2005-2006 AALL Copyright Committee
Report of Committee Chair
Paul D. Callister
July 21, 2006

The Copyright Committee bears a special charge to “inform and advise the Board and the Washington Affairs Office on copyright and other intellectual property matters.” The annual report of the chair is thus not just a perfunctory exercise but is intended to advise Board Members and Washington Affairs Office on issues critical to the Association’s interests.

This report highlights the work of the committee, the issues before it, and the outcomes of its work. The report will also describe continuing projects and issues, comment on items for further consideration, and subsequently offer recommendations. The report concludes that while the Committee made several important contributions during the year, the level of its engagement (and resources allocated for engagement) in copyright and intellectual property matters needs to increase significantly in order to meet current challenges to fair use, library and archival exceptions under 17 U.S.C § 108, and the public domain. Current trends in copyright and intellectual property law, such as the superimposition of licensed contracts and international conventions over the privileges granted to libraries and educational institutions under U.S. copyright law also pose challenges to which the Association must respond.

Meetings of the Committee

The Copyright Committee met at the annual meeting and by phone on Sept. 27, 2005, Dec. 16, 2005, March 3, 2006, and April 11, 2006. It will also meet at the annual meeting on Sat., July 8, 2006. Minutes of each meeting were kept and are being submitted with this report. See Attachment A.

Outcomes

1. DMCA Rulemaking

The Committee reviewed issues surrounding DMCA’s annual rule-making exemptions from liability for circumventing access control technologies, and prepared examples of educational uses of movie clips from DVDs and other protected media formats for submission to the U.S. Copyright Office, in conjunction with the Library Copyright Alliance. See Attachment B, Comments of the Library Copyright Alliance and Music Library Association, Section III. The incoming Committee will need to monitor additional opportunities for comment, and should also consider the effectiveness of the provisional granting of specific “fair use” exceptions to the DMCA through the rulemaking process.
2. **Participation in Section 108 Round Table**

The Committee applied to, participated in, and submitted comments to Section 108 Roundtable (library exemption provision). The U.S. Copyright Office sponsored the round table. Because of her proximity to Washington, D.C., the Chair asked Sally Wiant to represent the Committee at the event. Along with the Special Libraries Association (SLA), the Copyright Committee submitted comments on the need to preserve the exemption for libraries (including libraries at "for profit enterprises"), the importance of creating a safe harbor for Web archiving, the difficulties with the current three-copy limit in the digital environment, and the problems with requiring degradation of media prior to archiving electronic materials. The Committee is also concerned that without amendment of the DMCA, revision of 17 USC § 108 may have little practical effect, especially in light of the increasing use of technological measures restricting access to electronic materials. See Attachment C (letter published with Section 108 roundtable comments). The incoming Committee will need to monitor developments with Section 108 legislation.

3. **Creative Commons Open Access Model Publishing Agreement for Law Reviews**

The Committee reviewed and critiqued the *Open Access Model Publishing Agreement* sponsored by Creative Commons, Science Commons, Open Access Law Review Program. See http://sciencecommons.org/literature/oalaw. Creative Commons has adopted the Committee’s suggested changes to make clear that journals have the right (regardless of licensing restrictions as to types of use selected by the author) to license articles to electronic databases and to post such articles to the Web as part of electronic repositories. To further avoid confusion, the revisions explicitly require journals to mandate that databases and Web sites posting their content to provide notice of Creative Commons licensing. The Committee published a notice of its review of the *Model Publishing Agreement* in the June issue of *Spectrum*, and also cautioned members that even if contractual terms providing for exclusive publication were limited to a stated term as articulated by the Creative Commons in *Open Access Law Journal Principles*, such term should generally not extend beyond the period of one year.

4. **Sponsor Copyright Implications of Digital Archives (AALL 2006 Annual Meeting)**

**Participants:**

Catherine Lemann, Coordinator and Moderator, Law Library of Louisiana

Peter B. Hirtle, Cornell University Library
Program Description:

Many institutions are creating digital archives of items in their collections. Institutions also want to generate revenue to underwrite the cost of archive creation. Many digitized items are in the public domain, but some are not. This program will discuss the copyright and ethical implications of these efforts.

