



COPYRIGHT CLEARANCE CENTER, INC.

March 16, 2007

Ms. Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives
Library of Congress
Madison Memorial Building, Room LM-636
101 Independence Avenue, S.E.
Washington, D.C. 20540

Re: Comments in Response to Section 108 Study Group Request

Dear Ms. Rasenberger:

Copyright Clearance Center, Inc. ("CCC"), takes this opportunity to comment on the issues raised by Topic A, Questions 9 and 10, of the Notice and Request for Comments of the Copyright Office's Section 108 Study Group published at 71 Fed. Reg. 70434 (December 4, 2006) and to offer facts and data about the operation of the interlibrary loan and document delivery markets for the consideration of the Study Group (see Section IV).

I. Introduction

CCC is a not-for-profit corporation created by a consortium of copyright rightsholders and librarians in response to the recommendation of Congress in the legislative history of the Copyright Act of 1976 that an easy and efficient means should be created to enable the exchange of rights and royalties – the “permissions process” – between willing rightsholders and willing users of text-based copyrighted materials. See, e.g., S. Rep. 94-473, 94th Cong., 1st Sess. 70-71 (1975). Congress, and those who testified in the course of the legislative hearings leading to the 1976 Act, were reacting to the “new technology” of the time, which was making widespread copying of text-based copyrighted materials too easy and uncontrollable and thereby undermining the Constitutional mandate to maintain copyright laws. That new technology was, of course, photocopying, the field of use in which CCC was created to issue licenses and permissions (and one in which we continue to operate to this day).

II. CCC Today

CCC has been quite successful at serving market participants and allowing them to complete licensing arrangements on a voluntary basis. CCC has grown since opening its doors in 1978 from having no business at all to, in our most recent fiscal year, over \$160 million in revenues and over \$110 million in distributions to participating rightsholders, while still

remaining a not-for-profit organization. We believe that we are unique among collecting societies worldwide in including both rightsholders and users on our Board of Directors and in conducting both repertory and pay-per-use licensing without the support of any form of statutory or judicially supervised licensing. Finally, CCC has bilateral relationships with counterpart organizations in other countries that allow us to smooth the exchange of rights and royalties among rightsholders and users worldwide, and we are the largest member of the International Federation of Reproduction Rights Organizations (“IFFRO”), the worldwide association of collecting societies in the text field.

Today, CCC represents tens of thousands of copyright rightsholders (that is, publishers and authors, and their agents, societies and other organizations) around the world, each of whom, either directly or indirectly through a representative, has signed an agreement authorizing us to represent them. On the other side, CCC today issues two types of licenses, each voluntarily entered into by a user:

- repertory licenses which cover photocopy, email and intranet uses at thousands of business organizations in all sectors of the economy, representing more than 20 million employees (and we are just beginning to issue repertory licenses to colleges and universities as well); and
- pay-per-use (or “transactional”) licenses (sometimes called “permissions”), covering photocopy, email, intranet and many other kinds of uses, to thousands of businesses and academic institutions, particularly covering document delivery (including interlibrary loan that falls outside the limits of Section 108) and academic coursepacks, both paper and digital. These pay-per-use licenses number more than 1,000,000 per year, and we handle them both centrally at our own website (as well as by mail, fax and electronic communication with content intermediaries) and “at the point of content” online at dozens of publishers’ Web sites.

It is important to note that CCC does not license fair uses or other uses privileged by the Copyright Act. All licensing arrangements are voluntarily entered into by all users who have, presumably, made their individual fair use judgments and have come to CCC only for those uses that they themselves have determined are not fair uses or otherwise privileged.

III. Although CCC, and the Library Marketplace, Have Changed Since the 1970s, Section 108 Has Not

In 1978, getting permission to use the copyrighted text-based works of others within the scope of the rights granted by the Copyright Act was a difficult, manual process. In fact, that was precisely why Congress recommended creation of a collecting society and why both rightsholders and users were motivated to establish CCC. The permissions process was not only excessively opaque to users but it was also burdensome and expensive for libraries to have to maintain audit trails for many requests and responses of indeterminate status. The

process was also costly and inefficient for rightsholders because they too had to bear paperwork, accounting and customer service burdens. The networks underlying interlibrary loan (“ILL”) were at an early, inefficient stage as well. They often relied on personal relationships between librarians or loose associations among institutions. Finally, the concept of “non-returnable ILL” (specifically, delivering photocopies of articles from journals and other periodicals and of portions from books) destined for an end-user local to the “borrowing” library, was in its infancy.

Today, a more mature, efficient and international market exists, and CCC plays an integral part in that market. Prices for permissions through CCC are set directly by individual rightsholders for the million or more transactions that we process each year through our various pay-per-use licensing services. Thousands of institutional customers *voluntarily* participate in this method of copyright compliance. Thus, CCC’s experience indicates that both rightsholders and users of text-based publications recognize the value of copyrighted material and that both want to see that its use is properly compensated in order to ensure its continued creation in the future. In essence, the operation of this market maintains the creation-use balance envisioned by the Constitution and the Copyright Act.

