Section 108 Study Group

Comments on Section 108 of the U.S. Copyright Act
Submitted by University of Illinois at Urbana-Champaign
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The University Library of the University of Illinois at Urbana-Champaign respectfully submits the following comments in response to the request of the Section 108 Study Group for input on issues relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act. This statement is authorized by Karen Schmidt, Acting University Librarian.

These comments are being submitted by Janice T. Pilch, Associate Professor of Library Administration and Head of Slavic and East European Acquisitions.

The organization represented is the University Library of the University of Illinois at Urbana-Champaign (hereinafter referred to as the University Library). The University Library, a campus-wide network of libraries serving programs of learning and research in many disciplines, is the third largest university research library in North America and the largest publicly-supported university research library in the world.

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Statement

Topic A: Amendments to Current Subsections 108(d), (e), and (g)(2) regarding copies for users, including interlibrary loan

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?*

Section 108 of the 1976 Copyright Act serves the needs of libraries and archives well in enabling them to provide users with copies of works through interlibrary loan and direct request. Interlibrary loan and direct copying for users are among the most functional and least problematic operations of libraries and archives in the context of the law, and among the most appreciated by patrons. Libraries and archives, recognizing the privilege extended to them by Congress in the drafting of the 1976 Copyright Act, are extremely careful in exercising the provisions of section 108, and have a continued interest in being able to fulfill their missions in the digital context without interfering with the interests of rights-holders. We believe that this is possible by following the original intention of the provision, which provides a limited exception while also allowing for some flexibility and professional judgment in making copies for users.

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 single-copy restriction obviously needs to change to account for the nature of digital technology, which produces an unspecified number of transitory copies in the making of the single copy provided to a user. We agree that a flexible standard is the only way to address the nature of digital materials, but because the number of transitory copies is not always known, and varies depending on the operation, we favor the language: "a number of copies as reasonably necessary for the library or archives to provide the requesting patron with a single copy of the requested work."

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?*

The ratio of direct copies of library materials, not including archival materials, relative to interlibrary loan copies is small. Last year, out of the total number of requests under subsections (d) and (e) fulfilled by the Interlibrary Loan and Document Delivery unit of the University Library, the percent of direct request copies was .19. The percent of standard interlibrary loan requests out of the total number of requests was 99.81. The reason for this is that onsite users generally make copies themselves and no not require the assistance of librarians. Members of our user community who request copies by telephone, fax, or e-mail from a distant location for material other than rare or archival materials, are strongly urged to place their requests from the nearest public library or cooperative interlibrary lending library, so that the request is placed through the traditional interlibrary loan system. In addition to the Interlibrary Loan and Document Delivery unit, various departmental libraries occasionally provide direct copies to users as a matter of expedience. The number of copies provided directly to users from these units is still very small relative to interlibrary loan figures.

The picture is quite different for the University Archives, which does not distribute copies through interlibrary loan, but relies on direct use copies in providing materials to virtually all remote users, and also to some onsite users, when the users do not make copies themselves. Use of subsections (d) and (e) for direct copies is very prevalent in the archival community and for special collections; this is an essential means by which archivists and special collections librarians provide service to their researchers.

Document delivery figures are not included in this calculation, because they do not involve Section 108; our practice is to pay clearance fees for document delivery services. If digital reproduction and/or delivery is explicitly permitted, and if at some point the University Library decides to provide direct use copies to fulfill requests for materials from its remote storage facility, we expect that the number of direct use requests will increase.

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 mentioned, out of the total number of standard library requests handled last year by the Interlibrary Loan and Document Delivery unit of the University Library under subsections (d) and (e), direct request copies amounted to .19 percent, and interlibrary loan requests amounted to 99.81 percent. We do not have a separate breakdown for use under subsection (e), but know that it is a small fraction of the given percentages. Various departmental libraries and the University Archives also occasionally provide direct copies to users under subsection (e), but, again, the number of copies provided directly to users under subsection (e) is very small relative to those provided under subsection (d).