5. Sponsor What the #!*? is a "Snippet"? Copyright Issues Related to the Google Book Search Project (AALL 2006 Annual Meeting)

Participants:

Alison Ewing, Coordinator and Moderator, Arizona State University, Ross-Blakley Law Library (AALL Committee Member)

Jonathan Band, Jonathan Band PLLC (Counsel for Library Copyright Alliance)

Mark Sandler, Committee on Institutional Cooperation (CIC) formerly from the University of Michigan

Jeffrey Cunard, Debevoise & Plimpton LLP

Program Description:

Google's Book Search Project, a collaboration of libraries, publishers, and the Internet service provider, is a "pioneering" effort toward creating a global virtual library. Google has partnered with five major research libraries, including the University of Michigan, to digitize their collections and make them searchable through the Google Book Search Library Project. Google has also forged a relationship with publishers to make certain titles searchable through the Google Book Search Publishers Program. A representative from Google Book Search, the University of Michigan Libraries, and an expert on copyright law, and a lawyer representing the interests of publishers will discuss the project and related copyright issues: Will the plan democratize access to information? How will current litigation, like that involving the Internet Archive "Wayback Machine," affect the project? Why did the Google Book Search Library Project stop scanning all in-copyright works, giving publishers the opportunity to decide which of their books could and could not be scanned? And what exactly is a "snippet," the term used by Google to describe the amount of information that will be provided from copyrighted works?

6. Revision of Committee Web Site
Committee members Kelly Browne and Carol Roehrenbeck revised the Committee Web site updating the site for current issues and resources. See http://www.aallnet.org/committee/copyright/.

7. General Monitoring of Events

Bob Oakley from the Washington Office kept the committee informed on his progress with Orphan Works Acts (introduced on May 22, 2006 in the House) as well as on the status of Broadcast Flag legislation and U.S. ratification of the Hague Convention on Court Selection Agreements (which may significantly effect electronic licensing).

Ongoing Projects and Issues

1. Model Law Firm Copyright Policy

Michael Reddy and Dennis C. Kim-Prieto had taken on the project of revising the Model Law Firm Copyright Policy, available at http://www.aallnet.org/about/model_law.asp, to address electronic and licensing issues. Due to current proposals to amend 17 USC § 108, pertaining to library exemptions, and the proposed Orphan Works Act, we agreed that this project needs to follow in the wake of any new legislative developments. The Committee has been contacted several times by law firms who have requested additional guidance, and who have indicated that the model policy needs to be revised to address licensed and electronic information.

2. Government Relations Policy Statement

The Committee took up the issue of revising the Government Relations Policy Statement found in AALL’s handbook. The Committee did not resolve the modifications that should be made, but it did find that the statement on Public Domain Status of Government Publications in the handbook should be expanded to include all works in the public domain. The Association may also wish to make a statement on the need to "hold the line" on copyright term limits, in order to ensure the existence of a healthy public domain.

3. Role of the Committee and its Relation to Washington Affairs Office

The Committee held several discussions about the Committee’s role and the its proper relationship to the Washington Affairs Office, paying particular attention to the Committee’s Charge providing that the Committee is to “inform and advise” the Washington Affairs Office, as well as the Board. Because of the Washington Office’s proximity to legislative developments and other government functions, that office currently lays
the principle role of advising the Committee and AALL, in sharp contrast to the Committee’s Charge.

The Committee held several discussions on how the Committee could better perform its charge. At the Committee’s meeting in San Antonio, Bob Oakley, Director of the Washington Affairs Office, indicated a need for white papers that provided succinct analysis of copyright issues. These papers could be shared with other library organizations and used in conjunction with lobbying efforts. Bob did not feel that the white papers should function as policy documents.

In the course of the discussion, individual members of the Committee expressed that they felt unqualified to author such reports, but were more comfortable performing member education tasks, including program planning and reinvigoration of the Committee Web site. Currently, the Committee charge does not address educational roles or informing AALL members in general on copyright issues. It only discusses such function with reference to the Board and Washington Affairs Office and the Committee’s role in speaking for AALL on copyright and AALL issues. The Committee has submitted (for the July Board meeting) proposed language to the Executive Committee to revise the charge to reflect its important educational role.

