Comments on the Section 108 Study Group's questions regarding interlibrary loan.
Duke University Libraries
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The Duke University Library's strategic plan for 2006 – 2010, called "**Connecting People + Ideas**," reflects a commitment to facilitate access to information, learning and creativity in ways that are "nimble and flexible" in order to keep pace with the rapidly changing environment for research and teaching. Interlibrary loan is an important way in which the Libraries both support the research needs of our own academic community and help stretch our boundaries in service to others. Interlibrary loan allows us to adapt quickly as new patterns of interdisciplinary study and teaching, and the birth of whole new fields for research, put pressure on traditional notions of a library collection.

If the need to adapt to unexpected information demands is important at a major research institution like Duke, it is vital for many smaller institutions. For them, as for Duke, interlibrary loan is seldom a substitute for the purchase of material that really belongs in their collections; it is most often a last ditch attempt to provide access for a student or a scholar to information she would not otherwise find and that the library could not purchase due to budgetary constraints or collection development priorities.

At their core, the section 108 exceptions to copyright that facilitate interlibrary loan are vital servants of the basic constitutional purpose of copyright law in the United States; they "promote the progress of science and useful arts" by making available to new authors and creators material from which they would not otherwise be able to draw inspiration. The Libraries at Duke are concerned that the interlibrary loan provisions of section 108 be updated to reflect the realities of the 21st century academic library and believe that such minor "renovation" is possible without creating a significant threat to the traditional income streams that support the creation of new works. By recognizing the importance of permitting digital delivery of interlibrary loan materials within realistic and appropriate limits, section 108 can be amended to better facilitate creativity and learning.

Topic A – Responses to specific questions

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(d) needs to be amended to permit the delivery of a digital copy, either to the library which initiated the request or directly to the library user who requested the material. It is inaccurate to call such digital delivery "unmediated," since it still requires that a borrowing library process and submit the request, after being certain that it conforms to applicable rules for ILL, and it requires that the lender be satisfied by the borrower's certification of copyright compliance before processing the request.

Digital delivery is already a feature supported by the major software packages in use by many institutions for interlibrary loan. The Ariel software allows digital delivery between two libraries, and the digital files are often then sent by e-mail to the user who placed the request, while the Odyssey software now allows direct e-mail to the user. Such delivery does not bypass the traditional controls on interlibrary loan and they need not create any additional threat to rights-holders, as long as those controls are observed. First, a mediating library should not keep a copy of the digital file, observing in the digital world the caveat in (d)(1) that the copy become the property of the user, Second, notice of copyright restrictions should be applied to a digital copy just as it is now to print copies. Finally, recordkeeping should be carefully observed to prevent systematic ILL as a substitute for purchase or subscription; the software packages discussed above actually facilitate such record keeping. If these precautions are observed, digital delivery can and should be permitted under section 108.

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?*

Because so much print material is converted into digital files for ILL delivery these days, a flexible standard that accounts for the incidental copies made during that process should be adopted to replace single-copy restriction. Although digital copies made for our own users seem to be quite rare, at least at Duke, there is no reason that this flexible standard should not apply to both situations, as long as it is clear that this flexible standard does not abrogate the intent of the ruule that the final copy of the material become the property of the user and is not used to augment the libraries collection (see question 8 below).

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?*

At Duke, subsection (d) is seldom used for direct copies to our own uses. At the moment, we primarily employ the provisions of subsection (d) for interlibrary loan, which currently is always fully mediated. The practice of then sending a digital copy of an excerpt to the user after it is received by the requesting library through the ILL system is, we understand, very common and readily facilitated by most ILL software packages. This software also allows direct transmission by the lending library to the user who placed the ILL request; although Duke currently seldom employs this capability, there is no reason, as discussed above, that digital delivery after such "partial mediation" should not be allowed.

