

As for recordkeeping requirements, it would be valuable to add new recordkeeping requirements, so that all interested parties can get a better idea as to how section 108 is working and to what extent it is being used. Libraries and archives could be required to provide information about their 108 activities to the Library of Congress in the aggregate – without any personal identifying information. Lawmakers could use this information to ascertain whether the goals of section 108 are being met and whether further amendments to section 108 might be required. And potentially publishers could then use this information as a means to determine whether there are markets that are not being satisfied for certain works.

All records should be accessible for people outside the library community, at the very least in the course of a copyright infringement action by the copyright holder or the holder's successor in interest.

Response to Question No. 11: Electronic interlibrary loan should not be allowed internationally, with the possible and sole exception of same-institution branches that may be geographically located in different countries. In general, however, and given the disparate nature of national copyright laws, as well as differing standards for licensing, the risk is too great to rights holders from overseas users.

TOPIC C QUESTIONS

Response to Question No. 1: Although this question is not applicable to SIIA, we wish to clarify what is meant by an unlicensed work in the context of this question. Specifically, the following works should not be considered to be unlicensed:

(1) a pre-release work. Pre-release unlicensed works (*i.e.*, generally those digital works that have yet to be exploited by the owner in the market) deserve special handling and protection;
(2) a work that is not available in a particular format. So long as the work is available through a license in any format, that work should not be considered to be an unlicensed work;[1]
(3) a portion of a licensed work. Publishers and aggregators should not be required to "slice and dice" a work into licensable portions to meet a library's or archive's wishes; and
(4) an infringing copy of a work. The phrase "lawfully obtained" should be construed to mean "lawfully made and lawfully acquired".

Response to Question No. 2: The EU approach is a good one even though for some it may be considered to be too restrictive to be acceptable in the United States. Remote user access should be restricted as much as possible for these materials, but could be allowed under more clearly defined and delineated membership/affiliation rules for classes of users and usages, as mentioned previously.

Response to Question No. 3: The concept of implied license is one that is often used much too broadly by the public to justify otherwise infringing activities. Whether an implied license exists in any given situation is highly fact-dependent, and in reality, rarely exists.

In any event, whether an implied license exists for a library or archive to provide access to these types of works ultimately depends on whether the owner of that work understands and appreciates that libraries and archives will be providing access to, and making copies of, his or her work upon a request by a patron. To the extent that any implied licenses do exist, it is doubtful that such license would apply to new uses envisioned by the libraries and archives or new uses proposed in this study because copyright owners would have no prior knowledge of such uses.

[1] For example, if an SIIA publisher distributes books and includes a CD at the end of the book that contains the contents of the book. The CD is licensed, but he book is not. For purposes of this discussion, the book and the CD should be considered to be licensed, otherwise the libraries and archives could easily circumvent the license agreement.

Relying on a theory of implied license to permit a particular activity or library or archive is a recipe for disaster. If libraries and archives need special exceptions to make use of unlicensed digital works, then those exceptions should be clearly identified and put into the statute. A very strong case and narrow parameters for further use without authorization of the copyright owner, as always, should be made for such exceptions.

Response to Question No. 5: Generally, there should be no distinction between digital works embedded in tangible media and other digital works. If there is a reasonable expectation that the item sold to the library is expected to "last forever," then repair of the digital item should be allowed (the vendor often is willing to replace/restore). If there is no such expectation (as is the case with cheap DVDs), then no back-up should be allowed.

As for whether to allow for server copies, we have already noted in our comments above the numerous risks associated with permitting server copies. We do not know of any justification to permit the use of server copies.

Response to Question No. 6: No, at this time we see no reason to differentiate between type of works or types of media on which a work is marketed.

Response to Question No. 7: Yes, display rights are implicated when a library or other entity provides access to most types of literary works.[2] There is a huge difference between display on a library terminal and an online display by a library. The later is unacceptable. The former may be acceptable, so long as no server copy is made.

As stated earlier, we believe that the law should be "in step" with technology. Therefore, if section 108 were to appropriately encompass the display right then we would not object to a change in section 108 to reflect the need to make incidental transient copies of a work in the process of making such display ultimately available to the user under section 108, provided these copies are in fact incidental and transient and not used for any purpose other than as a necessary step in making the display.

We strenuously object to section 108 being expanded to cover online displays. It was readily apparent to anyone in attendance at the Chicago roundtable that any legislation addressing this issue is, at best, premature, and at worst, a grave mistake. However, if section 108 is expanded to cover the display right then we would demand that the exception no longer allow for the making and distributing of copies as presently permitted under section 108.

[2] For purposes of this question, only those issues relating to display are addressed. Issues related to performance are generally not applicable to SIIA or its members and are, therefore, not addressed.