Returning to the issue of white papers, the Committee discussed how the Committee could support AALL members with expertise sufficient to author such papers, and whether an AALL publication series would be sufficient recognition to persuade needed authors to participate. Several worthy topics were identified; however, the current Committee lacks the resources to launch such projects. Some members of the Committee, such as the Chair, had other publishing commitments. Other members lacked the time or were reluctant to play the role of editor and author. During the Committee’s March phone conference, Bob Oakley expressed reservations about the viability and utility (in terms of costs and benefits) of white papers. Nonetheless, the Chair believes that increasing the Committee’s size, careful recruitment and cultivation of members with appropriate expertise and skills, and retention of experienced members (including repeated cycling of previous committee members with demonstrated ability back onto the Committee) would enable a modest white paper project. Furthermore, such papers would help the Committee facilitate the work of AALL’s Washington Office, and inform the Executive Board of copyright and intellectual property issues. If nothing else, the Committee should be enabled to play such a role, if needed.

The proposed revision to the Committee’s Charter and Size (on the agenda for the July Board meeting) permits a flexible number, between 6 and 12, to serve on the committee. The revision also expressly authorizes the appointment of sub-committees. Providing such flexibility to the
Committee size and structure will not only facilitate the production of white papers, when prudent, but will also help the Committee meet its current charge to keep abreast of the increasing number of developments in copyright and intellectual property law, and explicitly authorizes the Committee’s important member education functions.

4. **Section 115 Reform Act**

This new bill deals with statutory or compulsory licenses for digital music. It was introduced in the House (H.5553) on June 8, 2006. On behalf of AALL, Bob Oakley signed onto a letter opposing the bill. See Attachment D (letter to the House Subcommittee of the Courts, Intellectual Property and the Internet). At its final meeting, Bob Oakley will to inform the Committee of the effect of the bill and the reasons for opposing it. The incoming Committee will have to monitor the bill. One issue with the bill is its treatment of incremental copies, including temporary copies in computer RAM.

**Recommendations and Items for Consideration by the Board and Washington Affairs Office**

1. **Submitted Items for Board Meeting in July.**

   The Board should consider proposed changes to the Copyright Committee Charge and Size and issue a statement regarding Open-Access Submission. See Attachment E (agenda items previously submitted to the Board for its July 2006 meeting). The proposed changes to the Committee Charge address its needs for flexibility in structure and size, as well as authorizing an important function carried on by the Committee with respect to member education.

2. **Hague Convention on Court Selection Clauses—Another UCITA, or Worse?**

   Ratification by the U.S. Senate of the *Hague Convention on Court Selection Clauses* (concluded June 30, 2005) would have important consequences for licensing agreements. The *Convention* adopts an extremely liberal standard for contract formation (broader than *UCITA*) which will recognize click and shrink-wrap agreements. The *Convention* mandates that courts in signatory states dismiss actions concerning agreements in which the contract specifies another forum.

   The effect is that vendors of software and informational databases will be able to shop for the most favorable forums for their agreements--forums that may not be inclined to uphold privileges conferred on libraries as a result of U.S. copyright law (such as fair use, library and archival exemptions under section 108, and the use of works in the public domain).
Currently, the contractual law of each U.S. state determines whether contractual provisions denying copyright right privileges such as fair use, reverse engineering, interlibrary loans (per the first sale doctrine) and archival rights for libraries may be voided as violations of fundamental public policy.

If ratified, the Hague Convention would often remove contractual interpretation from U.S. state and federal jurisdiction to foreign courts that will not consider U.S. copyright law when interpreting licensing agreements. This is especially troubling considering the viability of click and shrink-wrap agreements under the Hague Convention. For all of its flaws, UCITA has, at the least, provided consumers with rights of return and certain standards limiting the formation of click and shrink-wrap agreements. UCITA also limited remedies such as self-help and denial of service. It provided for terms that had to be specifically assented to, addressed warranties, and tackled thorny issues such as the enforceability of contractual terms fundamentally at odds with the policies embodied by U.S. copyright law.