Before making use of subsection (e), librarians make every effort to locate other available copies of entire works through extensive bibliographic searches in electronic and print sources, and they frequently obviate the use of this provision by locating a copy in another U.S. lending library. Subsection (e) is used in rare cases where the University Library owns the only existing copy in the U.S., and the work is not in good enough condition to be interlibrary loaned under Section 109.
Archivists and special collections librarians, on the other hand, make extensive use of subsection (e) for direct copies for their users, and overwhelmingly for remote users. Because much of the material they

handle is unique and uncatalogued, they do not rely on interlibrary loan systems, and because much archival and special collections material consists of small works, such as letters, documents, and photographs, they rely more on subsection (e) than do librarians handling standard library material.

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? Should such requirements such requirements apply both to direct copies for users and to interlibrary loan copies?*

Current restrictions for print copies require that the copy become the property of the user; require that the library or archives display a copyright warning at the order site and place a valid copyright warning on the order form; and in the case of section (e) require that the library or archives first determines, on the basis of a reasonable investigation, that a copy of the copyrighted work cannot be obtained at a fair price. These restrictions are appropriate as a deterrent to libraries and archives from adding to their collections, and to users from making downstream copies. We hold that the same restrictions should apply to the making and distribution of digital copies, and that no further restrictions be imposed.

It would, however, be helpful to make a clear distinction in the language pertaining to the copy provided to the user (what is at stake), and any other copies resulting from the technical process that would not serve as user copies, would not be used by the borrowing or lending library or archives to expand their collections, and in most cases would never even be visible. Up to now, no distinction has been made between "good" copies received by users, and "bad" or "incidental" copies that might be made but are not received by the user. Such copies would include discarded copies (toner was low, reduction mechanism was not effective, copy came out chopped or slanted), or in the digital world, incidental or transitory copies. A revision to the language pertaining to different types of copies would alleviate the need for further restrictions on the making and distribution of copies.

Such distinctions can be found in the copyright laws of other countries. Slovenia's copyright law provides a model example by treating incidental copies as free-use copies. Article 49a states: "Temporary acts of reproduction which are transient or incidental and an integral and essential part of the technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work, and which have no independent economic significance, shall be free." (Free here has the meaning of free-use.)

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?*

As a practical matter, traditional libraries and archives have defined user communities. It is not physically or financially possible for traditional research libraries and archives, or even for public libraries, to serve the public or the world at large. The University Library, like most libraries, sets service policies for defined categories of users. The University Archives, like most archives, serves a user community naturally limited by specific research needs. We expect to continue to serve our user community in compliance with any changes made to Section 108, and we support changes that will allow for digital copies so that our user community can be better served. We view digital copying as an improvement to services.

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 electronic requests from, and/or delivery to, the user from another library or archives?*

Some interlibrary loan systems, such as the ILLiad system used at the University Library, have options for the lending library to send copies directly to users, without mediation from the borrowing library. However, the system itself is mediating the use, because the request is being placed from an individual affiliated with and having access to the interlibrary loan system of the borrowing library. In this sense, there is no such thing as an unmediated use from both ends. The question is rather whether subsections (d) and (e) should

be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library on both ends *by a human being*.

The University Library mediates interlibrary loan transactions for both borrowing and lending. We will probably continue to mediate requests on both ends into the future. On the borrowing end we mediate to share in the responsibility for verifying requests (often the information provided by the user is incorrect), to ensure that we do not already own the material, to ensure that a reasonable investigation is conducted to obtain a work at a fair price as necessary to comply with subsection (e), and to ensure that users are not making unreasonable requests. On the lending end we mediate to provide the requested material, and to ensure that users are not making unreasonable requests.

However, given the fact that interlibrary loan systems are technically reliable, the risk of hackers entering a system to place illicit interlibrary loan requests seems negligible. The cost savings that might be gained by not having a staff member in the borrowing library be involved in every transaction might be desirable to some libraries, and we do not think that an amendment should be added to require mediation on both ends.

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 agree that it 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 future requests. The practice of the University Library is to make a single copy, provide it to the user, and not to retain any other copy of the requested material. Libraries generally follow this practice not only because it is an infringement of copyright law to retain copies, but also because it is not feasible technically or financially to retain them, and because the likelihood that the same work will be requested twice is slim.

