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Written Comments in response to Section 108 Study Group: Copyright Exceptions for Libraries and Archives, 71 FEDERAL REGISTER 70434 (December 4, 2006).

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TOPIC A: AMENDMENTS TO CURRENT SUBSECTIONS 108 (d), (e), AND (g)(2) REGARDING COPIES FOR USERS, INLCUDING INTERLIBRARY LOAN

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?

Response: Whether we desire it or not the world of information is digital. Library, archive and future 108 entity users while not eliminated from contact with paper or analog nonetheless interact in a world where digital content is common. Section 108 (d) and (e) should be amended to reflect this reality. While it is true that "digital" signals "danger" to content owners, and content owners are leery of allowing intermediaries additional rights to provide content in digital formats to their constituents as this might facilitate infringing conduct by those constituents, federal information policy as reflected in section 108 (as well as other provisions such as 109) identifies the important societal role libraries, archives and other entities can play in the dissemination of information. Recall that the copyright is not a complete monopoly but a limited one, thus numerous privileges are woven into the fabric of the law.

Second, after weighing the costs and benefits and deciding that all in all the balance favors dissemination Congress has approached the issue of potential "facilitation" in the past by imposing on library, archive and other communities the use of simple compliance obligations such as warning notices in sections 108, 109, 110(2) and 512(e), policy formation in section 110(2) and 512(i), or information outreach in sections 110(2) and 512(e). These can be characterized as more or less "passive" obligations (though if the policy formation targets specific conduct and enforcement response by the promulgating entity as does section 512(i) the obligation is "active"). In the past, libraries in section 108 and 109 have been relegated to the simplest of obligations: the warning notice. This passive approach reflects the nature of the relationship between the library or archive patron and the institution. Revision of section 108 through over-reaching compliance obligation would alter the nature of this relationship. Third it can be argued that such extreme measures are unnecessary. Recent amendment to the copyright law provides content owners with increased tools for enforcing their rights. One could argue that with the new service provider obligations of section 512 including enhanced subpoena options

and new enforcement tools of section 1201 and 1202, content owners have sufficient enforcement tools over works in the digital environment.

Finally, this commentator cautions any revision to section 108 that in an effort to protect the interests of content owners would impose technological burdens or other restrictions similar to those present in current section 110(2)(D)(ii), i.e., the TEACH amendments. TEACH is designed for educational settings. Although there may be overlaping in a general "education" mission by both entities there is a fundamental difference between the section 110 entity and the section 108 library, archive, or added 108 entity. There is a fundamental difference in the nature of the service and clients provided by 110(2) and 108. In the former section 110(2), it is students whereas a section 108 entity may be serving the public at large. As a result of the inculcating mission (*Board of Education, Island Trees Union School District No. 26 v. Pico*, 457 U.S. 853 (1982)) of the section 110(2) entity (especially the "in loco parentis" status of the K-12 setting) imposing such burdens on the educational entity is more realistic. Moreover the circumstances of service—instruction and related classroom interaction—offer the practical opportunity for the section 110(2) entity to fulfill it compliance obligations under section 110(2)((D)(i) and (ii). This is not the case in a section 108 setting such as a public library or local historical society where patrons often use copyrighted materials without any direct contact with staff

2. Should the single–copy restriction for copies made under subsections (d) and (e) be replaced with a flexible standard more appropriate to the nature of digital materials, such as ''a limited number of copies as reasonably necessary for the library or archives to provide the requesting patron with a single copy of the requested work''? If so, should this amendment apply both to copies made for a library's or archives' own users and to interlibrary loan copies?

