



Own Manage Share | Building On Others' Creative Expression | Copyright In The Library
University Administrative Interests | Contact Us

copyright in the library

Making copies: interlibrary loan

Related, concerted or systematic copies

Section 108(g) attempts to balance the interests of publishers and libraries regarding interlibrary loan arrangements. During the years preceding amendment of the copyright law in 1976, publishers lobbied hard for the strongly worded clauses in sections (1) and (2).¹ Libraries, fairly certain that such language would prevent normal and customary interlibrary loan arrangements, lobbied hard for addition language to clarify that the systematic copying the statute outlawed was *not* that which was customary so long as it did not substitute for subscriptions or purchases of the affected works.²

Later, the members of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") negotiated guidelines that described what amounts of copying would substitute for a subscription to or purchase of such work, a critical measurement in the balance. The [CONTU Guidelines](#) appear to have been much more successful than their Classroom counterparts ³ in fixing realistic or reasonable limitations in that the library community seems comfortable with the limitations even 30 years later.

But when it comes to libraries using their licensed digital database materials to send electronic copies in interlibrary loan, publishers have not been willing to compromise. Most database contracts flatly prohibit the practice. Those few that allow it insist that only an analog copy of the digital material can be transferred to the borrower. Others expect the lending institution to pay the borrower's fees for works borrowed that exceed the suggestion of 5. All in all, this is an area where libraries and publishers have not been able to agree on much of anything.

1. Interlibrary Loan.

The library may be either a requestor or responder in the interlibrary loan context ("IL"). Requestors are responsible for compliance with copyright law and, where applicable, the [CONTU Guidelines](#). Responders only have to ask whether the requestor has complied. Further, the CONTU Guidelines only apply to newer articles, those published fewer than five (5) years before the date of the request, and small parts of other works, and do not define what would substitute for subscriptions to older materials or entire works under Section 108(e). There are no guidelines for these.

Requesting

-- a copy of an entire book.

As requesting party, the library must comply with Sections 108(e) & (g):

- Determine that a copy cannot be obtained at a fair price;
- The copy must become the property of the patron;
- The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
- The library should both display and have on its order form a "[Warning of Copyright](#)."
- The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
- Since the CONTU Guidelines do not apply to copies of entire works, the library must state that it has complied with copyright law (not both copyright law and CONTU).

-- a copy of an entire journal issue.

As requesting party, the library must comply with Sections 108(e) & (g) and the [CONTU Guidelines](#):

- Determine that a copy cannot be obtained at a fair price;
- The copy must become the property of the patron;
- The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
- The library should both display and have on its order form a "[Warning of Copyright](#)."
- The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
- Since the CONTU Guidelines apply to periodicals, the library must make its request with a representation that it has complied with copyright law and the Guidelines;

- The library will pay royalties on any copy that exceeds the "suggestion of five;"
- The library will maintain its records of the request for three years.

-- a copy of an article from a journal issue or a small part of another work.

As requesting party, the library must comply with Sections 108(d) & (g) and the **CONTU Guidelines**:

- The copy must become the property of the patron;
- The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
- The library should both display and have on its order form a "[Warning of Copyright](#)."
- The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
- Since the CONTU Guidelines apply to periodicals and small parts of other works, the library must make its request with a representation that it has complied with copyright law *and* the Guidelines;
- The library will pay royalties on any copy of a periodical article that exceeds the "suggestion of five;"
- The library will maintain its records of the request for three years.

Responding to

-- a request for a copy of an entire book.

Most everyone believes that the supplying library in an IL transaction has no responsibility for compliance with copyright law. It's the requestor who has to do that. In the case of an entire book, there's no obligation on either side to comply with the CONTU Guidelines. So, all that's needed here is to require the appropriate statement of compliance from the requestor.

-- a request for a copy of one or more articles from a journal issue or a small part of a book.

As responding party, the library only has responsibility to request a statement from the requestor of compliance with the law and the CONTU Guidelines, since the Guidelines apply to articles.

2. Document delivery

Many libraries have begun to offer document delivery service, though in general there may not be a bright line between IL transactions and document delivery anymore. In the case of large public institutions where libraries have patrons all over the state, and now that "find it in a library" options on Google searches allow people all over the world to learn what you have in your collection that meets their needs, the application of Section 108 rights can be quite sweeping. Does document delivery by its very nature substitute for subscriptions or is it merely the natural expansion into the networked environment of IL practices that are well-established and accepted? If IL practices and Section 108's affirmation of such practices clearly contemplate photocopies, why should the medium make a difference? Questions about the medium are not perhaps the most difficult; what about requests that come to the library from librarians or others in for-profit businesses, law firms, investigator's offices and commercial research entities? What about requests from commercial document delivery services? Is the requestor's declaration that he or it has complied with copyright law or the CONTU Guidelines adequate?