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?*

Copying of library materials for our own patrons is very rare, and we do not copy entire works, either for our own users or for ILL, except in rare circumstances. Those circumstances usually involve archival material that is copied for research at another institution, and even there, the use of subsection (e) rather than (d) is the exception rather than the rule. Explicit authorization for digital reproduction and delivery of entire works would likely change this practice very little, since issues of staff time and efficient use of resources prevents this practice as much as compliance with section 108 does.

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 only practical controls that can or should be placed on the digital distribution of single copies of excerpts requested through interlibrary loan is user notification of restricted use at the points of request and delivery. Technological controls required by other parts of Title 17 have proven unrealistic and unworkable, and it would be a serious mistake to render section 108 as impractical for real use in the academic world as section 110(2) is. Such provisions have largely prevented legitimate academic uses of published material while hardly inhibiting at all illegitimate exploitation of those works. The ironic reason for this is that the academic community by and large tries very hard to respect copyright and the rules that govern it, recognizing that the purpose and intent of copyright laws is congruent with academic goals. The proliferation of restrictions that (incorrectly) treat academic use as the enemy of content production poses a real danger that this respect will erode.

The academic community actually poses little threat to the appropriate incentives for creative production; many of our uses of copyrighted material actual encourage both creativity and the purchase of already produced material. We have successfully relied for many years on legal, rather than technological, restraints and on the fundamental desire of the academic community to comply with the law. If realistic provision is made for the conditions that prevail in the digital world, there is no reason not to continue to rely on those two forces.

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?*

Like many institutions of higher education, Duke already restricts interlibrary loan requests for borrowing to its own faculty, staff and students. This restriction is dictated

both by cost, especially in terms of staff time, and by the desire to respect the CONTU guidelines "rule of five."

From our point of view, the danger of "online shopping" for digital copies is a straw man; our users seek digital copies of materials in the many databases we license for use by our community and are disappointed when they have to rely on interlibrary loan because of the delay involved. This is an example of how a parade of horrible possibilities is being used to attempt to restrict a practice that serves a real, practical and legitimate purpose.

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?*

As discussed above under question 1, a requirement that there be two mediating libraries for each ILL transaction that results in a digital file delivered to the user would be inefficient and impractical. As long as there is a borrowing library that mediates the request, keeping accurate records and certifying to potential lenders that it is in compliance with the copyright law, sufficient safeguards will be in place.

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?*

The intent of this provision should be retained, and that intent is better expressed by the prohibition suggested in the question.

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''?*

According to Professor David Nimmer, during the Congressional debates around the adoption of the DMCA the "specter of moving our Nation towards a 'pay-per-use' society had become as popular in Congress as the Mafia drug trade."[1] The Senators debating the DMCA correctly perceived that such a pay-per-use model directly conflicts

[1] Nimmer, David. Copyright: Sacred Text, Technology and the DMCA (The Hague: Kluwer Law International, 2003), 429 (citing 14 Cong. Rec. S11887).

with the purpose of copyright law as expressed in the Constitution, even if they protected against that possibility inadequately. Unfortunately, that specter is again raised by this question.

If commercial document delivery possibilities and licensing markets are incorporated into subsection (d) as part of a "fair price" provision, the subsection will essentially become superfluous. It has always been possible to pay for additional copies of a work to fill every demand, but Congress clearly expressed its intent to facilitate certain socially beneficial uses of published material outside of that market system. The fact that a licensing market is now facilitated by the Internet to the point were permission for each and every use of even the smallest portion of a work can be sold should not lead the Study Group to propose undermining the basic intent of Congress when it protected ILL functions from having to seek such permission.

A "pay-per-use" model fundamentally threatens both the socially beneficial aspects of interlibrary loan and the fundamental purpose of copyright law to encourage creativity. For one thing, such a model would make access to many materials simply impossible for many smaller academic institutions that already operate their libraries on inadequate and badly strained budgets. Such libraries would simply have to refuse requests from students and faculty if they had expended whatever funds were available to purchase use of materials through ILL. Learning, research and creativity would all be stifled under such a system as researchers would lack the resources to pursue their studies. Even worse, library budgets would be further depleted by the need to pay over and over again for material that has already been published. The result would be less money to purchase new material as it is published. In this way, the incentive to create that is at the heart of copyright law would be undermined, and smaller publishers, such as academic and university presses, would see their markets shrink even further. While large publishers especially would realize an additional income stream, that income would be essentially iterative, increasing the value, and the cost, of already published material but not necessarily serving to increase the incentive to support new research and publication.

