

Music Library Association

**Written Comments responding to Section 108 Study Group:
Copyright Exceptions for Libraries and Archives**
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Submitted by Eric Harbeson [REDACTED] on behalf of the
Music Library Association Legislation Committee:
Gordon Theil (Chair), Mary Wallace Davidson, Eric Harbeson,
Jon Haupt, Jerry McBride, Wendy Sistrunk

Contact:
Gordon Theil, UCLA Music Library
1102 Schoenberg Music Building
Box 951490
Los Angeles, CA 90095-1490
[REDACTED]
[REDACTED]

The Music Library Association (MLA) respectfully submits the following comments with regard to the request for public comment issued in the *Federal Register*, 4 December 2006. The MLA was founded in 1931 and is a professional organization devoted to music librarianship and all aspects of music materials. Our membership includes librarians, composers, scholars, vendors and others interested in music and librarianship.

The chief hope of the MLA is that the Section 108 Study Group will recommend the removal of §108(i), which excludes musical works, pictorial, graphic and sculptural works, and motion pictures and other audiovisual works from the exemptions granted in prior subsections, as discussed in Topic B. Our interests in Topic A depend on the decisions made in Topic B, therefore our comments in Topic A reflect the assumption that the exclusion of non-textual works is discontinued.

As a general comment, music libraries have always taken the position that copyright compliance is ultimately, and necessarily, the responsibility of the user. We post signs on copy machines, and include copyright notices in Interlibrary Loan (ILL) forms (both paper and online). Our position is that the same is true in the digital environment. What has changed is the ease with which copies can be distributed, not the purpose or intent.

In addition, we believe that libraries are, in general, quite good stewards of the rights-holders' intellectual property. Many librarians are rights-holders themselves, as are the libraries which employ them. Though we may disagree on many points, we count the community of rights-holders as colleagues and allies, not as adversaries.

Topic A

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?

The central position of the MLA is that the law needs to acknowledge the equally valid needs our users have for textual as well as non-textual materials. We hold this to be true regardless of whether the sources or copies are digital or analog.

Non-textual and textual materials are often very similar with regard to the needs of music library patrons. Non-textual works, such as printed music, are often used for research purposes in much the same way as are textual works, especially for students of music history and theory:

- A scholar of the music of a given composer may consult scores for that composer's works for comparison and analysis just as a scholar of a given author might compare the latter's writings.
- Music historians, conductors and performers frequently consult multiple editions of the same work for the purposes of criticism or historical authenticity in performance.
- Performers and musicologists compare different recorded interpretations of the same work in many situations, including preparation for performance, historical criticism or biography of a performer, or in the study of recording techniques.

The law also needs to take into consideration the multiple incidental copies which occur in the normal copying of materials digitally, such as temporary files which are not normally usable (or at least used) and copies which are made in the process of normal backups. Very often these copies are made without even the knowledge of the user.

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?

The current language is unduly restrictive as to the number of copies permitted. Ultimately, the number of copies itself is not the critical issue, but the distribution of those copies. It is impossible to convey one copy of a digital textual or non-textual document without making two or more temporary copies (often without any knowledge by those making the copies). In order to "better facilitate the ability of libraries and archives to make copies for users in the digital environment," the "single copy" language

must be changed as suggested. This will not “unduly interfere with the interests of the rights holders,” because normally these extra copies are not retained. If they are retained, they are retained in accordance with provisions concerning preservation.

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?

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?

We are unable to answer these questions in reference to Topic B since we are not currently permitted to provide ILL copies of printed or recorded music under subsections (d) and (e) §108. We currently must rely on §107 for any duplication and transmission of music materials.

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 flexible standard which is necessary to permit digital reproduction for users should ultimately represent the functional equivalent of the single-copy restriction for analog copies. Notwithstanding §107, we support language restricting further reproduction of copies delivered under §108. It is worth noting that restrictions to this effect already exist under §108 (f)(2).

However, we do not support statutory language requiring either general or specific technological means to achieve these restrictions:

- Many libraries may not have, or be able to afford, access to the technology or support staff needed to implement these often expensive measures
- The speed at which the technology for implementing such measures changes renders any statutory language too vague to be relevant or effective.

As a guideline, libraries should be encouraged to include persistent identifiers on the reproductions, as well as to implement downstream restrictions to the extent the

technology is available to them. We support the requirement that libraries include copyright warnings, as well as user agreements indicating compliance with copyright law.

