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DELIVERED VIA EMAIL

RE: Written Comments Concerning the Section 108 Study Group On Copyright Exceptions for Libraries and Archives

Pursuant to the Notice published by the Copyright Office in the Federal Register of December 4, 2006 (p. 70434-70440), and the subsequent web site notice of an extended deadline for written submissions, the Association of American Publishers ("AAP") submits these Written Comments on behalf of its members regarding certain issues relating to the exceptions and limitations applicable to libraries and archives under Section 108 of the Copyright Act.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, AAP members are active in the emerging market for e-books, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

Introduction

The introduction to the Written Comments submitted to the Study Group by AAP last April pointed out that Congress, in enacting Section 108 of the Copyright Act to provide libraries and archives with special exceptions to the exclusive rights of copyright owners, took care to qualify those exceptions with conditions and limitations designed to avoid turning these customers and preservation partners of book and journal publishers into direct competitors in the provision of access to published content.

Now, as the Study Group reviews this second round of Written Comments in considering whether the privileges afforded to libraries and archives under Section 108 warrant amendment to take account of the widespread use of digital technologies, AAP urges the Study Group to also take careful note of two important related developments.

Publishers & New Technologies Offer New Consumer Choices in the Marketplace

As it considers whether revision of the Section 108 privileges is appropriate to allow libraries and archives (and, potentially, other beneficiaries such as museums) to take advantage of the enhanced capabilities of digital technologies in serving the public's interest in accessing diverse content, the Study Group must place its examination of these issues squarely in the context of how such digital technologies have affected the marketplace for published works of original expression. In particular, as it examines possible revisions to the provisions in Section 108 that permit these entities to make and distribute copies of such works pursuant to requests by individual users, the Study Group should consider how the traditional business models of book and journal publishers have been evolving through the use of digital technologies to provide scholars, students, consumers, and other individual users with expanded opportunities and choices for enhanced access to and delivery of the content published in books and journals.

Whether one looks at the developing markets for audiobooks, ebooks, book segments or book search, or the journal communities' more advanced business models for subscription, purchase and licensed use of single articles, the choices and avenues for individual user transactions in the marketplace continue to expand and multiply as printed works increasingly become available through online display, downloading and other ways of utilizing digital formats for content access, distribution and delivery that could only be imagined when the special privileges for libraries and archives to address individual user requests were enacted in 1976.

The innovative use of digital technologies and adaptive business models by the journal publishing community to facilitate individual user transactions with respect to single articles published in journals is well documented in the Written Comments submitted to the Study Group in February of this year by Mark Seeley on behalf of the International Association of Scientific, Technical & Medical Publishers ("STM").[1]

Evolving innovations by book publishers, working in cooperation with leading digital technology companies, have similarly helped individual users to more readily find the content they are seeking in published books, including those that are now out-of-print, and have promoted new business models for allowing such users to acquire and use as much or as little of that content as they desire.

[1] Insofar as there is extensive membership overlap between STM and AAP's Professional & Scholarly Publishing ("PSP") Division, the Written Comments submitted on behalf of AAP endorse and incorporate by reference the analysis and recommendations of the STM submission with respect to the "interlibrary loan" issues raised in Topic A.

Note, for example, just a few of these developments within the past five years:

- Since it first began working with book publishers to offer its "Search Inside the Book" program, Amazon.com has continued working with its partners to add increasingly sophisticated search capabilities to this program. It has built on the concept with new programs to permit users to simply and inexpensively purchase and read online just the amount of content they need ("Amazon Pages") and to allow users to obtain "anywhere, anytime" online access to a digital copy of any physical book they have purchased ("Amazon Upgrade"). It has also implemented a Print-on-Demand program that offers its customers – both publishers and consumers – print-as-ordered copies of lower-volume and out-of-print titles ("BookSurge").

- Since 2004, Google, Microsoft and Yahoo – the world's leading online search engines – have competed to work with publishers and libraries to enhance the discoverability of specific content in published books, including those that are now out-of-print, by offering the public powerful online "book search" capabilities.[2]

- In addition to working with the major online search engines, some of the leading book publishers, such as Random House and Harper Collins, have begun their own programs that directly offer consumers the ability to browse and search the books they publish. Some of these publishers are also working with online booksellers, search engines, entertainment portals and other vendors to offer the contents of their books to consumers for pay-per-page online viewing; others have been developing online repositories for digital book content that will enable publishers to deliver their content in any one of a number of digital formats via multiple delivery channels (e.g., Holtzbrinck's BookStore).