Given the considerable opposition of libraries to UCITA, it would be a mistake for the library community to fail to exert its influence on U.S. ratification of the Convention. In reaction to UCITA, some states adopted anti-UCITA legislation denying the enforcement of clauses for agreements that would be subject to UCITA in other fora. The effect of the Hague Convention, if ratified by the Senate, would be to trump any state legislation meant to prevent the application of foreign contractual law, including law which might function like UCITA, or worse.

When the introduction of the Hague Convention to the Senate appears imminent, the Copyright Committee, the Washington Office and the Executive Board should proactively foster and engage opportunities to influence ratification of the Convention in a manner that sufficiently addresses concerns regarding the licensing of electronic information. AALL should monitor the status of the Convention and make sure that its partners and allies in the library community (both in the U.S. and abroad) are aware of its potential for harm.

3. Convergence of Copyright and Anti-Trust Issues

In the last year, the Committee commenced discussions about whether current fair use analysis as applied by courts under 17 USC § 108 adequately addresses instances of publishing monopolies that have captured a segment of a market, such as law or the biological sciences. In essence, a finding of fair use should be more likely when the information of a particular field or discipline has been effectively captured by a single publishing firm or small group of firms in way that adversely affects competition. The Copyright Committee, the Washington Office,
and the Board must pay increasing attention to the convergence of copyright and antitrust issues, and sponsor efforts to heighten awareness of antitrust issues related to intellectual property.

5. **WIPO Treaty on the Protection of Broadcasting Organizations**

Concern over this treaty was raised near the end of the Committee’s term. This treaty will be discussed at the annual meeting, but the new Committee will need to review it in detail. Other organizations have opposed the treaty, alleging that it would grant copyright or similar privileges to broadcasters even for material from the public domain. Furthermore, given the failure of the DMCA (implementing previous WIPO anti-circumvention provisions) to provide a fair use or library exception (such as in 17 USC § 108), the implementation of the new WIPO treaty may further cripple the privileges enjoyed by libraries, archives and educational institutions under U.S. copyright law.

6. **Call for More Attention to International Developments**

As demonstrated above, international and foreign developments increasingly affect copyright, licensing, and intellectual property issues in the U.S. Many of the recent developments have not favored U.S. libraries (and more importantly, the underlying values and objectives that make libraries so important). In addition, many nations have expressed dissatisfaction with WIPO for favoring the large publishing and content producing industries of the U.S. and European nations, instead of adequately considering the economic and social interests shared by the developing world.

Many of the interests of the developing world are aligned with those of library and educational communities in the U.S. Specifically, the developing world, along with Western libraries and educational institutions, all share the need to create robust learning environments, facilitating institutions whose mission is to empower students, educators, and various other communities through free or inexpensive access to information resources. Consequently, AALL should initiate partnerships with international counterparts to develop regulatory schemes (including model and uniform codes) for copyright and intellectual property which serve the needs of the developing world to promote the arts and sciences.

A proactive approach to model copyright regulations, if successful, may serve as an effective counterweight to commercial interests dominating U.S. trade initiatives and WIPO conventions. U.S. trade agreements and WIPO initiatives have pushed many developing countries to adopt regimes which do not necessarily promote the development of the arts and sciences, nor do they preserve or increase access to important government and legal information. For instance, a developing country
may well benefit from copyright term limits shorter than those currently provided for by U.S. statute. Such nations may also benefit from liberal fair use, library, and archival privileges, as well as exceptions to anti-circumvention legislation (like the U.S. DMCA). Model codes can foster reverse engineering, protect the public domain, and ensure broad access to government, legal, cultural, and indigenous resources (while preserving such resources from being captured by foreign enterprises through exclusive licenses or other devices).

Presumably, AALL could make better use of its members’ contacts with organizations such as the Salzburg Seminar, IFLA, and the Bibliotheca Alexandrina to support conferences addressing copyright and intellectual property issues in developing countries. Pressure from the developing world may reverse trends in the U.S., where contractual licensing restrictions shrink the size of the public domain, subvert the fair use and library privileges under Section 108, and hamstring fair use through the DMCA (which provides no fair use or archival exceptions for circumventing access control technologies).