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?

The appropriate restrictions discussed in the previous question should be sufficient to address rights-holders concerns. Further legislation to define and restrict a library's traditional user community is unnecessary, and is harmful to the music library community.

The restriction of §108 exemptions to a library or archives' traditionally defined user community is problematic:

- Legally defining the “traditional user community” restricts libraries' ability to innovate, to expand their reach in an increasingly global information community. For most libraries, especially academic libraries, the community of users is substantially broader than it was even 5 years ago. For libraries to remain relevant to society, we must be able to adapt to changing user needs, including the ability to serve patrons which do not share geographical proximity to the library.
- Many music libraries serve as manuscript repositories or archives, whether as official repositories for a university's school of music, or as custodians for the papers and manuscripts for composers or scholars. These materials are unique, and can therefore be defined only by the community of users which have interest in it.

In addition, statutory language defining and restricting access to a “traditional or defined user community” is unnecessary, since most libraries already define their user communities, and restrict services to those communities. The uncensored flow of information is one of the primary missions of public and research libraries, and should not be curtailed. Creating new definitions runs the risk of denying access to users who previously had access.

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?

We do not object to codifying Interlibrary Loans as transactions between two libraries. We recognize the concern raised about competition with the rights-holders' markets as a valid one. The friction involved in requiring library mediation on both ends encourages users to find material through other means if available (i.e., purchasing the material), and helps ensure that ILL is used for the purposes for which it was intended.

However, we support language allowing libraries to deliver digital materials directly to the user once the request has been placed through a borrowing library. Borrowing libraries may not have the technological means to distribute digital materials, though they would have means of authenticating users as members in good standing. Users from these libraries should still be able to take advantage of Interlibrary Loan regardless of their local library's means. This would not prevent borrowing and lending libraries from keeping the necessary records.

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?

We have no objection to specifying that the borrowing libraries or archives may not use the digital copies as a means of adding to their collection by circumventing the normal purchase of materials. However, the law must continue to allow libraries or archives to deposit copies for research use, or to use copies for preservation purposes pursuant to §108(b) and (c).

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"?

For analog material, §108(d) should continue to provide access without the additional restriction concerning fair price availability. In such cases, to add the fair price restriction would undermine a substantial function of ILL.

Even if the "fair price" test is to be included, the law must distinguish between materials available for purchase and materials available for license (though we would argue that

Title 17 does not concern licenses and contracts and so may not belong in this discussion). The ability to find an item for license (i.e., available in an online database for a subscription fee) is not an acceptable substitute for obtaining a copy which can be used in perpetuity. A scholar might request an item for a long term research project, and then need it again many years later. She ought not to have to pay a rental fee again (if indeed the item still exists for lease in the future). Additionally, libraries ought to be able to make copies of items which they fully own under §108, even if the item is available for license elsewhere.

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?

Whether or not revisions are deemed necessary, our position is that this falls outside of the scope of this discussion and that any revisions to CONTU guidelines should take place in a separate forum with specific opportunities for discussion, and should take place independently of revisions to §108. The issue has not been adequately discussed in the public roundtables or discussion fora engaged by the §108 Study Group.

Topic B

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 position of the Music Library Association is that subsection (i) should be eliminated because it constitutes an arbitrary and inequitable distinction between textual and non-textual content. As a result of this subsection, libraries cannot provide access to musical works (or other works of art) for uses which are recognized as non-infringing for text materials under subsections (d) and (e). It is difficult to see how modifying, rather than eliminating, the subsection would provide any additional benefit for access to non-textual materials.

With scores, the inequity is particularly stark. Musical scores, especially in the hands of advanced musicians, are functionally no different from textual materials. Scholars and performers read scores in largely the same way that they read books, and for many of the same purposes. There can be no fair distinction made, for example, between a Shakespeare scholar comparing editions of *A Midsummer Night's Dream* and a musicologist comparing editions of Gustav Mahler's *Kindertotenlieder*. Libraries should be allowed to supply the request through analog as well as digital copies.