- Book and journal publishers continue to sign up with copyright licensing solutions providers, such as the Copyright Clearance Center, that partner with leading technology innovators as they introduce and implement a series of increasingly efficient approaches to copyright rights and permissions clearance for library, educational and corporate uses of published content.

- In the sphere of education, leading publishers like Pearson, Houghton Mifflin, Harcourt, McGraw Hill and John Wiley & Sons are investing in developing a variety of technologically and pedagogically innovative custom publishing

[2] The lawsuit that several book publishers have filed against Google with AAP support alleges that the unauthorized copying and distribution of copyrighted books in the Google Books Library Project constitute copyright infringement; however, many AAP members participate in the Google Books Partner Program, where the copying and distribution of such books is done pursuant to agreements in which publishers grant permissions. The Library Project and the Partner Program are separate aspects of Google Book Search.

> solutions and online textbook support mechanisms for faculty seeking to personalize assigned instructional materials and provide advanced or remedial learning opportunities for students at all grade levels. At the same time, however, they find themselves competing with open-content learning resource centers, such as the Open Educational Resources Commons and the Connexions Content Commons, that make a broad variety of classroom materials and scholarly content freely available online for use by educators and students. **Given the increasing availability of such free, competing educational content, it is fair to ask: why should Congress promote libraries as competitors to book and journal publishers by permitting them to freely and digitally reproduce and distribute the publishers' own content?**

It may not be a politically-popular response to advocates of expanding some or all of the Section 108 privileges, but the Study Group should examine how digital technologies have enhanced content access and delivery for users *in the marketplace* before assuming that it is either necessary or appropriate to "*better facilitate the ability of libraries and archives to make copies for users in the digital environment*…" (Emphasis added).

AAP appreciates the balanced approach that the Study Group has thus far consistently taken in its inquiry, as exemplified by its recognition that any revision of Section 108 to "better facilitate" these entities' ability to make copies for users must accomplish this result *"without unduly interfering with the interests of rights–holders*" (emphasis added). Nevertheless, AAP members are concerned that the leading library advocacy groups, who are the strongest voices for expanding and enhancing Section 108 privileges with broader utilization of digital technologies, have clearly indicated their unwillingness to support appropriate conditions and limitations that would permit them to exercise such privileges without unduly interfering with the interests of rights-holders.

Libraries Want New Digital Capabilities Without Concurrent New Responsibilities

In considering possible revisions to the provisions in Section 108 that would permit libraries and archives to take advantage of digital capabilities in making and distributing copies of copyrighted works in response to requests by individual users, it is crucial that the Study Group carefully consider whether such entities will accept and responsibly comply with appropriate conditions and limitations that are designed to ensure that their exercise of digitally-enhanced Section 108 privileges would not (1) apply beyond certain special cases, (2) conflict with the normal exploitation of such works, or (3) unreasonably prejudice the legitimate interests of the copyright owner, consistent with the "three-step test" for limitations or exceptions to exclusive rights as adopted in the Berne Convention (Art.9.2) and incorporated in the TRIPs accord (Art.13).

In November of last year, well after the deadline for the Study Group's initial request for the submission of Written Comments, the American Library Association (ALA) and the Association of Research Libraries (ARL) submitted to the Study Group a position paper entitled *"The ALA and ARL Position on Access and Digital Preservation: A Response to the Section 108 Study Group."* Part II of that submission provided *"Detailed Responses*

to Section 108 Working Group Questions," apparently to clarify, based on additional input from the library community, the earlier statements that the two groups had filed in conjunction with the March 2006 Roundtables and the Federal Register notice of the initial request for Written Comments.[3]

The joint ALA/ARL submission contains a number of jarring position statements that advocate a very broad expansion of Section 108 privileges for libraries, archives, museums and "other cultural heritage organizations" with apparently no tolerance for any conditions or limitations designed to ensure that these entities would exercise their privileges without unduly interfering with the interests of copyright rights-holders.

A few examples of these positions should suffice to demonstrate the serious concerns they raise for the rights-holder communities, especially as the Study Group now considers the more explosive issues of libraries and other beneficiary institutions being able to use digital technologies to make and distribute copies of works to their user communities:

- Libraries want all "cultural heritage organizations" to engage in preemptive preservation of "at-risk" works (defined "as broadly as possible"), but they claim that (1) they do not need any specific new statutory exception to do so, and that (2) such activity should not be limited to "trusted preservation institutions." They also claim that existing "trigger conditions" in Section 108 permit preservation copies to be made accessible to libraries' user communities, and that there should be no prohibition on remote access to digital preservation and replacement copies, and no restrictions on preservation and replacement copies (including those in digital format) other than those explicitly assigned to the original work when it was acquired.

