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**Section 108 Study Group**

**Copyright Office Library of Congress**

**Public Comment on Library and Archive Exemption**

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I submit my comments as the Vice-Provost and Dean of Academic Resources and Services at the University of Maryland University College (UMUC) where I have experienced first-hand the issues and confusion that arise concerning copyright, libraries and fulfilling the university's mission of teaching and learning. UMUC, the second largest public university in Maryland, is one of 11 degree-granting institutions in the University System of Maryland (USM). Since 1947, the university has fulfilled its principle mission: to serve non-traditional students by meeting their individual learning needs at any time and at any place through the delivery of high quality programs tailored to meet the needs of a rapidly evolving workforce.

UMUC has more than 88,000 students, 22,000 of which are Maryland residents. Classroom sites are located throughout Maryland, the Washington, D.C. metropolitan area, and at over 100 overseas locations. Students can also "attend class" anywhere in the world by connecting electronically via the Internet.

In 2005-06, UMUC offered 98 bachelor's and master's degree programs and certificates fully online via WebTycho, the university's state-of-the-art learning management system (LMS). The university holds the largest contract with the Department of Defense to deliver academic programs to active duty military and their dependents at military installations across Europe, Asia and the Middle East. Innovative and global in reach, and focused on quality, access, and affordability, UMUC is dedicated to the success of its students.

In my capacity as Dean of Academic Resources and Services, I oversee library services, course development and design, multimedia services, career services and the Center for Intellectual Property (CIP), a resource center that provides education and studies issues related to copyright, libraries and higher education. I have over twenty-five (25) years of experience as an academic administrator and faculty member in higher education. Recently, I was asked to lead the discussion by the University Continuing Education Association (UCEA) on international distance education. I also co-authored chapters on copyright issues and digital rights management in *The Center*

*for Intellectual Property Handbook.* I have my bachelor's and master's degree (in Library Science) from Emory University, and a Ph.D. in higher education policy, planning and leadership from the University of Maryland, College Park. I have managed library services prior to arriving at UMUC at Emory University, Columbia University in the City of New York, and the Smithsonian Institution. My understanding and depth of experience crosses all types of libraries and educational delivery formats. I am a seasoned faculty member and have over 15 years experience teaching online and face-to-face.

### **Possible Amendments to Section 108**

My views are those of an academic librarian serving students and faculty at a diverse, technologically-oriented, public university. I have observed, during my tenure, that the restrictions on the use of copyrighted materials have continually increased. The continual erosion of rights and the ascendancy of digital materials are diminishing the library's capacity to serve the needs of faculty and student constituencies. The growing movement to review, restrict and refine copyright law does not serve the future of scholarship, or the preservation of collections. Although there is much opportunity for good to come from a regular review of copyright law, the end result has consistently been disappointing. As one example, the Technology Education and Copyright Harmonization (TEACH) Act, although well intentioned, has numerous conditions for faculty and institutions to comply with in order to benefit from the exemption. According to the UMUC Center for Intellectual Property's research, less than 7.8% of the survey respondents indicated their institutions were seeking to comply with TEACH Act requirements. The CIP's survey findings support other reports that few institutions are complying with the Act's rigorous requirements. Whatever the outcome of the section 108 study, it is clear from the CIP's research that, to be effective, any amendment to section 108 must be practical and recognize the daily needs of libraries to efficiently and effectively transfer information to their clients. In other words, any amendment to section 108 should not be so cumbersome that the average librarian can neither use nor understand it.

#### **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 subsection 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?**

- 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?*
- 2. Should the single-copy restriction for copies made under sub-sections (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”?*

Although most individuals in the library community agree that section 108 presently permits making digital copies and providing digital delivery of materials for library clients, easing the single-copy restriction for copies in sub-sections (d) and (e) would enhance libraries capacity to serve their clientele and support research and teaching.