Amending section 108 to authorize the making of multiple copies in relationship to a single transaction will eliminate any doubt as to the legality of those copies. There are two options. First, add a provision to section 108 similar to the last paragraph of section 110(2) relating to transient and temporary storage. The following language could be used: "For purposes of this section, no library or archive shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital distribution of that material as authorized under subsections (d) and (e). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made." The advantage here is consistency, using similar language to accomplish a similar objective. Another advantage is that the provision can apply across the subsections of 108. A second option is to included simple language in both subsections (d) and (e) that allows for "such copies as reasonably necessary and for a time period sufficient for the library or archives to provide the requesting patron with a single copy of the requested work.'' Adding a temporal

component allows for rapid and efficient response by the library or archive when through technical problems the material would need to be resent to the requesting patron. A final option would be to add another subsection to section 112, the ephemeral recording provision, but this option would necessitate that users use two provisions of the copyright law. Moreover, since the copies would not be retained section, 112 is not an appropriate vehicle for copies that are best characterized as transient.

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?

While the commentator is not affiliated with a particular library or archive he has spoken at dozens of events (conferences, workshops, in-services, etc.) to practitioners over the years about the provisions of section 108. Two anecdotal recollections are nonetheless offered. First, most audience members are surprised to learn that subsections (d) and (e) allow reproduction and distribution for their own patrons. Second, during the discussions that ensue most participants indicate that they do not offer copy or reproducing services for their patrons; those few that did have ceased such operations. The reason is time and cost coupled with expanded opportunity for patrons to make copies on their own, either through analog (photocopier or print-out) or digital (cut and paste then save to disk) means. As a result, it can be concluded that libraries and archives do not exercise their rights under this subsection and do little copying for their own patrons.

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?

Again, while the commentator is not affiliated with a particular library or archive he has spoken at dozens of events (conferences, workshops, in-services, etc.) to practitioners over the years about the provisions of section 108. Two anecdotal recollections are nonetheless offered. First, most audience members are surprised to learn that subsections (d) and (e) allow reproduction and distribution for their own patrons, especially of an "entire work, or to a substantial part of it." Second, during the discussions that ensue most participants indicate that they do not offer copy or reproducing services for their patrons; those few that did have ceased such operations. Those that did offer such operation did not as a matter of practice reproduce monographs or similar items in entirety for patrons. Whether this response was based on a misunderstanding of section 108(e) or a higher ethical duty and respect for the copyright owner (in spite of the law) not to reproduce substantial or entire works of this sort is unclear. As a result, it can be concluded that libraries and archives do not exercise their rights under this subsection and do little copying for their own patrons.

5. If the single–copy restriction is replaced with a flexible standard that allows digital copies for users, should restrictions be placed on the making and distribution of these copies? If so, what types of restrictions? For instance, should there be any conditions on digital distribution that would prevent users from further copying or distributing the

materials for downstream use? Should user agreements or any technological measures, such as copy controls, be required? Should persistent identifiers on digital copies be required? How would libraries and archives implement such requirements? Should such requirements apply both to direct copies for users and to interlibrary loan copies?

The question is unclear. All parties appear to agree that the user-patron should receive a single copy of an item requested under subsection (d) and (e), not "copies" of the item. Again, the differences between the section 110(2) entity and the section 108 entity suggest caution when considering imposing by law active compliance obligations upon the section 108 entity. To be sure some section 108 entities are large such as the library system of a major metropolitan area or a state university, but many libraries and archives may be very small, often with a limited staff and budget. Such entities rely on the privileges of section 108 and may be impacted by even small changes to a greater extent. Rather than impose technological burdens that often entail financial as well as time and administrative burdens it is suggested that a non-interference standard (with existing protection measures) be imposed rather than an obligation on the section 108 entity to apply such measures. A non-interference provision would allow for the use of persistent identifiers by copyright owners but not obligate the section 108 entity to insert identifiers.