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"?*

We are against this notion for several reasons. First, many licensing agreements permit libraries to copy and provide articles and other works through interlibrary loan. When they do not, the Library rigorously respects the terms of the license. Second, it could be argued that the range of unlicensed resources to which this provision could apply is growing smaller by the day. It does not seem sensible to change the law to allow for scenarios which are becoming less prevalent, when the purpose of the Section 108 revision is to shape the law for the future. Third, with respect to the decreasing number of resources that still fall into the category of unlicensed, we hold that libraries and archives must retain the right to limited and unsystematic copying of certain materials for interlibrary loan and direct use. Libraries and archives acquire print and electronic works with the understanding that these works generally may be used multiple times by members of their user communities at no further cost to these members whenever possible. That is why libraries and archives exist. Print materials are often priced for institutional, i.e. multiple, uses; for them libraries pay dearly. To add to the law a requirement that libraries and archives must newly obtain all available materials each time a member of the user community wishes to use them is unreasonable.

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?

It is generally recognized that the CONTU guidelines adequately address the issue of repeated requests for works, and libraries and archives follow these guidelines closely to maintain the interests of rights-holders. They do not need to be revised. The record keeping guidelines currently apply to the borrowing institution that benefits from the transaction and pays the fees, including copyright fees, after the fifth request. This guideline should not be amended to apply to the lending library.

Because direct use copies account for a minor portion of the copying activity performed under Section 108, and because it would impose a substantial burden on libraries to track direct use copies, for no practical gain to rights-holders, we do not recommend additional guidelines for direct use copies.

Records of direct use and interlibrary loan transaction are not generally accessible by people outside of the library community, and they should not be. Libraries and archives, as research, educational, and public interest institutions, serve a vital role in our society, distinct from the role played by commercial entities, and arguably a more important role for the continued development of human potential, the growth of knowledge, and social cohesion. This role was recognized by Congress in its crafting of the 1976 Copyright Act. Libraries and archives are fully capable of managing their operations in compliance with the law, and do not answer to the profit-making sector in the matter of recordkeeping.

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

Current practices for international interlibrary loan at the University Library are similar to those for domestic interlibrary loan. Practices work well and have not been problematic. International transactions make up a very small percentage of our loans, and our understanding is that this is true of most research libraries handling international requests.

Several considerations surface in connection with international electronic interlibrary loan transactions: jurisdictional issues involving copies made by U.S. libraries and archives that might violate copyright laws in other nations where the borrowing or lending library is located; library and archival, as well as free-use, limitations and exceptions in the laws of other nations; differences among national laws; and the language of the copyright notice affixed to the interlibrary loan copy, which currently references only U.S. law. Ultimately, mediation on both ends of an international transaction ensures that copying will be done as seamlessly as possible and within the limits of all applicable laws.

The first question is whether providing digital copies from the U.S. might contribute to infringement by libraries in other countries in a way that providing print copies does not. To answer this question, we should first consider the exclusive rights implicated in digital lending. While interlibrary loan copies involve reproduction, display, distribution, and making available of works, they do not involve display, distribution, or making available of works *to the public.* Thus the exclusive rights of copyright holders, as variously worded in national laws, of public display, public distribution, public performance (if section 108 (i) is amended), or making available to the public, are not implicated in interlibrary loan activity. The right for which libraries and archives need to be concerned is that of reproduction. Could the U.S. library be contributing to an unlawful reproduction in the borrowing or lending country?