Meanwhile, in the libraries of America and elsewhere, ILL and other services have grown to reflect the expansion of everyone’s reliance on information to fuel business, education and every other sector of the economy, and those libraries have evolved with everyone else from a reliance on paper for transmitting information to a reliance on digital tools of various kinds. And yet, Section 108 of the Copyright Act – written at a particular moment in time to address a particular problem (photocopying) – has not evolved sufficiently along with its beneficiaries, the libraries, archives and users of copyrighted works.

So, for example, as noted in the Study Group’s questions and has been amply reported in the roundtable discussions, an “article economy” has indeed grown up in the years since the wide availability of inexpensive photocopying: no longer need one subscribe to a journal or buy a book or journal issue in order to obtain a specific chapter or article. Today, substantial businesses, such as Factiva, Dialog, Ovid, CISTI, the British Library Document Supply Centre and many others, have grown up specifically to fill this need.

While the spread of photocopying, to which Section 108 was explicitly a response, began this trend, digital uses and the transmission speed and convenience of the Internet have tremendously amplified it and sped it up. Today, in addition to the intermediary businesses noted above, many copyright rightsholders of all kinds – from individual authors to international publishing houses – are willing and able (through their Web sites) to make individual chapters or articles available to the interested user right alongside subscriptions or full-issue purchases. This evolution has permitted more sensitive pricing and marketing of materials based on the nature of the use and of the user (including free distribution in many cases, including to medical patients and their families).

In this context, many of the assumptions that underlay the writing of Section 108 in the 1970s have probably outlived their utility. One widely-accepted example of such an outdated assumption is that seldom is it any longer necessary for a librarian, or even an end-user him- or herself, to locate a library that holds the particular article or chapter desired and then make complicated arrangements for physical delivery of the desired material across long distances. Rightsholders have already made such a transaction easy either directly themselves or through intermediaries. Library systems themselves have recognized this reality (and its costs), having substituted first photocopies and then digital copies for the sending of originals and, more recently, having implemented all manner of fees to pay for the finding, copying, shipping and handling services involved, sometimes including a copyright fee that is remitted to the rightsholder either directly or through CCC. And, of course, the ready availability of online communications, including national e-mail lists and chat rooms, has encouraged libraries (and others) to issue “all points bulletins” for an ILL “lender”, turning a local, inefficient market into a highly efficient, international one which directly competes with rightsholders for the delivery of individual articles and chapters from copyrighted works.

IV. Some Market Information for the Study Group’s Consideration

Information from the marketplace confirms the fact of change in classic ILL and the growth of the delivery of documents on demand by libraries to all types of users. For example, a recently-published analysis by the Association of Research Libraries (“ARL”) reports on an in-depth study comparing actual 1996 and 2002 ILL transaction data for 44 leading research libraries. Mary Jackson et al., Assessing ILL/DD Services: New Cost Effective Alternatives (Ass’n of Research Libraries, Washington 2004) (“ARL Study”). These data indicate that “for borrowing and lending there has been an increase in the number of filled transactions at every percentile. On average, there has been a 75% increase in filled borrowing transactions, and an average of 59% increase in filled lending transactions.” ARL Study at page 72. The same study reports that an increasing proportion of these transactions are “unmediated” by librarians, ARL Study at pages 15-19, and that a majority of total transactions (52% in both 1996 and 2002) characterized as “interlibrary loan” are of “nonreturnable photocopies”, ARL Study at page 72.

Across the same period, the total number of CCC's commercial document delivery customers has shrunk substantially. These commercial providers find themselves contending with, among other market factors, competition from library-based providers of “non-returnable ILL” transactions – that is, the commercial document delivery organizations are in the position of being asked to supply the same articles for the same corporate customers, but at a cost disadvantage due to the royalties they must pay on all requests for delivery of copyrighted materials. CCC’s own communications with librarians and even many of our corporate customers confirm the commercial document deliverers’ perception (and competitive reality): many of the libraries and corporate entities do not perceive any obligation to obtain permissions for what is in essence a document delivery-to-order

business, including service to customers across the country and around the world who are themselves using the documents for commercial purposes (a use specifically outside the scope of Section 108), even though many of these same corporate customers recently paid copyright fees for deliveries of the same types of documents from commercial providers. An additional factor is the appearance in the marketplace of libraries outside the United States which can, and do, efficiently deliver documents to United States customers, and of United States libraries which can, and do, efficiently deliver documents to customers abroad, with both sets of cross-border transactions often relying on Section 108 privileges although their circumstances almost certainly fall outside the assumptions that underlay the drafting of Section 108 in the 1970s.