During a recent trip to China, the Chair observed that although there are now over 600 law schools in that nation, Chinese law librarians generally lack engagement in domestic copyright issues. China looks to business transactions in the U.S. as models on many issues, often without adequate understanding of the important social issues and constitutional policy objectives that stood as the basis of American law. The Chinese tend to view copyright law as a trade concession in negotiations with Western nations and, perhaps, as a necessity for capitalist economies. They do not see copyright as a tool for scientific, social and cultural development. As a trade concession, copyright is simply a property right, and not much more.

The legal and copyright experience among AALL members is perhaps unique to the U.S. and is an important resource to be shared with colleagues around the world. With the blessing of that expertise, and the attendant power that knowledge endows, comes the responsibility to act for the benefit of those who cannot do so for themselves. Consequently, AALL should take a leading role in international copyright developments and share its expertise generously with others. It is also in AALL’s long-term interests to do so.

**Conclusion**

While making some important and appreciated contributions during 05-06, the Copyright Committee needs to rise to the magnitude of the challenges facing libraries as a result of increased legislative activity, important litigation and international developments. To do this, the Committee
needs to increase its membership size, utilize sub-committees, take on projects outside of its traditional comfort zone, mentor a larger pool of capable committee members, and improve communications with Washington Affairs Office and Executive Board.

As a whole, ALLL needs to be more aggressive in engaging its colleague organizations on copyright and intellectual property issues and lend its expertise to developing world, the interests of which may closely align with library interests in the U.S. The failure to face current copyright challenges may threaten critical library functions (such as interlibrary loan and educational support) and impair not only the progress of the arts and sciences, but impede the access and preservation of government and legal information throughout the world.
Attachment A

2005-2006

AALL Copyright Committee Minutes
Copyright Committee  
2005-2006  

Members of the Committee:  Kelly Browne (07), Alison Ewing (06), Michael Reddy (07), Carol Roehrenbeck (07), Christopher Simoni (06), Kira Zaporski (06)

Chair:  Paul D. Callister (06)

Executive Committee Liaison:  Victoria Trotta

Washington Office:  Bob Oakley, Mary Alice Baish

Other Welcome Guests:  __________________________________________________
______________________________________________________________________

Introductions and Appointment of Meeting Secretary/Time Keeper (7 min)

Reading and Discussion of Committee Charge and AALL Strategic Directions (18 min)

• What are our priorities as given per the charge and AALL Strategic Directions?

• How can we best advise and inform the Washington Office and Executive Committee?
  o White Papers
    ▪ What is their function? (generally not a policy statement)
    ▪ Who should author?
    ▪ What format? (executive summary, issue, analysis, proposed strategies and action, annotated bibliography
    ▪ Where and how should we publish/distribute?

  o Anthology of Other Works
  o Reviewing Existing Policy
  o Issue Spotting
  o Recommendations on Re-structuring the Committee

• Other (Secondary) Activities of Benefit
  o Conference Programs
  o Spectrum Article
o Web Sites

Advising and Informing (18 min)

- Whitepaper Topics for Review (see attached sheet)
- Policy Review
  - Creative Commons Model Agreements
    - Endorse
    - Recommended max. term for exclusive license
  - Review of existing AALL policies (copyright and fair business practices)
- Assignment to topic teams

Review Minutes from Outgoing Committee Meeting (3 min)

Follow-up on Programs for 06 Suggested by Outgoing Committee (5 min)

