



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 USERS OF WORKS REPRODUCED BY CERTAIN LIBRARIES AND ARCHIVES; PUBLIC HEARING

The following excerpt is taken from Volume 45, Number 231 of the Federal Register for Friday, November 28, 1980 (pp. 79202-79204).

LIBRARY OF CONGRESS

Copyright Office

[Docket LPR 80-5]

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). The subject of the report is 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 which are reproduced by certain libraries and archives. This notice announces and invites participation in the fifth and, under present plans, the last of a series of regional public hearings designed to elicit views, comments, and information from all interested persons, including copyright proprietors, libraries, and users of all types of libraries. 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.

DATES: The hearing will be held on January 28, 1981 and, if necessary, on January 29, 1981 as well, at the New York Hilton, 53d Street and Avenue of the Americas, New York City, in Room B of the Gramercy Suite, beginning at 9:30 a.m.

The hearing will take place during the same week as the annual meeting of the American Physical Society.

Anyone desiring to testify should submit a written request to present testimony by January 19, 1981 to the address set forth below. To assist the Copyright Office in scheduling witnesses and in deciding whether a second hearing day will be needed, we urge the public scrupulously to observe the date for requesting time to testify, even if written statements are submitted later. Ten copies of written statements must be received by the Copyright Office by 4:00 p.m. on January 21, 1981.

Supplemental statements will be entered into the record until March 1, 1981. Ten copies of such statements should be submitted.

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

If sent by mail: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Department DS, Washington, D.C. 20540.

If delivered by hand, the copies should be brought to: Office of the General Counsel, Madison Building, Room 407, First and Independence Ave. SE., Washington, D.C.

All requests to testify should clearly identify the individual or group desiring to testify and the amount of time desired. The Copyright Office will try to contact all witnesses to confirm the times of their appearances.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20540; Telephone: (202) 287-8380.

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 what many felt was a copyright law which was ill-suited to such technological developments of the twentieth century as cable television, computers, and photocopying machines. One of the 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).

These provisions represent a balance between the positions forcefully advocated by the proprietor and user communities in testimony before Congress during the legislative effort that resulted in the current Act. Because of the uncertainty about their effect, at

present and in the future, 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, the subject of the hearing here announced, is due January 1, 1983. An advisory committee composed of ten representatives of concerned interests meet regularly with the Copyright Office to plan the preparation of the report. In addition to public hearings, the Copyright Office has under consideration the possibility of conducting an empirical survey to provide objective data on the effects of section 108.

The purpose of this hearing is to examine practices under section 108 as they have developed since January 1, 1978, when the Copyright Act of 1976 became effective. 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.

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 work 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 (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 nonprint copyrighted works are

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 activity may represent an infringement of the copyright law. Also, nothing in section

108 "in any way affects the right of fair use as provided by section 107," 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 employee—

(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 which 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.)

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. Copyright Clearance Center

In an attempt to establish a centralized mechanism to facilitate payment of royalty fees for copying activities not exempt under the Copyright Act, publishers, with planning assistance by authors and librarians, established the Copyright Clearance Center, Inc. The Center, which is a not-

for-profit organization, does not provide copies or grant permission to copy. Each publisher sets its own article copying fees and, to the extent feasible, publishes an article-fee code on the first page of articles to inform users of the appropriate charges for copying.

Participating libraries register with the Center and obtain a user-registration number for use in reporting copying. They submit periodic reports of copying activities and pay the applicable royalty fees on the basis of their chosen payment method, including deposit accounts, billing, and possible prepayment through a stamping meter or stamp.

Presently, this clearance system operates with respect to works in journals, magazines, newsletters, proceedings, symposia, and similar works. Its operating costs are borne by participating publishers.

4. Specific Questions

The Copyright Office is interested in receiving comments and testimony about any issues relevant to section 108 which concern copyright owners, librarians, and their patrons. Of particular interest are answers to the

following questions:

1. To what extent has section 108 changed library procedures? Has there been any significant effect on users' and librarians' access to information?

2. To what extent has section 108 affected established patterns in the publishing industry and the relationship between authors, libraries, and library users?

3. Depending upon the type of library involved, describe the effect, if any, of section 108 upon the type and amount of copying performed by the library on its own behalf or on behalf of users. To what extent have publishers and authors experienced a change in the number of requests from libraries to reproduce works since the present law went into effect?

4. In what manner has the establishment of the Copyright Clearance Center affected your experience under section 108? Would the creation of a National Periodical Center affect your operations? (The intent of these questions is to elicit responses from publishers and authors on the one hand and libraries and library users on the other.)

5. Describe the impact, if any, that section 108 has had upon the replication of nonprint materials, including the ability of libraries to reproduce phonorecords and audio visual works dealing with news. In response to this question describe any problems which have

been encountered as the result of the narrower exemptions for nonprint materials under section 108.

6. How have the CONTU guidelines worked in practice? How should periodicals more than five years old be treated?

7. What is your opinion of the relationship between section 107 ("fair use") and section 108 ("reproduction by libraries and archives")?

8. How should foreign copyrighted works and requests from foreign libraries be treated under section 108 and, in practice, how are they treated now?

9. If problems do exist, can they be resolved without resort to legislative amendment? If so, what are the problems, and how could they best be resolved? If not, what changes should be made in the law?

(17 U.S.C. 108)

Dated: November 17, 1990.

David Ladd,
Register of Copyrights.

Approved:
Daniel J. Boorstin,
The Librarian of Congress.

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