Rather than imposing compliance obligations on digital distribution that would prevent users from further copying or distributing the materials for downstream use, an expanded use of a warning notice to recipients relating to further dissemination and distribution is preferred as this would be passive compliance obligation. The following notice could satisfy this requirement: "WARNING NOTICE CONCERNING COPYRIGHT RESTRICTIONS. The copyright law of the United States (Title 17, United States Code) governs the use of protected material, including the reproduction and public distribution of that material. XXX furnishes journal articles, chapters from books and other text-based material protected by copyright law or that may be protected by copyright law. Subsections (d) and (e) allow XXX to reproduce and distribute such material to its patrons. That reproduction and distribution is conditioned on receipt and use of a single copy of the material by XXX to the patron who requested it. Do not make additional copies, forward to another person or post material received from XXX by any means. XXX or its staff reserves the right to refuse to make available photocopy or other reproduction technology or to provide access to the requested material if, in its judgment, use of such technology or material would involve violation of copyright law. Any person who makes an unauthorized copy of such material, or redistributes the material, except as permitted by Title 17 of the United States Code, may be liable for copyright infringement."

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?

It is current practice that libraries or archives serve well-defined user communities. Although section 108 libraries and archives serve remote users the entities do not as a

matter of practice serve the entire world of users, but rather impose requirements that restrict services to well-defined user communities, e.g., students in the district served by the school media center, residents of the municipality served by the local public library, etc. While the membership may change over time, e.g., from semester to semester, from tax year to tax year, etc., the section 108 entity or its parent institution which it serves is likely to have at any particular point in time a definite and identifiable user community. The limit of that user community is articulated through the entity's mission statement, policies and procedures, etc. Thus a section 108 library or archive is very likely to have "a limited and well-defined user community." Even if guests or walk-in use is permitted this is not the normally defined (by its mission statement or policy and practice) user community. While visitors may have use privileges extended to them, the ranges of services—subsections (d) and (e) reproduction and distribution is a SERVICE—are far more limited than those available to the persistently defined user community, which again is a subset of all potential users. Revision of section 108 should not impose arbitrary, statutory standards upon such an entity. Section 108 encompasses many sorts of libraries, archives, etc. from the large state university system library to the rural community library, from the archive of a major nonprofit association to the small county historical society. Any amendment must be made with this reality in mind. However, imposing some sort of password or student or registration number requirement upon off-site access does not appear unreasonable.

7. Should subsections (d) and (e) be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library or archives on both ends, and to not permit direct electronic requests from, and/or delivery to, the user from another library or archives?

First, libraries and archives are just as concerned about protecting valuable resources as are content owners. As a result, libraries and archives generally restrict subsection (d) and (e) services to their own patrons as discussed above. Requests from patrons are processed by the initiating library or archive that then makes a request of the lending library for the material. The lending library then reproduces and distributes the material to the patron's library or archive for distribution by that library or archive to the patron. This practice is standard within the interlibrary loan process in libraries and archives across the country. Obligating such practice by statute would also be superfluous for another reason. Subsection (d) and (e) and the implementing regulation (37 C.F.R. § 201.14) already indicate the request-reproduction-distribution process is to be mediated. For example, the statute ("the library or archives displays prominently, at the place where orders are accepted, and includes on its order form,") as well as the implementing regulation make repeated use of the concept of "place" where such mediation must occur ("displays prominently at the place where" "the following notice printed in such size" and "shall be printed on heavy paper"). If any adjustment is needed it should be limited to refinement of the statute and implementing regulation relating to expansion of subsection (d) and (e) into the digital environment, i.e., that such indicators (notices) should be used in analog as well as digital interfaces and appear on an online request form for example.

8. In cases where no physical object is provided to the user, does it make sense to retain the requirement that ''the copy or phonorecord becomes the property of the user''? 17 U.S.C. 108(d)(1) and (e)(1). In the digital context, would it be more appropriate to instead prohibit libraries and archives from using digital copies of works copied under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling future requests?