Schedule Next Phone Conference (3 min)
**White Paper Topics**

1. Hague Convention on Choice of Court Agreements and problems for non-negotiated or “click-wrap” agreements
2. Implications of *Grokster*
3. Amendment of Section 108 (protecting libraries) to deal with modern issues of e-reserves, technology migration, etc.
4. Orphaned works
5. Digital Media Consumers’ Rights Acts and the preservation of the “Betamax Defense”
6. Implications of CAFT and copyright (requires member states to extend copyright term and ratify WIPO ratification).
7. Legal issues for digital depositories
8. Trademark Dilution Act
9. Family Entertainment and Copyright Act
10. Failure of EU member states to implement and backlash against Database Protection and/or Privacy Directives. Is the pendulum swinging the other way? How should this be used to influence legislation in the US?
11. Failure of US to follow WTO decision concerning US Copyright exemption for jukeboxes—fair use implications
12. Copyright renewal—constitutionality of extension
13. UCITA licensing issues—now that UCITA is dead, what law applies to interpreting licenses?
14. Antitrust and copyright—should “fair use” analysis consider the implications of monopolies and oligopolies in any segment of content creation industries such as scientific presses, etc.
15. Lawsuit against the Wayback Machine and the Internet Archive.
16. Broadcast flags.
Minutes
Copyright Committee - Phone Conference
September 27, 2005
2:00 p.m. EST

Present: Kelly Browne, Paul Callister, Alison Ewing, John Gabeggi, Bob Oakley, Mike Reddy, Carol Roehrenbeck, Chris Simoni, Sally Wiant

Under the update on prior business, Paul announced that the Open Access Committee requested that the Copyright Committee hold off on its endorsement of the Creative Commons Law Review Principles and licenses until an article, which more fully describes these principles will appear in Spectrum. Mary Alice spotted an issue in the proposed license. Two paragraphs are in conflict: the right of the faculty member to post on SSRN, which is a commercial site with a paragraph in which faculty may restrict the kinds of uses to non-commercial use.

The chair has not heard whether the Copyright Committee's program proposal has been accepted, although some members believe that notification would soon be forthcoming. Google will probably still be an issue by the meeting.

Kelly Browne volunteered a staff member to serve as the Copyright Committee's web master. What role should the committee take in keeping links updated? Kelly and Carol will review the committee's site and the committee's charge.

Orphan review...Two hearings have been held in Washington D.C. and California. Most support the idea of doing something about orphan works - those which are hard to trace and the copyright holder cannot be located. What should be the remedy if the work is an orphan? The problems of the visual artists are more particular and difficult than others. There is hope that there will be a proposal by the end of the year.

108 Review. This review addresses the series of exemptions for libraries. The Copyright Office appointed a special committee to see whether those exemptions should be changed to accommodate digital information. The committee is being co-chaired by Lolly Gasaway and a representative from the publishers. It's a two year committee. The publishers on the committee are very nervous.

The conversation turned to the Broadcast Flags Legislation. The Library Copyright Alliance has responded in a September 19, 2005 letter expressed our concerns. The Flag software in a signal does not prevent initial copying so that TIVOs work; however, a user cannot subsequently copy. This interferes with fair use. Because there have been many changes in equipment, this is not as exciting an issue as it was before. There are no specific proposals. The alliance's proposed language was rejected as over broad. On this issue, we will follow the Washington office lead.
The Model Law Firm Copyright Policy was last reviewed in 2001. Mike Reddy will take the lead on this. Committee members should review the policy and pass on comments to Mike. At a minimum, the policy should be posted on the Copyright Website. The policy was written at a time when print use was predominate. It should be reviewed in light of use of electronic documents. Also, Carrie Russell in the Washington Office of the ALA has written a copyright book for the lay person attempting to address some of the issues that are similar to those raised especially by the law firm community.

Students from BYU have traveled the world collecting primary source materials. BYU has scanned and built a database, but because of the lack of permission many of these international primary government documents cannot be made readily available. Access to legal information is an important value of the Association. AALL developed a set of principles for WIPO, among these is the proposition that government information should be in the public domain. This principle was translated into several languages and the document was signed on by librarians throughout the world even those whose home country primary materials were not readily available. AALL has been working with and through IFLA, however, there are limited resources both in terms of time and money. If there are critical meetings on this topic, Bob Oakley tries to attend. There is a WIPO Internet site with IP laws from around the world.

Through the Salisbury Seminar, Paul received requests for AALL to endorse some principles on international advocacy. If these are the principles seen by the Library Copyright Alliance earlier in the week, we should be cautious in signing them. Some of the alliance saw a number of issues. Bob Oakley will review the principles and respond back to the committee.