However, I do not agree with replacing the single-copy with the flexible standard suggested “a limited number of copies as reasonably necessary...” The ALA’s suggested language of “such copies as reasonably necessary” provides the flexibility that digital libraries, like UMUC’s, need.

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?*

As a librarian serving a dispersed, global student population, my first concern is delivering needed materials to my clientele in the format most efficacious for their needs. In order to meet the demand for digital copies, we first turn to the publishers and vendors who provide information in digital form through electronic databases, electronic books, or other formats that allow patrons to self-serve through library-negotiated licenses. We also utilize electronic reserves, which entails licensing of the content . Commercial purchases or purchasing licenses for electronic reserves serve as our two, primary avenues for providing content for our users. If those two commercial solutions do not meet the need, we then utilize interlibrary loan. When we do, we follow the guidelines and rules for ILL and are cautious in how and to what extent we use this delivery option. ILL represents a relatively small percentage of copies which are typically made by the patron him/herself rather than being mediated by a librarian.

Inter-library loan plays a key role in meeting patrons’ needs for information in support of learning and scholarship. Patrons initiate the process and consistently prefer that the copy to be in digital format. Libraries depend on the availability of subsection (d) to meet student and faculty demand. Without interlibrary loan, a fundamental service, for out-of-print or unavailable materials would be lost. The impact on future scholarship would be significant and the loss to libraries, potentially devastating.

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 current law is usually interpreted to permit a single, digital copy. Librarians take their responsibility to balance the needs of users and the rights of copyright holders very seriously. In view of this, if a more flexible standard was adopted, this would help libraries to fulfill their mission while still being mindful of the need to respect the copyright holder's rights. However, if restrictions, such as those imposed with the TEACH Act, were replicated, the additional capability would not lead to additional flexibility or advance scholarship. Instead, the suggested restrictions listed for this item would result in a potentially burdensome set of requirements that most libraries could not ensure were met. As a result, the current ability to make a copy could be forfeit. To ensure the continuation of this very necessary aspect of the library exemption, I would recommend leaving it as is. In the event it were altered, a notification of copyright should be sufficient to alert users of their responsibilities. Further, asking that the library provide the service to a "trusted member of the library's user community" through a secured portal would be a secure delivery method. Requiring libraries to control downstream copying is unduly burdensome and would exceed what is needed to control and discourage piracy.

The study group should not attempt to craft an exemption that mandates technological controls similar to the ones in the Technology, Education and Copyright Harmonization Act. The CIP's research suggests that the low level of compliance with the TEACH Act is related, at least in part, to technological control mandates that are difficult to interpret and hard to implement.

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?*

Currently, all libraries have a defined user community. In every instance, users must be eligible for service or they do not receive services from a public, special, or academic library.

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 for another library or archives?*

If interlibrary loan transactions are mediated by a librarian at the point of the request, they represent a mediated transaction. Adding an additional requirement that they have a

library engaged in both request and delivery suggests a lack of understanding of a dispersed, global user population. In almost all instances, a library receives and responds to a request from a user within its trusted user community.

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 copies under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling requests?*

We have not experienced any instance where libraries are enlarging their collections using a digital copy of a work. As for the statement in Section 108 study: “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)” we would posit that it does not translate into the digital era and could be deleted because of lack of relevance.

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”?*

This requirement would be overly burdensome for libraries and slow service and access to library materials. Further, the library at UMUC is constantly working to obtain permissions for articles and other portions of copyrighted works. Although in theory there are many ways to identify and pay licenses for the use of these materials, in practice it is demanding, tedious, and oftentimes ignored by the copyright owner. The market for licenses for parts of works is not yet fully developed. Anticipating a future market, while reasonable to speculate, the need and availability is not yet available. As a result, there is no benefit, but added burden, if this provision were adopted.

10. *Should the Study Group be looking into recommendations for revising the CONTU guidelines on ILL? Should there be guidelines applicable to works older than five years? Should the record keeping guideline applying to borrowing as well as the lending library in order to help administer a board 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 ILL copies? Are these records currently accessible by people outside of the library community? Should they be?*

The CIP does not advocate revising the CONTU guidelines on ILL. Libraries provide services to their user community. The records are not accessible to people outside the library unless required by law.