A "sole purpose" may capture the intent of the existing provision in the reality of the digital environment. There are several advantages. First the use of such language would be consistent with other provisions of the copyright law including section 108 (subsections 108(b) and (c): "solely for purposes of"). See also, section 110(2)(C) ("the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to") and section 112(f) ("such copies or phonorecords are used solely for transmissions authorized under"). This language would also prevent the mediating library or archive from using subsection (d) and (e) to enlarge their own collections. The following language could be included: "any copies reproduced are used by the library or archive for the sole purpose of delivery of a single copy of the material to the requesting patron, and no further copies are retained or reproduced from the requested material."

9. Because there is a growing market for articles and other portions of copyrighted works, should a provision be added to subsection (d), similar to that in subsection (e), requiring libraries and archives to first determine on the basis of a reasonable investigation that a copy of a requested item cannot be readily obtained at a fair price before creating a copy of a portion of a work in response to a patron's request? Does the requirement, whether as applied to subsection (e) now or if applied to subsection (d), need to be revised to clarify whether a copy of the work available for license by the library or archives, but not for purchase, qualifies as one that can be ''obtained''?

A so-called market check provision should not be added to section 108(d). While at first impression this might appear consistent with the other subsections of 108, (c) and (e), where such provision is in place, a closer look reveals that such inclusion in subsection (d) would to the contrary be inconsistent with the concept of a market check test. This is so for several reasons. The market check provision under subsection (e) relates to entire works (or a substantial part of it). So too, the library or archive exercising its right under subsection (c) where the other market check test exists is typically concerned with complete works as well, such as a literary work (monograph), an audiovisual work (VHS tape) or sound recording (LP or CD). While it is true that a single article can constitute a complete work, the copyright law itself through bifurcation of reproduction and distribution between shorter (subsection (d)) and lengthier copies (subsection (e), suggests a definite statutory distinction. Second, the current test for reproduction and distribution for patrons under subsection (e), upon which this amendment would be based according to the question, is unlike the market check in subsection (c). The subsection (d) test is not tied to an unused replacement but to any copy in including used copies. Since articles are not made available in this way (used), including a similar test in a revised subsection (d) would make little sense. Third, the reason that such market tests are

included in section 108 and elsewhere in title 17 is to leave unaffected the market incentives for the creation of such works in the first instance. While not as developed today as in 1976 there existed then a nascent market for single articles, e.g., off-prints, yet Congress still choose to include for the provision in subsection (d) for reproduction and distribution of single articles to patrons as this practice would not undermine the market for single articles. There may of course overtime be a negative impact on subscription markets, but this possibility is foreclosed by section 108(g)(2). Finally, there appears to be great divergence of opinion regarding what constitutes a fair price for a single article. Unlike the two existing market check tests the base line is easily determinable, i.e., the original cost of the monograph, VHS tape, LP or CD, etc.

Works obtained by license are not purchased. The modification of either the existing market check requirement of subsection (e) or in the amendment to subsection (d) to include a check of licensing opportunities would be inconsistent with the concept of a market check as codified by Congress in 1976. The legislative history of each provision suggests the concept of a permanent, purchased copy. Section 108(c): "The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service." H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 75-76 (1976) reprinted in 5 United States Code Congressional and Administrative News 5659, 5689 (1976). Section 108(d): "It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service." H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 76 (1976) reprinted in 5 United States Code Congressional and Administrative News 5659, 5690 (1976). Uncoupling "obtained" from the concept of purchase ("fair price") ignores the intention of the statute and the reality of how subsection (c) and (e) works (entire works) are obtained, replaced or reproduced in libraries and archives. A licensing market does not typically exist for single articles but does for entire databases or subscriptions. Moreover, just because an article would be available from a vendor as part of a license agreement is not a practical condition to impose on the library or archive. Such a rule would require a section 108 entity to enter into a license agreement for journal subscription or for an entire database of journals just to obtain one article, a ridiculous result. The market tests recognized by the plain words of the statute ("cannot be obtained) and its legislative history indicate the physical possession through purchase ("trade sources" and "reproducing service") is intended, and not a "license" or even a permission-for-a-fee standard to reproduce and distribute the work. In other words the fact that a library or archive can pay x-amount to the publisher for each copy of an article it reproduces (undertakes its own reproduction) is not the same as a market check test developed by Congress in section 108 (obtained from others through trade sources or reproducing services).

