



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF PUBLIC HEARING

REPORT OF THE REGISTER OF COPYRIGHTS ON THE EFFECTS OF 17 U.S.C. 108 ON THE RIGHTS OF CREATORS AND THE NEEDS OF THE USERS OF WORKS REPRODUCED BY CERTAIN LIBRARIES AND ARCHIVES; PUBLIC HEARING

The following excerpt is taken from Volume 52, Number 41 of the Federal Register for Tuesday, March 3, 1987 (pp. 6407 - 6409)

LIBRARY OF CONGRESS

Copyright Office

[Docket LP 87-2]

Report of the Register of Copyrights on the Effects of 17 U.S.C. 108 on the Rights of Creators and the Needs of Users of Works Reproduced by Certain Libraries and Archives; Public Hearing

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of public hearing.

SUMMARY: The Copyright Office of the Library of Congress is preparing a report for Congress in accordance with 17 U.S.C. 108(i) which requires the Office to report to Congress every five years on the extent to which 17 U.S.C. 108 has achieved the intended balance between the rights of creators and the needs of users of copyrighted works that are reproduced by certain libraries and archives. This report is the second to be submitted, the first having been published in January, 1983. This notice announces and invites participation in the single public hearing designed to elicit views, comments, and information from all interested persons, including,¹ among others, authors, publishers, librarians, library patrons, and educators. The Copyright Office actively seeks the participation not only of organizational representatives, but also of any individual whose informed

opinion may contribute to the preparation of the report and the possible recommendation of changes in the copyright law.

DATE/LOCATION: The hearing will be held April 8 and 9, 1987, in the Mumford Room (LM-649), James Madison Memorial Building, Library of Congress, Washington, DC. The hearing will begin the day after the Legislative Day of the National Library Week.

Anyone desiring to testify should submit a written request to testify, which should be received at the address set forth below no later than March 20, 1987. To assist the Copyright Office in scheduling witnesses and deciding whether a second day of hearings will be necessary, we urge the public to observe the date for requesting time to testify, even if written statements will be submitted later. Ten copies of written statements must be received in the Copyright Office by 4:00 p.m. on April 1, 1987.

Supplemental or reply statements will become part of the record if received by 4:00 p.m. on June 15, 1987. Ten copies of such statements should be submitted.

ADDRESSES: Written requests to present testimony and ten copies of all written statements should be submitted as follows:

If by mail: Register of Copyrights, U.S. Copyright Office, Library of Congress, Department 100, Washington, DC 20540.

If by hand: Register's Office, Room LM-403, James Madison Memorial Building, First & Independence Avenue, SE., Washington, DC²

All requests to testify should clearly identify the individual or group desiring to testify and the amount of time desired. Oral presentations should not exceed ten minutes in order to reserve sufficient time for discussion of witnesses' written statements and relevant issues. The Copyright Office will attempt to contact all witnesses to confirm the times of their appearances.

FOR FURTHER INFORMATION CONTACT: Anthony P. Harrison, Assistant Register of Copyrights or Christopher A. Meyer, Policy Planning Advisor. Address: Copyright Office, Washington, DC 20559. Telephone: (202) 287-8350.

SUPPLEMENTARY INFORMATION:

1. Background and Purpose of the Report

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, was a product of many years of effort by Congress to replace a copyright law that many experts thought was ill-suited to such technological developments of the twentieth century as cable television, computers, and photocopying machines. One of the³ most difficult problems to resolve concerned the photomechanical reproduction, in whole or in part, of copyrighted works by libraries and archives. In addition to codifying the doctrine of fair use for the first time (17 U.S.C. 107), the Copyright Act of 1976 contains provisions authorizing certain acts of reproduction and distribution by qualifying libraries (17 U.S.C. 108).

With these provisions, Congress sought to balance between the positions forcefully advocated by the proprietor and user communities. Because of the

¹Error; line should read:
"from all interested persons, including"

²Error; line should read:
"SE., Washington DC."

³Error; line should read:
"photocopying machines. One of the"

uncertainty about their effect, Congress provided that the Register of Copyrights should prepare, at five-year intervals, reports concerning the effectiveness of the balance created by the Copyright Act. The first such report was published in January, 1983. Copies may be obtained from: National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161 (Tel: (703) 487-4650). With appendices, the NTIC Accession Number is PB83 148239,⁴ and the price is \$100.00 (paper) or \$31.50 (microfiche). Without appendices, the NTIS Accession Number is PB83 148247, and the price is \$17.50 (paper) or \$4.50 (microfiche). Copies of the Report are also available for use in the Information Section of the Copyright Office in Room LM-401 of the James Madison Memorial Building, Library of Congress. The second report, the subject of the hearing announced here, is due January 1, 1988.

The purpose of this hearing is to examine practices under section 108 as they have developed since 1982. It would therefore be most helpful if witnesses not simply reiterate positions previously taken with respect to library copying, but amplify their remarks with a discussion of ways in which the Act has or, of equal importance, has not affected their practices, and new developments in how libraries acquire, copy, and distribute works to their patrons, particularly covering the last five years.

2. Summary of Section 108

Under section 106 of the Copyright Act of 1976, authors and other owners of copyright are given the exclusive rights, among others, to reproduce the copyrighted work in copies or phonorecords and to distribute copies or phonorecords of the copyrighted works to the public. These exclusive rights are subject to several exemptions, including those contained in section 107 ("fair use") and section 108 ("reproduction by libraries and archives").