CCC's own market estimates indicate that 58% of the United States academic market for "non-returnable ILL" of copyrighted material is unpermissioned; 17% is publisher-permissioned, and 25% is permissioned by CCC. Both empirically and anecdotally, we observe that while the most knowledgeable and conscientious library operations seek permissions for those uses that are "beyond-CONTU" (that is, beyond the quantity and age limits proposed by the CONTU Guidelines, or for uses that are outside Section 108's focus on library-to-library transactions), a significant number of libraries do not – and do not appear to believe they have an obligation to – seek permissions for document delivery to business customers who are not themselves libraries (a requirement of Section 108 itself). Further, based on our communications with librarians, by and large they do not perceive "cost recovery" charges for ILL as in any way leading to an obligation to pay copyright fees to the rightsholder (even if the amounts charged are similar), thereby charging the user for a delivery but sharing none of the revenue with the rightsholder in the material delivered. See also Jeff Luzius & Pambanisha King, "Fee-Based Document Delivery: Who's Buying?", 16(3) J. Interlib. Loan, Doc. Delivery & Elec. Reserve 67-73 (2006). This activity comes against a background, disclosed in external surveys conducted by CCC, that indicates that more than half (51%) of colleges and universities deliver materials to corporations and/or individuals not associated with their institutions, and that, within this group, 8% charge a fee (above and beyond costs) to the corporations or individuals receiving the information. Our research also indicates that only 14% of colleges and universities classify document delivery as a separate service from ILL, further suggesting "leakage" between the two activities even though one may be covered by Section 108 and the other is certainly not.

An additional factor undermines the "grand bargain" (between rightsholders in text-based materials and libraries and archives) embodied in Section 108. The library literature is replete with articles documenting the rise in "patron-initiated" or "unmediated" ILL and document delivery in the post-1976 period, down to the present. See, e.g., ARL Study; Lee Andrew Hilyer, "Copyright in the Interlibrary Loan Department", 16(1/2) J. Interlib. Loan, Doc. Delivery & Elec. Reserve 53-64 (2006). This rise is partly due to the technological advancement of the Internet, and of improved functionality in "integrated library systems", and also partly due to a rise in user expectations. Approximately 50% of this traffic is in non-returnable ILLs. ARL Study at page 72. Section 108, however, did not address unmediated

ILL; instead, the environment envisioned by Section 108 presupposes library staff as the gatekeepers, or intermediaries, who mediate these borrowing and lending requests. Over the same period, many libraries otherwise qualified under Section 108 have expanded their service areas beyond their “natural constituencies” (local faculty, students and private researchers, as well as local individuals doing research for themselves and their families) to serve ever broader swaths of the community. The new constituency now often reaches nationwide, and even internationally, and includes in particular the business community, which tends to be exceptionally knowledge-hungry in the new information-driven economy and is willing to pay fees to receive that information. Taken in combination, these environmental changes have served to lower the barrier between the public service functions of qualified libraries and archives (those intended to be facilitated by Section 108) and the world of commercial research and its steady need for copies of articles in support of commercial motives, which was always understood as beyond the scope of Section 108 because of its likely negative impact on subscriptions and other copyright-authorized uses. See House Rep. 94-1476, 94th Cong., 2d Sess. 74-78 (1976); S. Rep. 94-473, 94th Cong., 1st Sess. 67-71 (1975). That is, whatever distinctions there were between ILL as a public policy choice, even as it has evolved away from classic interlibrary loan, and document delivery for a fee are rapidly disappearing for many, many libraries.

V. Conclusion

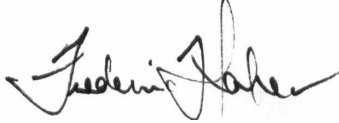
CCC observes that the text of Section 108 seeks to address particular market failures extant at the time of its enactment (1976). Today, however, in an international system of information distribution, where access to the Internet is ubiquitous and email delivery in a moment is not only available to all but actively used by all, (i) the old pre-1976 market failures have diminished in importance almost to the vanishing point, (ii) the old pre-1976 assumptions about library practices have become outdated by an international ILL system in which copies of articles and book chapters are delivered not only between libraries each serving local users but directly between distant libraries and local users, including for-profit business users, and (iii) the journal-level, mediated, holdings-based system enshrined in the “grand compromise” that is Section 108 is less and less germane to contemporary library services and patron needs beyond whole books (that is, “returnable ILL”). Now, a significant and ever-increasing proportion of the total universe of articles and other materials is available to library patrons from rightsholders in digital form, deliverable through web-based services that accept common forms of payment and issue standardized licenses (including free licenses for particular uses). CCC (and in fact every other observer) has every reason to expect that all of these trends will continue for the foreseeable future. A revised Section 108 ought to better reflect the current and anticipated market in journal articles and book chapters and, optimally, address only those market failures which continue to exist.

Considered as a “carve-out” for libraries and archives directly open to the public from the exclusive rights of copyright rightsholders granted in Section 106, Section 108 has for many years functioned as a valid and cherished choice in public policy, but CCC believes that that

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policy is now due for careful reconsideration and for a re-balancing within the spirit of the Constitutional mandate of copyright and of the Copyright Act as a whole.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frederic Haber". The signature is fluid and cursive, with a large initial "F" and "H".

Frederic Haber
Vice President and General Counsel