10. Should the Study Group be looking into recommendations for revising the CONTU guidelines on interlibrary loan? Should there be guidelines applicable to works older

than five years? Should the record keeping guideline apply to the borrowing as well as the lending library in order to help administer a broader exception? Should additional guidelines be developed to set limits on the number of copies of a work or copies of the same portion of a work that can be made directly for users, as the CONTU guidelines suggest for interlibrary loan copies? Are these records currently accessible by people outside of the library community? Should they be?

There should be a move away from the use of guidelines. Statutory text once created (enacted) continues to evolve, either through amendment of the text or through interpretation of the text by courts. A guideline is a static concept. Once created it remains frozen in "practical" as well as "legal" time (technology, best practices, etc. continue to evolve). While section 108 received little if any interpretation by the courts since its enactment in 1976, the copyright law through judicial interpretations continues to evolve, uncoupling section 108(d) through a new set of guidelines from the benefit of that evolution and understanding is unwise and would do more harm than good.

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

It is unclear whether the question seeks information regarding circumstances where the lending library is overseas (and the requesting patron and entity are in the Untied States) or those cases where a library or archive in the United States serves as the source of the material in response to a request from overseas. Again, while the commentator is not affiliated with a particular library or archive he has spoken at dozens of events (conferences, workshops, in-services, etc.) to practitioners over the years about the provisions of section 108. As a result, anecdotal evidence alone is offered here. Of all the hundreds of questions asked over the years from audiences, from students in the classroom, or from the field over the phone or email, the commentator has never once encountered the question of interlibrary loan where the requesting entity is overseas. It could be concluded that such international transactions are rare. Even so would not the protocols of international copyright law suggest that the law of the country where the use is made applies, i.e., where the copy is first reproduced (by the lending library) and where the copy is finally distributed to the patron (by the requesting library) apply to the transaction?

TOPIC B: AMENDMENTS TO SUBSECTION 108(i)

1. Should any or all of the subsection (i) exclusions of certain categories of works from the application of the subsection (d) and (e) exceptions be eliminated? What are the concerns presented by modifying the subsection (i) exclusions, and how should they be addressed?

The rationale for treating some categories of works differently such as audiovisual works is expressed elsewhere in the 1976 Copyright Act. Relating to the requirement that use of audiovisual works in the face-to-face classroom be lawfully made the legislative history offers the following comment: "The final provision of clause (1) deals with the *special*

problem of performances from unlawfully-made copies of motion pictures and other audiovisual works." H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 82 (1976), reprinted in 5 United States Code Congressional and Administrative News 5659, 5696 (1976) (emphasis added); and a similar comment regarding section 112: "Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market." Id. at 103, 5718. However, it would appear that in the in the media rich environment of society today the arbitrary distinctions imposed by subsection (i) are somewhat outdated. It is obvious that the markets for some works are quite sensitive, such as musical works, sound recordings and audiovisual works. Yet section 108 contains built-in conditions of reproduction and distribution that protect the owner's interest. For example, section 108(d) already limits such reproduction and distribution to a "small part" of these other work thus preserving the market for the entire work. Likewise section 108(e) requires that a library or archive must make a market check before proceeding: "on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price." This in essence requires that two markets be checked, first to determine whether the work is still available in the acquisitions market place and second if a used copy can be obtained. Considering the strength of the secondary (resale) marketplace and the ease with which such check can reveal that a copy does exist somewhere that someone is willing to sell, on e-Bay for example, there is little likelihood of negative market impact. It should be remembered that the entire copy privilege and the attending market test in subsection (d) and in subsection (c) for that matter, exists to offer opportunity to the library and archive to serve as a societal source of content (a cultural record if you will) for items that are no longer available. This is a critical function of the library and archive. Section 108 should not be amended in a way to interfere with this right. If a copyright owner chooses to "rest" their work (a term used by Sandra Aistars, Time Warner at the January 31 Roundtable discussions), as is their right and no longer make it available in the consumer marketplace then the content owner takes the risk that the secondary (resale) market will fail and that a reproduction and distribution of the work may occur under section 108.