- Libraries oppose any proposed changes to Section 108 that would be predicated on the use of restrictive conditions or technologies, such as those included in the TEACH Act, and do not want to be "obligated to control, monitor, or enforce technological protections tied to digital works, or to adjudicate the legality of user behaviors."

- Libraries urge that, in providing their user communities with electronic access to digital replacement or preservation copies, each institution should be permitted to apply "'best practices' which evolve over time with new technologies and changing user information needs," and that "[l]egislation should not interfere with library policies when libraries seek to enable, and not restrict, community use."

[3] Although these submissions have not been posted on the Study Group's website as of the date of this submission, the two parts of the submission may be found on the ALA website at www.ala.org/ala/washoff/WOissues/copyrightb/section108/108ppfinal.pdf and www.ala.org/ala/washoff/WOissues/copyrightb/section108/mm108long.pdf.

The ALA/ARL submission seems to espouse a "trust us" approach to the expansion and digital enhancement of the preservation and other privileges their members may exercise under Section 108, urging that libraries be permitted to rely upon naturally-evolving "best practices" (rather than legislative prescriptions) and their claim to have "demonstrated great care in protecting works – digital and otherwise – from unauthorized access, reproduction and distribution."

Notwithstanding the intention and painstaking efforts of the Study Group to locate a middle-ground on these volatile issues, it appears that the library community has strong reservations about working toward such a goal and may not accept the result if it can be achieved. Although the first part of their submission concludes with an acknowledgement that the limited reproduction, preservation, and access to works that libraries should be permitted to allow "must naturally occur under the purview of libraries *in the most technologically secure way possible and without impinging on the economic interests of rights-holders*" (emphasis added), this otherwise encouraging statement is thoroughly undercut by the more specific pronouncements in the submission.

Overall, perhaps the most troubling notion articulated in the ALA/ARL submission is the flat assertion by libraries that "[t]he shift to a digital environment has not changed our mission." While it is not surprising that libraries would hold this view with respect to their proclaimed role as "stewards of our cultural and historical record," it is a view that does not appear to leave room for the possibilities that the shift to a digital environment (1) has changed the *marketplace* in ways that warrant reconsideration of the rationale for authorizing libraries to make and distribute copies of certain works for individual users, and (2) has created the potential for libraries to facilitate digital copy access, distribution and delivery for users in ways that will *directly compete* with publishers, or will, at a minimum, pose the risk of market-harming unauthorized access, reproduction and distribution of publishers' works in the absence of appropriate preventive safeguards.

On behalf of its members and other rights-holders, AAP urges the Study Group to give these issues very careful consideration. For any contemplated revision of Section 108, it is critical that the Study Group give serious attention to (1) examining how the current digital activities and aspirations of libraries square with the traditional notion of a "library" under Section 108 as enacted, and (2) distinguishing the roles of libraries and publishers in serving the public's needs and interests regarding the use of creative works of original expression.

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

General Issue: 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?

Response: As previously noted, in light of the extensive membership overlap between the International Association of Scientific, Technical & Medical Publishers ("STM") and AAP's Professional & Scholarly Publishing ("PSP") Division, AAP endorses and incorporates by reference the analysis and recommendations presented in the Written Comments submitted to the Study Group on February 13 of this year by Mark Seeley on behalf of the STM concerning the "interlibrary loan" issues and accompanying questions under Topic A.

The innovative use of digital technologies and adaptive business models by the journal publishing community, facilitating individual user transactions for a single journal article with efficiencies that simply would have been impossible to achieve at the time Section 108 was enacted, is well documented in the Written Comments submitted by Mr. Seeley.

For convenience, the basic STM recommendations that are endorsed by AAP with respect to "interlibrary loan" ("ILL") issues are as follows:

- Online delivery of a file or copy in digital form (regardless of whether the original is in a digital form or the digital copy was made from a scanned print copy) should continue to be clearly identified as outside the scope of Section 108;

- Borrowing/requesting libraries should have more carefully defined user communities for their ILL requests, which should consist of:

    1. Staff, students and faculty in the case of academic libraries,
    2. Professional staff in the case of museums or archives, and
    3. Community residents in the case of public libraries.