Most nations that are signatories to international copyright treaties and agreements have exceptions in their copyright laws to allow for interlibrary lending. Most, if not all, also have free-use exceptions in their copyright laws for reproduction for personal or private use; use for study, research, and scholarship; or noncommercial use, as variously worded in national laws. Such exceptions reduce or eliminate the risk of infringement involving the right of reproduction. As has been noted, some nations, notable Slovenia, have even adopted language that eliminates the risk of incidental copies. However, it is true that some laws may not include these exceptions, and also that there are differences in the scope of exceptions among national laws. Areas in which exceptions tend to differ in scope, with selected examples from laws of three East European and Eurasian nations, include:

1) *Publication status of works.* Sections 108 (d) and (e) allow for supply of direct use and interlibrary copies of works, including unpublished works. Other nations have stricter exceptions for personal use and reproduction by libraries and archives. For example, the Russian Federation (Article 20) and Kazakhstan (Article 20), restrict library and archival reproduction to "lawfully published works" and do not allow interlibrary or direct use copying of unpublished works. Slovenia (Article 50) restricts reproduction for internal library and archival use to "disclosed" works.

2) *Whether entire works may be copied.* Section 108(e) allows for reproduction and distribution of entire works or substantial parts of them. Some national copyright laws, including those of the Russian Federation (Article 20) and Kazakhstan (Article 20), allow copying of entire articles and small works lawfully published in collections, newspapers, and other periodical publications, but only of excerpts of longer lawfully published written works, by libraries and archives for individual requesters, for the purpose of study and research. Slovenia (Article 50) also does not allow reproduction of entire books for internal library and archival use.

3) *Categories of works that may be copied.* Some national laws limit categories of works eligible for the library and archival exception and the free-use exception. As mentioned, the Russian Federation (Article 20) and Kazakhstan (Article 20) do not allow for library or archival reproduction of works other than written works. Slovenia (Article 50) restricts reproduction for internal library and archival use to disclosed works, and excludes from the exception entire books, graphic editions of musical works, electronic databases and computer programs, and architectural structures; however, it permits reproduction of an entire print book if it has been out of print for at least two years, and of a graphic edition of a musical work by means of a handwritten transcription.

4) *Definition of noncommercial use.* Library and archival exceptions are generally based on the condition of noncommercial use, but national laws define "noncommercial use" differently. The issue of definition came to the foreground in interlibrary loan circles when amendments to the U.K. copyright law were introduced in October 2003, to implement the 2001 European Union Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, eliminating fair dealing and library privileges involving copying for commercial purposes. The definition of "commercial" in U.K. law is broader than it is in the U.S.; it is considered synonymous with "direct or indirect income-generating," and could include activity like private research directed at improving one's earning potential, or research toward a scholarly book that would generate royalties. Kazakhstan (Article 20), as well as the Russian Federation (Article 20) use the term "making of profit;" Slovenia (Article 50) uses the term "direct or indirect economic advantage."

5) *Personal or private use.* There might be instances where free use exceptions for personal or private use justify the making of a library or archival copy. In the U.S. the fair use doctrine applies to both published and unpublished works of any category. However, some national copyright laws are more restrictive. The Russian Federation (Article 18) and Kazakhstan (Article 18) limit personal or private use copies to lawfully disclosed works, and the exception does not apply to works of architecture, databases or substantial portions of them, computer programs except in certain instances, or entire works or musical scores. Slovenia (Article 50) similarly restricts reproduction for private use to disclosed works, and excludes from the exception entire books, graphic editions of musical works, electronic databases and computer programs, and architectural structures; however, it permits reproduction of an entire print book if it has been out of print for at least two years, and of a graphic edition of a musical work by means of a handwritten transcription.

6) *Digital copies.* National laws deal with the provision of digital copies by libraries in different ways. For example, the law of the Russian Federation was amended in 2004 to stipulate (Article 19.2) that libraries may provide temporary free use of works that have lawfully been made available to the public, but if the copies are in digital form, including copies obtained through interlibrary loan, they may be used only on the premises of the library and digital copies may not be made of these works.

To allow for cases in which the copyright law is more or less restrictive in the foreign borrowing or lending nation than in the U.S., or in which definitions in the statute of the other nation differ from those in U.S. law, it is in the best interest of U.S. libraries to reinforce best practices for mediation of international electronic transactions on both ends. The U.S. library will ensure that activity taking place within the U.S. complies with U.S. law, and the foreign institution will be responsible for monitoring compliance with its national law. In effect the success of a transaction will be limited by the stricter law. In any case, as long as the U.S. library complies with U.S. law, the risks associated with international transactions involving digital copies are no greater than those associated with domestic transactions.