2. Would the ability of libraries and archives to make and/or distribute digital copies have additional or different effects on markets for non–text–based works than for text–based works? If so, should conditions be added to address these differences? For example: Should digital copies of visual works be limited to diminished resolution thumbnails, as opposed to a ''small portion'' of the work? Should persistent identifiers be required to identify the copy of a visual work and any progeny as one made by a library or archives under section 108, and stating that no further distribution is authorized? Should subsection (d) and (e) user copies of audiovisual works and sound recordings, if delivered electronically, be restricted to delivery by streaming in order to prevent downloading and further distribution? If so, how might scholarly practices requiring the retention of source materials be accommodated?

Regarding the distinctions between categories of works see comments to Topic B, Specific Question 1. In the alternative, a solution tied to diminished capacity (resolution for example) would appear unworkable as the same market forces that may have led to

the initial distinction may also operate. The example in the question of "thumbnails" is an excellent case in point. See, e.g., *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 851 (C.D. Cal. 2006) ("On the other hand, Google's use of thumbnails likely *does* harm the potential market for the downloading of P10's reduced-size images onto cell phones. Google argues that because "P10 admits [that] this market is growing," its "delivery of thumbnail search results" must not be having a negative impact. Apart from being more relevant to the quantification of damages, this weak argument overlooks the fact that the cell phone image-download market may have grown even faster but for the fact that mobile users of Google Image Search can download the Google thumbnails at no cost."). Regarding the use of persistent identifiers see response to Topic A, Specific Question 5, above. The concerns of content providers regarding the dissemination of work in digital format are well taken. However, imposing the use of technological measures on section 108 should be avoided, again underscoring the difference between a section 110(2) entity where such devices are obligated and the section 108 entity. Again, passive non-interference provisions are favored over an obligation to require the use of such measures. Again as discussed earlier (Topic A, Specific Question 1), content owners have at their disposal adequate legal and technical means to deal with downstream abuse by the constituents of intermediaries such as libraries and archives. If such measures are nonetheless proposed a standard different than that used in section 512 should be considered. Rather language that would require the use of technology that "reasonably prevent . . . as cost and technological developments allow . . . further reproduction or public distribution" would ensure that flexibility remains with the entity that must adopt and use such technology. Imposing standards found in section 512(i)(2) that defines standard technical measures from the copyright owner's perspective ("broad consensus of copyright owners" "available" "do not impose substantial cost") rather than from the perspective of those who must implement it should be avoided.

3. If the exclusions in subsection (i) were eliminated in whole or in part, should there be different restrictions on making direct copies for users of non–text–based works than on making interlibrary loan copies? Would applying the interlibrary loan framework to non–text–based works require any adjustments to the CONTU guidelines?

Regarding distinctions between various categories of works and the form of those works see previous comments to Specific Questions in this Topic. Regarding the use of guidelines see comments to Topic A, Specific Question 10.

4. If the subsection (i) exclusions were not eliminated, should an additional exception be added to permit the application of subsections (d) and (e) to musical or audiovisual works embedded in textual works? Would doing so address the needs of scholars, researchers, and students for increased access to copies of such works?

If the subsection (i) exclusions remain then in recognition of the media rich content of even text-based material, there should be amendment allowing embedded content to likewise be reproduced and distributed, similar to the "illustration, diagrams, or similar adjuncts" language in current subsection (i). This would not impact the market for the entire work from which the musical or audiovisual clip is drawn.