Section 108 deals with a variety of situations involving photocopying and other forms of reproduction by libraries and archives. Subsection 108 (a) provides that—

" . . . it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such a copy or phonorecord, under the conditions specified by this section if—

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) The collections of the library or archives are open to the public or

specialized researchers; and

(3) The reproduced or distributed material includes a notice of copyright.

Thus, paragraph (a) of section 108 establishes the basic conditions under which a library or archives may claim an exemption from the exclusive rights of copyright proprietors. In addition, for the library activity to be exempt under section 108, one of the other conditions set forth in paragraphs (b) through (f) must be satisfied. Moreover, under paragraph (h), the exemptions for nonprofit copyrighted works are⁵ modified substantially. Very generally, with the exception of facsimile duplication for preservation purposes and to replace damaged, deteriorating, or lost copies, the exemptions of Section 108 apply primarily to books and periodicals.

Archival preservation (Section 108(b))

This exemption applies only to unpublished works in the current collection of a library or archives. It allows reproduction only in facsimile form, and only for ". . . purposes of preservation or security or for deposit for research use in another library or archives."

Replacement (Section 108(c))

Libraries or archives are authorized to duplicate a published work in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen *but only if they find that an unused replacement copy cannot be obtained at a fair price.* The legislative reports offer some guidance as to what is meant; they indicate that a reasonable investigation will always require recourse to commonly known trade sources in the United States, and in the normal situation also to the publisher or copyright owner or an authorized reproducing service.

Journal Articles, Small Excerpts, Etc. (Section 108(d))

This paragraph applies to ". . . no more than one article or other contribution to a copyrighted collection or periodical issue, or to . . . a small part of any other copyrighted work." The only conditions for supplying a reproduction are that: ". . . the copy becomes the property of the user;" there is no reason to suppose that it ". . . would be used for any purposes other than private study, scholarship, or research;" and the library or archives must display prominently, at the place where orders are accepted, and include on the order form, a warning of copyright in language prescribed by a Copyright Office regulation.

Entire Works or Substantial Parts (Section 108(e))

With one addition, the conditions applicable under paragraph (d), as discussed above, apply under paragraph (e) to the "entire work," or "a substantial part of it." The added condition is that "the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of a copyrighted work cannot be obtained at a fair price." This paragraph applies essentially to out-of-print works.

General Exemptions (Section 108(f))

In addition to the specific exemptions described above, paragraph (f) makes clear that no copyright liability attaches to a library or its employees for copying done on unsupervised copying machines provided the machines bear a warning that certain copying activities may represent an infringement of the copyright law. Also, nothing in Section 108 ". . . in any way affects the right of fair uses as provided by section 107⁶ . . ." and a small number of copies of an audiovisual news program may be made and distributed by lending.

Multiple and Systematic Copying (Section 108(g))

Section 108 does not permit copying when the library or archives, or its employees—

(1) Is aware or has substantial reason to believe that it is making or distributing multiple copies of the same material, whether on one or several occasions, or

(2) Engages in the systematic reproduction or distribution of copies of periodical articles or excerpts from other copyrighted works; however, certain copying for interlibrary loan purposes is permissible, even if it might otherwise appear "systematic."

Copying for interlibrary loan purposes is authorized to the extent that libraries receiving copies so made do not do so "in such aggregate quantities as to substitute for a subscription to or purchase of such work." Guidelines for interpretation of the language "such aggregate quantities . . ." were adopted by Congress during its enactment of the Copyright Act, and their effectiveness is a subject of this hearing. They, as the Act, represent a compromise between proprietary and user interests. Because they were drafted by the interested parties with the administrative support of the National Commission on New Technological Uses of Copyrighted Works (CONTU), they have come to be known as the "CONTU Guidelines." (CONTU was a temporary commission that examined certain copyright issues related to computers and photocopying in order to permit Congress to proceed with its revision of the copyright law in general).

⁴Error; line should read:
" NTIS Accession Number is PB83 148239,"

⁵Error; line should read:
"nonprint copyrighted works are"

⁶Error; line should read:
"fair use as provided by section 107"

The guidelines which were adopted provide, essentially, that copying for interlibrary loans is permissible—

(1) If no more than five requests for copies of periodical articles from any given periodical are filled for a requesting library during a calendar year, with respect to articles less than five years old. (There is no provision covering the copying of older articles);

(2) If no more than five requests for copies of excerpts of any given work are filled for a requesting library within a calendar year; and

(3) If requesting libraries state that their requests comply with the Act and keep records of their requests for three years.

3. Specific Questions

1. How have photocopying practices

in libraries (including corporate libraries and information centers), archives, university communities, and copy shops changed since 1982?

2. Have new technological devices affected the so-called section 108 balance?

3. Have changes in the options offered through the Copyright Clearance Center, Inc. changed patterns of publisher membership, copying, payment, or permission seeking? Why is publisher membership not more universal than it is?

4. Do you have any data concerning photocopying that you would like made part of the record for this report?

5. Do you feel that new legislation is needed to either clarify existing legislation or to rectify any imbalance

between the rights of owners and the needs of users? If you do, please specify as precisely as possible what provisions it should contain.

6. Has there been any change in authors' income in the last five years as the result of sharing in photocopying royalties? If so, please characterize such change.

Dated: February 20, 1987.

Ralph Oman,

Register of Copyrights.

Approved:

Daniel J. Boorstin,

The Librarian of Congress.

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