With or without a change in the law to allow for digital interlibrary loan, and with or without mediation on both ends for international interlibrary transactions, there might be some wisdom in adopting an additional copyright notice for international transactions. The frame of reference in the current copyright notice is U.S. law. It adequately addresses the matter of reproduction of copyrighted material by the U.S. institution and use of the reproduction by the user within the U.S., but it does not extend to the matter of reproduction of a work by an institution in another country, or activity performed by a user in another country. The notice states: "The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material…." This statement could be misread by users in an international context as meaning that U.S. law governs uses of copyrighted materials in the foreign nation. As a deterrent to unlawful activity in the foreign borrowing or lending nation, and as a matter of clarification, perhaps it should be revised to indicate that use of works by an institution or an individual user in another nation are governed by that nation's laws.

Topic B: Amendments to subsection 108(i)

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?*

In the best interest of scholarship and learning, exclusions involving musical works, pictorial and graphic works, and motion pictures or other audiovisual works other than audiovisual works dealing with news should be eliminated. Research is need-based, not format-based, and there are compelling reasons to treat certain non-text based works under the same rules as text-based works.

Rights-holders have legitimate concerns about reproduction of commercially available musical works, sound recordings, films and other audiovisual works. However, the reality is that there are legal and natural roadblocks to prevent unlawful reproduction and distribution of such works. Libraries and archives adhere closely to the requirement in subsection (e) to conduct a reasonable investigation for a copy at a fair price. They also strictly interpret subsection 108(g)(2) to limit the number of copies made from works. It is also important to keep in mind that these categories of works are more expensive and time-consuming to copy than text-based works, and for some formats such copying even puts the existing library copy at risk. It will not always be in the interest of libraries and archives to fulfill requests for this type of material. The intention is to provide someone at another institution a copy of a work when they have no other reasonable way to obtain the work, and when the request is reasonable within the limitations of the law as well as of library operations.

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?*

In the case of entire works or substantial portions of works, under subsection (e), there will be no effect on the market if the work can be obtained at a fair price and if a reasonable investigation can determine this. If a work is not available, or not available at a fair price, there is still no effect on the market, because no real market exists. In the case of contributions to copyrighted collections or small parts of other copyrighted works, subsection 108(g) limits the effect on markets of library and archival uses.

We need to provide users with copies that they can use effectively. We are against the idea of limiting copies of visual works to thumbnails, which are generally inadequate for research, or of requiring streaming, which is a costly and impractical service for libraries to provide. We are also against the use of persistent identifiers, because this goes against the culture of research and learning we espouse, and involves a layer of digital rights management software that can present serious problems for user access.

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 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?*

The same conditions should apply to direct copies and interlibrary loan copies of non-text-based works. But because the CONTU guidelines address copying only under subsection (d), questions arise as to the practicality of making small parts of non-text-based works. Sometimes small parts of larger works are naturally defined, such as a song from a CD. In other cases, as was discussed at the January 31 public roundtable in Chicago, they are less well defined. Interlibrary loaning a part of a pictorial work (a hand section from a portrait); a sound recording (strings only, ten measures); an audiovisual work (short sequence based on a description of the action) presents some practical concerns for the application of CONTU and for the copying process. In any case, CONTU guidelines could be applied to non-text-based works, resulting in purchase of a work after the fifth request of any part of the work is filled in the calendar year.

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?*

Yes, this would be an improvement to the current provision.

Topic C: Limitations on access to electronic copies, including via performance or display

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?*

The University Library acquires *tangible* CDs and DVDs mainly through the standard acquisitions process, and also occasionally as gifts; these are considered unlicensed materials. The University Archives also collects some unique tangible digital materials from donors, which are unlicensed.

Our experience in acquiring unlicensed *intangible* digital works is limited. Materials deposited in the UIUC institutional repository will be licensed under optional licensing models. The quantity of unlicensed intangible digital material that the University Library acquires is currently small, but is likely to increase in the future. We recommend that the law be revised to include an exception for temporary copies incidental to access that applies not only to unlicensed digital material, but to all digital material.