The committee turned its attention to its charge and structure, and discussed the relationship with the Washington office. How can the committee support the Washington office in a meaningful way? How should the committee be doing its work? This is a discussion which may take much of the year. Certain issues need to be studied in depth and make the results available to the Washington office and the Board. One such issue was raised at our discussions today and that is international access to primary government documents. The charge of the committee was likely written before AALL established the Washington office. The committee should put together recommendations. One might be to identify people who could write white papers and who might be encouraged to write white papers by publishing through the AALL Publication Committee. This will be a topic which will be discussed at our phone conference, approximately in six weeks.

Respectfully submitted -

Sally Wiant
Minutes
Copyright Committee Meeting
December 16, 2005, conference call
2:00 p.m. EST

Present: Mary Alice Baish, Kelly Browne, Paul Callister, Allison Ewing, Bob Oakley, Dennis Kim-Prieto, Mike Redding, Carol Roehrenbeck, Chris Simoni, Kira Zaporski

1. Introductions
   Dennis was introduced and welcomed. Kira Zaporski agreed to take minutes for the meeting. Carol moved to approve the minutes from the last meeting, Chris seconded, and the minutes were approved.

2. Revision of Gov. Relations Policy (Mary Alice)
   http://www.aallnet.org/about/policy_government.asp
   The policy was last revised in March 2001. It originally came out of Govt Relations, and that is the focus. Tim Coggins and Mary Alice have indicated that there are substantive changes that need to be addressed. Mary Alice would like to take the revisions to take to the July 2006, board meeting. She asked if the Copyright Committee is willing to take on this project, this year.

   Paul asked Mary Alice what is nature of help needed from the Copyright Committee? What specific aspects would the Committee focus on? Bob indicated that they’d like to keep the policy stmt fairly broad. It would be better to not include specific statutes, but rather to deal with it on a higher level.

   Mary Alice indicated that 90% of the revision falls to Govt Relations, and they are going to be working on the revision, but Mary Alice wants to make sure that all bases are covered, and so would like review be the Copyright Committee. Her concern is that the revise policy covers everything that it needs to. She would like a strong stmt that the AALL Board can endorse. The revised policy should also probably explicitly tie fair use to content in digital format.

   Paul suggested that two members of Committee take the next month to review the current version, and decide what, if anything, is missing. For example, does the policy adequately address issues of equitable balance, preservation of fair use, and sufficiently broad public domain coverage.

   Decision: Bob Oakley, Chris Simoni, and Dennis Kim-Prieto will work on revisions. They will then circulate something to the Committee in the next 4-6 weeks

3. Update on Annual Meeting - Programs and Committee Meetings
   a. Google Print (Alison Ewing)
      The program will now be called Google Book Search instead of Google Print, to reflect the recent name change. Our two speakers so far are - Mark Sandler from University of Michigan Libraries, Collection Development, and Jonathan Band.
Alison is trying to come up with a representative of Google for a third speaker, but having difficulty pinning anyone down at Google. Although Jonathan Band could possibly cover the Google position, if we can’t get a separate speaker to cover that aspect. Bob suggested possible speakers for the third position:

- Peter Gibler, of AAUP
- Sandy Thatcher at U Penn
- Someone from AAP

Part of the issue is that there are multiple questions to address, including both the legal issues, and the questions related to whether this is good policy.

Decision: Alison will continue to try to secure a Google representative, but if that looks like it’s not going to work out, she’ll instead get the third speaker elsewhere, possibly from the suggestions provided by Bob.

b. Copyright Issues for Digital Archives
Defer topic to a future meeting.

4. Progress on Law Firm Model Copyright Policy (Mike Redding) (http://www.aallnet.org/about/model_law.asp)

Mike suggested that efforts to revise might be premature, because of tentative changes to Section 108, which would result in additional need for revision. Paul raised the question of whether Section 108 adequately addresses the needs of our constituents, particularly law firms. The Section 108 group is having public hearings in March, one in California and one in DC. Does AALL want to make a pitch to appear? Bob is part of the Section 108 group, so he would not be appearing on behalf of AALL. Discussion about whether someone from the Committee attend/appear on behalf of AALL?