- Objective standards that facilitate measurement and reporting of ILL activity should be implemented as part of Section 108, similar to the CONTU "Rule of 5" guidelines, but in a manner that extends the recordkeeping requirement to "lending" or fulfilling libraries in addition to the current recordkeeping requirements on "borrowing" or requesting libraries, and makes such records (on any anonymous basis to protect personal privacy) available to the public;

- The principle of "mediation" between borrowing/requesting libraries and lending/fulfilling libraries must be maintained as fundamental to the distinction between ILL and document delivery activities (i.e., the latter conducted through voluntary licenses); and,

- Libraries that are state entities should not be able to rely on the "affirmative defenses" of Section 108 if they are, at the same time, asserting sovereign immunity from suit for an award of damages.

TOPIC B: AMENDMENTS TO SUBSECTION 108(i)

General Issue: Should subsection 108(i) be amended to expand the application of subsections (d) and (e) to any non–text–based works, or to any text–based works that incorporate musical or audiovisual works?

Response: To the extent that the products of most AAP members continue to be primarily text-based literary works, AAP views this topic and its accompanying questions as primarily aimed at those who are in the business of producing audiovisual, musical or other non-text-based works for commercial markets.

However, to the extent that some AAP members are increasingly producing text-based literary works in non-text-based formats (i.e., audiobooks), as well as non-text-based works and text-based works that incorporate audiovisual works and phonorecords (e.g., educational websites, textbooks and journals in various disciplines), we would observe that the exclusion of non-text-based works from the application of subsections (d) and (e) when Section 108 was codified in 1976 seems to have had more to do with the fact that such works were not susceptible to the principal copying technology available to libraries and archives at that time (i.e., photocopiers) than any specific public policy considerations. Since this is no longer the case in an environment where new technologies have produced a convergence of different types of media with respect to digital access, distribution, reproduction and storage capabilities, AAP believes that reconsideration of the exclusion is appropriate and that any proposed revision of the applicability of Section 108 that would continue to discriminate among different classes of works in terms of applicability bears a heavy burden of justification.

At the same time, AAP recognizes that, given the context of its original focus on text-based works, certain current and proposed aspects of subsections (d) and (e) may work differently or prove to be unworkable in application to non-text-based works, whether standing alone or embedded in text-based works. Moreover, the potential economic impact of applying these subsections to evolving business models featuring online delivery could differ significantly among currently included and excluded classes of works. This is all-the-more reason why proposed revisions to Section 108 should be considered in their potential application to all classes of works, and producers of all classes of works should have a recognized stake and be represented in their consideration.

TOPIC C: LIMITATIONS ON ACCESS TO ELECTRONIC COPIES, INCLUDING VIA PERFORMANCE OR DISPLAY

General Issue: Should section 108 be amended to permit libraries and archives to make temporary and incidental copies of unlicensed digital works in order to provide user access to these works? Should any exceptions be added to the copyright law to permit limited public performance and display in certain circumstances in order to allow for user access to unlicensed digital works?

1. What types of unlicensed digital materials are libraries and archives acquiring now, or are likely to acquire in the foreseeable future? How will these materials be acquired? Is the quantity of unlicensed digital material that libraries and archives are likely to acquire significant enough to warrant express exceptions for making temporary copies incidental to access?

Response: The Notice references these works as "particularly those that exist in purely electronic form," which AAP understands (on the basis of Question 5 below) as distinguishing them from digital works embedded in tangible media, such as DVDs or CDs. In further describing such works for which lawful copies are obtained by libraries and archives without a license, the Notice offers "donated personal or business files…, electronic manuscripts… and legally captured Web sites" as examples of the type of "unlicensed digital materials" that libraries and archives are acquiring or are likely to be acquiring in the foreseeable future.

The citation of these examples may mistakenly convey the idea that the issue concerns only works that are acquired on a noncommercial basis. It is our understanding that some publishers of "ebooks" and other electronic content for the commercial marketplace rely on DRM technology and copyright law, rather than a textual license, for protected distribution of literary works in a digital format. To the extent that libraries typically purchase copies of such works, the logic of the last part of this question – which implies that a wide availability of unlicensed digital materials should "warrant express exceptions for making temporary copies incidental to access" – could be troubling to publishers insofar as it might mistakenly be read as a rationale for circumventing access restrictions imposed by a publisher through DRM technology. However, if the exceptions are clearly and carefully crafted to make lawful only those temporary and incidental copies that are automatically created as part of the inherent digital technical process of making the work perceptible pursuant to the terms of access that are authorized by the publisher, there should not be a problem.