A licensing market is appropriate only for those uses that Congress has not clearly determined to be sufficiently in the public interest as to merit an exception from the exclusive rights of the copyright holder. That Congressional judgment, and the delicate balance reflected in Title 17, would be fundamentally overturned if each new market for vending permissions is allowed to eviscerate the rights of users.

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?*

In spite of reservations on both sides, the CONTU guidelines on interlibrary loan seem to have worked well and garnered widespread compliance on the part of academic libraries. There is already a level of record-keeping on both sides of an interlibrary loan transaction; in most cases the borrower keeps track of compliance with the "rule of five,' while the lender checks each request to be sure that the notice of copyright compliance which can be placed in OCLC ILL forms is present. Some libraries also keep lists of those borrowers that they deem suspicious or careless of copyright compliance and decline to lend to those borrowers. These safeguards seem adequate and there is no compelling reason to increase the burden with additional, redundant record-keeping.

At Duke, we have always assumed that the ILL records we keep, apart from those that contain specific patron information and are therefore protected under North Carolina statute, are available for publishers to examine, but such a request has never been made. It is disingenuous to demand that an additional burden on libraries be written into the federal statute without any determination that such a mandate is necessary or would be used.

Unless section 108 is entirely gutted by the inclusion of a "fair price" provision in subsection (d) (see response to question 9 above), there seems little purpose to expanding the "rule of five" recordkeeping requirement to include material over five years old. No argument can be made that such a requirement is necessary to protect traditional or electronic subscription markets, and the added burden of such record-keeping would substantially increase the cost of ILL for libraries without purpose or legitimate benefit.

Topic B – Responses to specific questions

The background statement for set of questions nicely expresses the reasons why the restrictions in subsection (i) are out-dated and need to be revised. A growing percentage of scholarly material is in non-text form and an increasing amount of research is focusing on visual culture especially. Nevertheless, including authorization for digital copying for audio/visual works for the purposes of interlibrary loan should be done carefully since here there is a real potential for market harm that simply does not exist for textual work.

Duke does not currently loan audio/visual material through interlibrary loan, mostly for practical reasons involving demand on campus and work flow concerns. The ability to make digital copies available through ILL would alleviate the former worry but intensify the latter, and we would still be unlikely to make such loans except in extraordinary circumstances.

With these concerns in mind, we suggest that digital copying of audio/visual works for loan to other institutions be allowed under a provision similar to subsection (e), limited to works that can not be obtained at a fair price. This would facilitate access where it is most restricted without creating any threat to a commercial market. The ability to loan the original of an item in a library's collection, if the owning library was willing, would, of course, remain uncompromised.

Digital copying for use by an institution's own community, in the form of streamed reserves, for example, seems best addressed as by a fair use argument rather than by a specific provision in section 108. There is, again, the danger of making a provision so unwieldy and unworkable that it defeats its own expressed purposes.

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?*

Yes, as suggested above, the ability to copy for interlibrary loan those audio/visual works that can not be obtained at a fair price would address a small but important gap in the ability of academic libraries to meet the needs of students and researchers.

By allowing such copying, those audiovisual works which are most subject to the danger of loss or damage would be protected and the ability to share them with other scholars would be enhanced at no risk to commercial markets.

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?*

If the market limitation on copying for interlibrary loan suggested above were adopted, there would be no point in limiting the allowable copying to small portions or copies of lesser quality. Such limitations would serve no purpose and would significantly undermine the value of the suggested change.

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?*

In this situation, any section 108 provision should only address copies made for interlibrary loan. Direct copying to use material within the owning institution should be left to other provisions, like section107.