As with scores, we believe the reproduction of analog sound recordings of musical performances not available digitally should be allowed under both subsections (d) and (e). With regard to sound recordings, it is important to note that in many cases a specific work is not itself sufficient to fill the need of the user. Both the work and its manifestation may be the sources of study. For example, a scholar may be studying the performances of a given musician, interpretations of a given work by many interpreters, or recording techniques over a given time-span. Recognizing that subsection (i) does not currently discuss sound recordings *per se*, we offer the following, for recordings that are available commercially:

- If the performances (whether movements (sections) or entire works) are available for purchase at fair prices whether in physical form or through online music services, we believe that libraries should not be permitted to provide reproductions through ILL in any form. The "fair price" test must take into account the needs of the user, however. If a user needs only one recording that is available only as part of an expensive multi-volume set, the "fair price" would not be met. A user should not be expected to purchase the whole set for a single recording, just as a patron requesting an article from an encyclopedia is not expected to purchase the entire encyclopedia.

Again, we would like to emphasize that people who take the time to come to a library to obtain digital sound recordings they can't get commercially at a fair price, whether in analog or digital format, are being responsible and following the proper procedures. It hardly needs to be said that these are people who could have simply downloaded the

materials illegally. By bringing music into subsections (d) and (e), we may provide a mediated and legal framework that may, at least in some cases, circumvent illegal file sharing.

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?

The effect on markets would be minimal so long as appropriate standards of amount and availability were taken into consideration as discussed earlier. Our position is that copying by libraries under §108 does not constitute a threat to the recording or music publishing industries, especially in today's climate.

With regard to digital audio files of music sound recordings, we support the restriction of access to streaming for temporary periods of time, though downloading of files may in some circumstances be permitted under §107.

We do not support limiting the quality (in re: Diminished Resolution) of digital reproductions:

- The diminished resolution standard is vague as a point of law, especially when considering the different forms files may take, and the speed with which the technology which produces them changes.
- When a researcher is looking to study a work, the researcher's information needs might or might not be satisfied by diminished resolution files. A researcher studying the works of Van Gogh, for example, may be satisfied by thumbnail images of a work of art if she merely needs to confirm the general nature of a work, but a thumbnail may be wholly inadequate if the scholar is looking to study an artists' brush strokes. Likewise, a researcher working with a scanned image of a music manuscript, will need to be able to discern differences of ink, pen and pencil strokes, paper types, and presence of possible erasures. A diminished resolution reproduction would be a disservice to such a patron.

- Similarly, with regard to sound recordings, a user may need only to identify a composer and title of a piece of music, in which case a lower sampling rate would be sufficient, but very often the user is interested in minute details of a specific performance, not just mere recognition of the work. Such details would be lost if sampling rates (the logical equivalent of diminished resolution) were restricted. A researcher seeking a recording of Bach's *Goldberg Variations* may be satisfied by a low fidelity reproduction if he merely wishes to identify the work, but the latter would be unusable if the point of interest was the processes by which Glenn Gould recorded the work in 1955 and 1981.

Libraries must be permitted under the law to supply the information needs of their patrons.

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?

Access to direct copies of works should still be mediated, either through an ILL department or a formal program administered in the library that develops the sound recording collection (e.g. the music library). So, restrictions should be the same in both cases. For subsection (d) some determination would need to be made as to the amount of a musical work that should be made available through streaming. Subsection (e) deals with entire works that are not available at a fair price, so there should be no distinction between textual and non-textual works.

Subsection (d) is in some ways more difficult for the study of music. Formal analysis of a work (the study of ABA form, for example) requires the presence of the entire work. Songs, excerpted from song cycles, lose context if the entire work is under study. For this reason users have long relied on §107.

However, there are many cases in which §108 would be useful. In determining what might be considered the equivalent of an article or “small part of any...copyrighted work”, anything less than a defined section—whether a whole movement of a larger work or an entire song (though not an entire song cycle)—would be unworkable.

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?

We would prefer not to consider the possibility of keeping subsection (i) exclusions, as their elimination is crucial to the equitable consideration of music and textual works under the law. In treating musical works differently, subsection (i) has adverse effects on music creators and scholars by stifling the exchange of ideas which Interlibrary Loan was designed to support. The exemptions in subsections (d) and (e) should *a fortiori* apply to musical and audiovisual works embedded in textual works.

Keeping subsection (i) but allowing application of (d) and (e) to embedded works would provide small relief in specific circumstances, but it would not solve the problem. To the contrary, it would create additional disparity in cases where electronic materials are published with hyperlinks to external sites with pertinent scores or audio files instead of embedded files. The subsection (i) restrictions are already affecting the publishing of dissertations in electronic format—as more colleges and universities move (as some already have) to publishing dissertations exclusively in digital form, this problem will worsen.