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 dedicate terminals on the premises of the library or archives to one user at a time for each copy lawfully acquired?*

Approaches will be different depending on several factors, including whether the work is tangible or intangible, published or unpublished, archival or rare. Most library materials in the U.S. circulate and may be used off the premises. Requiring that tangible digital materials such as CDs and DVDs be used only on the premises restricts the use of such material unfairly. Libraries should be free to make their own choices as to whether they permit tangible digital materials to circulate, and thus at times be unavailable on the

premises, or whether they classify such material as noncirculating. In either case, as a practical matter, a library will make available as many copies as it has acquired. Archival or rare tangible digital materials will likely be treated with more restrictions, following longstanding practices for works in special collections.

It is difficult to generalize on the matter of intangible digital works. Unlicensed intangible digital files of public information should be made available without any restriction. On the other hand, libraries and archives will likely continue to handle archival or rare intangible digital materials in a more restricted manner.

The EU model seems artificially restrictive as a general practice. In any case, we hold that at this point most libraries do not have enough experience providing access to unlicensed digital works, other than through standard circulation of tangible digital works, and do not have well-developed policies in this area. Any major revision of the law in this area might be premature.

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?*

It is also difficult to generalize on the matter of implied licenses. In cases where the material is acquired by the entity that is the copyright holder, there is an implied license. For example, if a professor donates digital files or CDs of works that she has created and for which she holds copyright, there is an implied license for future use. Donations of material for which the copyright holder is an entity other than the donor, or for which the copyright holder is unknown, do not carry an implied license.

Libraries and archives are very careful about providing access to works when there is not an implied license, and will undoubtedly continue this practice. Practices have been developed to allow for limited use of such material that is sufficient to meet the needs of both users and staff without infringing on the rights of copyright holders, and these practices can be extended into the digital realm.

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?*

For the University Library, this has not been a major concern up to now, because we have not attempted to provide access to unlicensed digital content on a large scale. We would rely on an implied license if one could be associated with a work. We would continue to rely on fair use both in situations where there was an implied license, and also when there was not.

5. *Are the considerations different for digital works embedded in tangible media, such as DVDs and 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?*

As mentioned above, the considerations for tangible and intangible digital works are different in that tangible digital works can be accessed like books: they can circulate and be used easily off the premises directly by users. No server copies are needed for access.

For purely electronic works that have been lawfully produced and acquired, server copies for access should be allowed in lieu of circulation. Restrictions on access will probably need to vary, depending on the factors mentioned in Question 2 above. For example, restrictions would not be necessary for providing access to a public document file, but would be advisable for handling use of a unique electronic file of unpublished notes of a Nobel Prize laureate that were donated to the University Archives.

Back-up copies should absolutely be allowed both for purely electronic works, and for circulating tangible digital material, especially when no replacement copy is available at a fair price. It is important to allow for the up-front preservation of material at risk of near-term or sudden loss.

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.)?*

No, conditions on providing access should not be based on the category of work.

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?*

Public performance and/or display rights are not necessarily exercised in providing access to certain unlicensed digital materials. They are exercised only if the materials are made publicly accessible. They are not exercised if access is restricted to a defined user community; for example, individual reception of a streaming audio recording from a computer does not qualify as a public performance.

Public performance rights, involving a moving sequence of images and sounds, would be exercised in public viewing of a motion picture on DVD or other digital audiovisual work, or a public streaming of a video; or a public digital audio transmission of a sound recording. Public display rights, involving non-sequential display of an image, would be exercised if text or images (pictorial or graphic works) were placed on a server or on the Internet for public viewing.

As stated above, we strongly agree that the copyright law needs to be amended to address the need to make incidental copies in connection with digital uses. Also, an exception should be added for libraries and archives to perform unlicensed electronic works in certain circumstances, similar to the 109(c) exception for display. Libraries and archives make use of this exception to organize exhibits that showcase their collections and services. Temporary public exhibits do not allow for reproduction of materials by users, they involve small works or small portions of larger works, and thus they do not seem to interfere with the legitimate interests of copyright holders.

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