2. What uses should a library or archives be able to make of a lawfully acquired, unlicensed digital copy of a work? Is the EU model a good one namely that access be limited to dedicated terminals on the premises of the library or archives to one user at a time for each copy lawfully acquired? Or could security be ensured through other measures, such as technological protections? Should simultaneous use by more than one user ever be permitted? Should remote access ever be permitted for unlicensed digital works? If so, under what conditions?

Response: The EU model appears to strike an appropriate balance that not only addresses security concerns, but also helps to ensure that the free digital access that is afforded to individual users by a library does not unfairly substitute for the market availability of digital access to the work that may be provided by the publisher on a commercial basis. Although publishers have long accepted that library lending, pursuant to the "first sale" doctrine or a license agreement, will (at least in some instances) substitute for the potential marketplace acquisition by the patron that might otherwise occur, the competition that traditional one-at-a-time, on-premises library lending currently offers to

the marketplace is reasonably limited by the tradeoffs involved in terms of convenience of access, and ownership or use of a copy.

The limitations of traditional library lending reflect acknowledgement of the different user needs served by libraries and publishers, respectively, which make the relationship between libraries and publishers complementary rather than competitive. Users frequently make choices between obtaining longer-term access to a copy of a work (e.g., through direct purchase or licenses that provide varying terms and duration governing use) and getting temporary or limited access to a copy of a work, based on balancing considerations such as cost, convenience and manner of use. If libraries can freely deliver copies or access to copies without the users having to accept any compromise in convenience or manner of use, then libraries will directly compete with publishers in a way that will inevitably interfere with normal exploitation of the works in their markets. The ability of libraries to provide free access *remotely* and *simultaneously to multiple users* through digital networks only exacerbates the problem of unfair competition.

3. Are there implied licenses to use and provide access to these types of works? If so, what are the parameters of such implied licenses for users? What about for library and archives staff?

Response: It depends on the particular situation and circumstances, and on the decisions made by the copyright owner with respect to the use or non-use of DRM technologies to control permitted access and use of an unlicensed digital copy of a work. For example, when a copyright owner makes an unlicensed digital copy of a work available to a library or archive without DRM or other restrictions on access and use, it may be appropriate to view the owner's actions as constituting an implied license for access and use if other related circumstances would warrant that conclusion. The circumstances of lawful acquisition or creation of a copy of an unlicensed digital work may give library and archives staff an implied license for certain forms of access and use in connection with the performance of their staff responsibilities with respect to the work. Those circumstances may not, however, imply any license with respect to third-party access and use. In general, it should be noted that any policy encouraging users to act on the perception of an "implied license," particularly where the circumstances make the copyright owner's intentions regarding access and use unclear, could adversely impact the legal interests of both the copyright owner and the user, including users who are library or archives staff.

4. Do libraries and archives currently rely on implied licenses to access unlicensed content or do they rely instead on fair use? Is it current library and archives practice to attempt to provide access to unlicensed digital works in a way that mirrors the type of access provided to similar analog works?

Response: AAP members lack sufficient knowledge of current practices by libraries or archives, regarding reliance on implied licenses or fair use to access or use unlicensed digital works, to provide a meaningful response to these questions.

5. Are the considerations different for digital works embedded in tangible media, such as DVDs or CDs, than for those acquired in purely electronic form? Under which circumstances should libraries and archives be permitted to make server copies in order to provide access? Should the law permit back–up copies to be made?

Response: The considerations for digital works embedded in tangible format are somewhat different from those implicated for digital works acquired only in a purely electronic form, since the alternative exists to adhere to traditional library lending policy by lending the physical object in which the copy of the digital work is embedded. Where the library acquires that physical object, it should not be permitted to make server copies for purposes of providing access, but should generally provide access through the loan of the tangible media in which the copy of the digital work is embedded. Any right to make copies should be controlled by those provisions of Section 108 that deal with copying for replacement or preservation purposes, however the Study Group might otherwise recommend that those provisions should be revised.

6. Should conditions on providing access to unlicensed digital works be implemented differently based upon the category or media of work (text, audio, film, photographs, etc.)?

Response: See response to Topic B.

7. Are public performance and/or display rights necessarily exercised in providing access to certain unlicensed digital materials? For what types of works? Does the copyright law need to be amended to address the need to make incidental copies in order to display an electronic work? Should an exception be added for libraries and archives to also perform unlicensed electronic works in certain circumstances, similar to the 109(c) exception for display? If so, under what conditions?

Response: Depending on the number of individuals receiving online access, the provision of online access to literary works in digital formats would appear to necessarily exercise the public display right, and involve the creation of temporary, incidental copies. See response to Question 1 regarding the need for exception in the law for incidental copies.

Respectfully Submitted,

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