11. *Should separate rules apply to international electronic ILL loan transactions? If so, how would they differ?*

I see no pressing need for separate rules to apply to international electronic ILL loan transaction. UMUC provides education all over the globe. Differing rules for international electronic ILL loan transactions would make an already difficult job, even more so.

#### **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?**

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

Faculty and students often need access to various types of works in order to adequately conduct scholarship. In light of the digital era in which much digital scholarship includes graphics and/or multimedia, the exclusion of non-text based works in section 108 (i) is antiquated and does not take into account the changing nature of scholarship, particularly in the digital environment.

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 study group should avoid including any type of technological control mandate within section 108. Technological control mechanisms are changing. To freeze in law at 2007 with the use of “thumb nails”, “persistent identifiers” and “streaming media” is to immediately make any amendment to section 108 obsolete after passage. Section 108 needs to have flexible conditions for using non-text and text based works so that the law will be relevant and applicable for years to come.

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 ILL copies? Would applying the ILL framework to non-text based works require any adjustments to the CONTU guidelines?*

No. No changes are required to CONTU.

4. *If 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?*

Again, due to the changing nature of scholarship in the digital environment, an additional exception should probably be added if subsection (i) is not eliminated.

### **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 use 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?*

UMUC lawfully provides access to its digital materials. Moreover, access to digital documents delivered to patrons ends after a very short period of time. UMUC does not retain source or temporary copies.

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 for unlicensed digital works? If so, under what conditions?*

UMUC is primarily a university involved in delivering education and quality educational resources at a distance. Digital copies of works lend themselves to uses via digital networks. Therefore, it seems odd that access to these digital copies would be limited to “time and place” requirements like “dedicated premises” at libraries. The future of education is any time and any place. The future of libraries is the same. Therefore, use of lawfully acquired unlicensed digital copies of works should be used in varied environments with some type of access control that, of course, accommodates the any time, any place flexibility of universities like UMUC and its library.

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?*
4. *Do libraries and archives currently rely on implied licenses to access unlicensed content or do they rely on 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?*

Typically, libraries license digital content. Digital content is not managed similarly to analog works and is usually more restrictive because of concerns with copyright compliance. And, typically, libraries do not have large quantities of unlicensed digital works.

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?*

When a library purchases a copy of a work, the expectation is that the work is available in the collection. When the work is in digital format, the expectation does not alter from a patron’s perspective.. If libraries cannot make back-up copies, and the life of a digital medium is significantly shorter than an analog



purchase, the library is unable to ensure the availability of a lawfully purchase copy. A digital resource should not result in lesser access. Instead, allowing libraries to make server copies to deliver to a trusted user community make sense and is within the intention of the law.

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

Varying conditions based upon modality would be impractical and unnecessary. We respectfully request that the Section 108 study group refrain from placing any restrictions based solely on format. The value of a resource is not synonymous with its packaging. It would be unfortunate if the law were to prescribe access based on category or media type. Libraries face their greatest challenge in providing interoperability because so many resources are proprietary and incompatible. Delivering digital media via networks requires interoperability and consistency in policy and accessibility. Dictating how a resource should be distributed, based on its format, would not achieve the goal of protecting some works to a greater degree than others, but could unfairly discriminate against some modalities or leave libraries in a situation where they cannot deliver resources effectively because each resource has to be handled differently.

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 © exception for display? If so, under what conditions?*

If a work is displayed, libraries are aware of and respectful of the need to ensure there is no misuse of works that would threaten or impair the rights of the copyright holder. In our view, it would be beneficial to the public interest, and those of the libraries that serve them to make an exception for libraries to perform unlicensed works under certain circumstances. We would recommend that they are permissible for display when they are used for a non-commercial use, delivered to a trusted user community, and are necessary and essential for the delivery of required course content.