These questions evidence an approach to the analysis of document delivery that attempts to understand the practice in the context of "making copies," an activity that is closely circumscribed and essentially an infringement, except for our narrow exemptions about which both libraries and copyright owners may be very uncomfortable. In truth, document delivery is poised to take center stage as the basic mechanism for distribution in the networked environment (see discussion below on [Database licenses and interlibrary loan](#)). The exceptions provided by Sections 107 and 108 are about to swallow the rule. Sections 107 and 108 were never intended to be the main vehicles for the distribution of knowledge and information but they appear to be headed towards that function. Perhaps the idea of making copies and focusing on those copies and trying to control and count those copies is impeding our collective recognition that a fundamental change is taking place in the nature of distribution whereby the copy will not have the same meaning, significance and importance that it used to have. When the simple prohibition, "don't make a copy" has the power to prevent all use of a document in so far as even glimpsing it requires that one and perhaps many copies be made, then a "copy" is not what it used to be.

Document delivery will continue to raise issues related to whether it is essentially an abuse of Section 108 in that it is, by its very nature, related and concerted reproduction and distribution under section 108(g). Libraries must be rigorous in complying with the requirements of copyright law and the CONTU Guidelines, where they apply, but we cannot be sure whether that will be enough.

3. Legislation

Section 108 was modified in 1998 by provisions in the Digital Millennium Copyright Act ("DMCA") and the Sony Bono Copyright Term Extension Act ("SBCTEA"). Although neither of these Acts changed subsection (g), the part of Section 108 that specifically authorizes IL activities, they did affect IL indirectly. The changes are shown on [17 U.S.C 108 redlined to show DMCA changes and clean copy](#). It would be advisable to be able to refer to this document during the rest of the discussion in this section.

The DMCA and SBCTEA changes affect IL as follows:

- The new notice requirement in subsection (a) applies to any copies made, including those for IL;
- The new section (h) that creates a limited exemption from the SBCTEA's 20 year term extension permits copies to be made and distributed for scholarship or research purposes, so long as the work to be copied is not being commercially exploited at the time.

The new notice requirement requires libraries to reproduce any copyright notice that appears on the work, and if there is none, to include a notice similar to those libraries have used before the law changed.

The limited exemption from SBCTEA's 20 year term extension applies only in the last 20 years of protection for published works and the new subsection (h) that implements the exemption details the conditions for exercising it. It appears to provide rights unrestrained by the part of subsection (g) that prohibits systematic copying that substitutes for subscription to or purchase of a work (with the CONTU guidelines establishing what that means), because that section's proscription only applies to copies made pursuant to subsection (d) (parts of a work copied in response to a

patron's request). Subsection (h) appears to provide rights free of all of the other restrictions of the Section, except the restrictions in the first subsection that establish qualifications for relying on Section 108 rights.

Thus, it might seem that this new right is broad and valuable, especially in light of mass digitization projects that will allow libraries to make copies of these works available more widely than more recent works.

4. Database licenses and interlibrary loan

Libraries increasingly license access to electronic works they previously acquired exclusively in analog form. It has been the rule for some time that most licensors of electronic databases did not permit IL or document delivery from their digital materials. Recently there has been some shift in this almost uniform armoring against traditional modes of sharing. Ultimately, however, newer forms of licensing could greatly reduce the need for and practicality of IL and document delivery.

For general information about acquiring materials by contract, please see [Licensing access](#), another article in this series.

Footnotes:

1 Section 108. Limitations on exclusive rights: Reproduction by libraries and archives

...

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee--

(1) is a ware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of materials described in subsection (d): ...

2 Section 108(g) proviso (the last clause in Section 108(g)(2):

Provided, That nothing in this clause prevents a library or archives from participating in interlibrary loan arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

3 See discussion in [Reserve Room Operations, Print Copies](#).

The subjects in this series include:

Fair Use (Section 107)

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library's collection

Library reproduction and distribution (Section 108)

- Archiving
- Patron requests
- Unsupervised copying, news programs and contractual limitations on acquisitions
- Interlibrary loan

Other

- Scholarly communication
- [The digital library](#)
- [Licensing access](#)
- [Is your library an Internet service provider under the DMCA?](#)