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From:	Mary Minow, Policy Analyst, California Association of Library Trustees and Commissioners
Date:	March 2, 2007
Re:	Written Comments on Interlibrary Loan and Patron Requests [Docket No. 07-10802]

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?

This is an inordinately difficult question. On the one hand, publishers are justifiably concerned that they can lose control of their works when libraries make digital copies for users. On the other hand, libraries rely on both Section 108 and Fair Use to serve their users. No library can anticipate or satisfy the needs of all its users with its own collections. Interlibrary lending agreements have helped to bridge the gaps between a particular library's collection and its user's needs.

After photocopy machines emerged, libraries began making copies of articles ("nonreturnables"). As is well known in the library world, Williams & Wilkins, a medical publishing house filed suit against the National Library of Medicine (NLM), claiming that NLM was systematically making unauthorized photocopies of periodical articles for scientists and researchers. The trial court ruled for the plaintiffs, saying that Library's "wholesale copying" met none of the criteria of "fair use." The Court of Claims, however, dismissed the claim against the library, finding that the copying was indeed "fair use." It emphasized the importance of the public interest in free access to medical knowledge, and lack of evidence showing harm to the publishers. On February 25, 1975, the Supreme Court split four-to-four to affirm the Court of Claims decision, without a written opinion.

Congress later addressed the issue of library photocopying when it enacted the 1976 Copyright Act. The new law provided that libraries could make a single copy of a work if the copy was not intended for commercial purposes. The new law also allowed libraries to make copies for interlibrary loan, provided the copies did not substitute for a subscription to a journal. As it became more feasible for libraries to pay royalties for individual articles, a balance was struck. Widely in place today are the CONTU guidelines known as "The Rule of Five," allowing a limited number of copies.

Such guidelines allow a balance between ownership and use.

Limiting the digital copies would likely be the best way to facilitate the ability of libraries and archives to make copies without unduly interfering with the rights of rights-holders. The common practice in academic libraries of placing digital copies behind a password-protected site, and leaving the copies for a limited time, coupled with warnings to users about the requirement that the use be nonprofit, seems to be a good balance.

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?

Yes. Although temporary copies should not be considered infringements, it would clarify the rights of libraries and archives if they can make "a limited number of copies as reasonably necessary…"

This should apply to both the library's own users and to ILL copies.

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?

If technological protection measures are devised that do not unduly restrict the actual user, such mechanisms could help protect owners, while allowing users some access. Current use of password protected sites and limited durations make more sense than measures that could render a copy unopenable by users.

Digital copies of journal articles have, of course, been available to library users for many years through the use of licensed databases. These articles typically are not accompanied by technological protection measures.

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?

Yes. For public libraries, the user community can be defined as persons with library cards. Typically, card membership is limited to those within a specific political jurisdiction (such as a city or county), although some libraries allow nonresidents to purchase cards.

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 question is extremely problematic. If libraries are required to determine that they cannot purchase a copy at a fair price, this eviscerates the library exception and the CONTU Guidelines.

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?

No

11. Should separate rules apply to international electronic interlibrary loan transactions? If so, how should they differ?

No.