John Wiley & Sons, Inc.
Publishers Since 1807

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Re: Written Submission of John Wiley & Sons, Inc. ("Wiley") to the Section 108 Study Group

The following is submitted pursuant to the Federal Register Volume 71, No. 232 notice of December 4, 2006. It is submitted as a supplement to the comments of John Wiley & Sons, Inc. presented by Roy Kaufman during the public roundtable discussion held in Chicago, Illinois, on January 31, 2007.

1. Introductory Comments

Wiley recognizes a need to update Section 108. Such updates must consider the original purpose of Section 108, the market need it originally addressed, and the impact of changes in the market with respect thereto. Specifically, Wiley believes that the robust markets for individual articles that have developed since 1976 have eliminated the justification for most library deliveries made under copyright exceptions. To the extent a publisher or its licensee makes individual articles available, the "borrowing" right serves no purpose other than to save money at the expense of the rights holder.

In contrast, where individual articles are not made available, we support the continued right of libraries to make non-systematic deliveries of articles under a Section 108 exemption, subject to reasonable qualifications.

In light of the thorough submissions from the International Association of Scientific, Technical and Medical Publishers ("International STM") and the Association of American Publishers, Wiley is limiting its specific comments to two points: (1) changes to the marketplace that implicate Berne Convention compliance, and (2) record keeping obligations of "lending" institutions.

2. Changes in the Marketplace

According to the Berne Convention:

> "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."[1]

In 1976, there was a perceived need to allow libraries to make photocopies of individual journal articles for delivery to other libraries. In order to make it seem like the customary and unobjectionable practice of actually lending a copy of an object from one library to another, this library copying and delivery was referenced by the misnomer "inter-library loan." Although nothing was actually lent,[2] Congress noted that so long as there was no substitution for a sale, there was little harm in allowing for sporadic copies of individual articles to be made upon the request of a "borrower."

Topic A of the Federal Register Notice poses the following question:

> Should the provisions relating to libraries and archives making and distributing copies for users, including via interlibrary loan (which include the current subsections 108(d), (e), and (g), as well as the CONTU guidelines, to be explained below), be amended to reflect reasonable changes in the way copies are *made and used* by libraries and archives, taking into account the effect of these changes on rights-holders? (emphasis added)

We believe that the answer to this question is "yes." The provisions *should* be updated to reflect reasonable changes in the way copies are made and used, subject to reasonable safeguards. In answering the specific questions from the Federal Register Notice, Wiley refers to the answers submitted by International STM, in whose answers we generally join.

However, the following equally important questions, which are not directly asked in the Federal Register Notice, should be asked: Should the provisions be modified to reflect the way copies are *purchased* by the libraries, and should they also be modified to reflect the way works are now *produced, published, marketed and sold* by publishers? The answer to the unasked questions is also "yes."

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[1] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9(2)(1967 revision).

[2] *Webster's New World College Dictionary*, 4th Edition (published by Wiley) defines *lend* as "**1.** to let another use or have (a thing) temporarily and on condition that it, or the equivalent, *be returned*..." (emphasis added).

In 1976, (1) there was no effective collective licensing mechanism for individual articles, (2) there were no electronic deliveries of articles and no electronic publications, and (3) journals were generally purchased by subscription. As a result, the exemption for library delivery did not cause prejudicial harm to rights holders. As will be seen below, this is no longer true.

1. Collective licensing: Copyright Clearance Center ("CCC") was founded in 1978, in an effort to make academic permissions efficient for users, owners, and intermediaries. Since then, CCC has authorized and licensed photocopying and delivery of individual articles. Either as a result, or certainly at the same time, commercial document delivery companies were established that could provide customers with individual articles on request. These commercial companies were forced, and are still forced, to compete with high-quality article businesses operated by libraries that do not charge copyright fees. These library services often charge a "service fee" comparable to or higher than those charged by commercial suppliers. However, because they do not pay or charge copyright fees to publishers, learned societies or authors, the total cost of acquiring articles from libraries is lower. For example, Infotrieve, a commercial supplier, charges a $12.00 service fee plus copyright fee per article. Wiley's copyright fee for an article is $30.00, so the total cost to the buyer is $42.00. Linda Hall Library charges $12.00 for academic use, $18.00 for others, and has a "copyright optional" policy. Even at $18.00 for the "service charge," it is cheaper for someone to obtain a copy from Linda Hall Library, and opt not to pay a copyright fee.[3]

2. No electronic delivery/no electronic publications: Although invented in the early 1970s, the PC did not become a common product until the 1980s. In 1976, it was inconceivable that individuals would sit behind powerful computers, at home, in the office, or on the train, and be able to search for journal articles on a publicly available network. Publishers have been early adopters of Internet technology. Wiley, for example, launched its first electronic journal in 1995, and its full InterScience service in 1997. (By contrast, Google was founded only in 1998.) These electronic journals have changed user habits. Users began moving from print to on-line and, instead of flipping through journal issues, began to search databases and read individual articles without intermediaries.

3. Move from subscription model/debundling of content: The Web accelerated the trend begun by CCC, namely an un-bundling of the journals market into individual units of intellectual property, namely articles, and, to a lesser (but growing) degree, chapters.[4] Today, while many libraries still buy journals in

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[3] Compare www4.infotrieve.com/products_services/document_delivery/pricing_options.asp, with www.lindahall.org/services/document_delivery/index.shtml#fees.

[4] This distinction between the collective work and the article as an individual unit of intellectual property capable of being infringed has already been recognized by the Supreme Court in *New York Times v. Tasini*, 533 U.S. 483 (2001).

subscription format, others buy only articles, and almost all large Wiley customers buy a combination of both. Publishers such as Wiley also allow individuals and libraries to buy single articles and chapters on many publisher websites. Publishers have invested enormously in article-to-article linking and discovery tools to establish and further this market.

When considered in light of these three significant developments over the past thirty (30) years, even the current exception for library deliveries is often not justified and therefore should not be automatically extended. Now that there is a market supplying them, the lost sale of an individual article must be considered as a lost sale. In Berne language, allowing libraries to copy and deliver for free what is readily available commercially conflicts with "normal exploitation" and prejudices the "legitimate interests of rights holders," even where no purchase of a "subscription" is lost.

Wiley does support the current practice of library delivery in two contexts: (1) where the copyright owner or its licensee does not make the individual article available for sale, and (2) as a matter of bargained-for customer licensing with the libraries (as is commonplace).[5] The former is appropriate for legislation; the latter, not.

3. Record Keeping

Section 108 currently attaches liability for copyright infringement only where a party making a copy has actual knowledge or "substantial reason to believe" that the copies requested go beyond the scope of the library exceptions. This "willful ignorance" standard actually encourages the library making copies to avoid any knowledge of activities of the requester, lest knowledge become a liability. This is neither helpful nor desirable.

In order to further insulate the "lender" from liability, when the issue of record keeping was discussed in the context of CONTU, the burden of keeping records was placed on the "borrower." It may be true that if it uses a variety of sources, only the "borrower" knows how many articles from a given journal it has requested. However "ILL" is now performed through standardized systems that track customers for billing purposes.[6] In such a case, there is no reason that the library lenders should not also be required to keep records.

In the commercial context, *Basic Books v. Kinko's*[7] placed the burden of copyright compliance on the entity making the copies. Thus, there is a disconnect between the obligations placed on commercial document suppliers and the obligations placed on

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[5] Wiley allows the practice under many of our licenses.
[6] See generally, comments of International STM at pages 5 and 6.
[7] See, *Basic Books Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991)

libraries. Commercial document providers are required to collect records and report to rightsholders. Libraries are encouraged to destroy records. This is bad policy.

We believe the law should make clear that all libraries which charge any fees for deliveries must be required to report to the copyright owners. If a library is capable of tracking an order for the purposes of billing a "borrower," then that library is also capable of reporting the transaction to the copyright owner.

4. About Wiley

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Respectfully submitted,

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