Lolly Gassaway is presenting a PLI program on law firm issues. Mike will be attending the program and will update us at our next meeting.

Decision: The matter is tabled until the next meeting, at which time the Committee will revisit.

5. Update on Web Site (http://www.aallnet.org/committee/copyright/) (Kelly Browne)
Carry this item over to next meeting. Kelly and Carol will report.

6. Creation of Strategic Plan and/or Revision of Charge (http://www.aallnet.org/committee/copyright.asp#charge) in Light of AALL’s Strategic Directions (see http://www.aallnet.org/strategic/)

Claire Germaine is encouraging us to create a strategic plan based on AALL’s strategic direction. We need to consider how we’d create a plan for ourselves.

Decision: Kira and Alison will work on this.
7. Update on DMCA Rule Making (Paul Callister)
   a. Proposed Exemptions
   b. Need for Legislative Solution

Bob provided an update. A few of our examples were included with the submission from the Library Copyright Alliance. We are waiting for release of the rules and will have opportunity to make reply comments. Discussion that some groups are disillusioned with the process. This issue is, for whatever reason, is not generating much traction with the public and there is a lack of grass root support. Dennis suggested that forming associations with musicians that are taking a stand on these issues would raise awareness. Discussion that this is really the job of an organization like EFF, to generate grass roots interest. Question of whether this is really the Copyright Committee’s primary charge, the generating of grass roots interest, outside of our members.

Decision: Paul will think about this issue and what could be done with regard to generating interest and support. Perhaps draft a mass letter to law school IP groups.

8. Update on Creative Commons Licensing (Paul Callister)

Paul just got the text to the proposed model agreement today. The open access Committee wants to endorse these principles. Should the AALL Board be the entity to endorse the principles, because this goes beyond the Copyright Committee? Paul asked if it’s worth it for Copyright Committee to endorse it separately when the larger AALL entity will almost certainly endorse. The answer is probably yes. If we endorse, we would likely post the final version of the Copyright Committee’s website.

Decision: Chris Simoni and Paul will look at this issue. They will also consider the possibility of collaborating with the Library & Technology Committee of AALS, and other routes.

Other:

Paul, Chris, Bob, Carol are going to AALS – there may be the opportunity to do some Committee work at the time, or to at least have an informal meeting.

Time ran out before we were able to make it to agenda item nine, “other items”, which included:

   a. EU Database (Bob)
   b. Broadcast flags
   c. Orphan works
   d. Support of open access to gov info internationally
   e. New developments (Bob and Mary Alice)
   f. Mary Alice's Trip to Egypt
   g. White Papers anyone?

Paul will schedule another telephone conference for approximately five weeks out.
Respectfully submitted,

Kira Zaporski
Minutes of the Copyright Committee Meeting  
March 3, 2006  
Conference Call, 11:00 a.m. EST

Present: Mary Alice Baish, Kelly Browne, Paul Callister, Alison Ewing, Bob Oakley, Dennis Kim-Prieto, Mike Reddy, Carol Roehrenback, Sally Wiant, Kira Zaporski

1.) INTRODUCTION

Sally Wiant took the minutes for this meeting. The minutes of December 16, 2005 were approved as corrected to reflect the correct spelling of Mike Reddy.

2.) REVIEW OF THE COMMITTEE CHARGE

Due to e-mail complications, most of the committee had not received the draft proposal for restructuring the Copyright Committee. Most of us were able to pull up the proposal during the conference call. The charge was expected to reflect other things, like offering programs. Mary Alice discussed the structure of the GRC and the subcommittees, which were developed to monitor what's happening. Another GRC subcommittee addresses awards. A third subcommittee works directly on GRC issues. This is a relatively informal agreement among the members of the committee.

The question of Copyright Committee jurisdiction was raised. An advisory committee term is generally three years. A standing committee is a two year term. With the proposal for two committees, there is a worry about a conflict of where the jurisdiction of one committee leaves off and the other begins. It is better to have a single committee organized for different tasks. Bob Oakley suggests that we should not put undo emphasis on the topic of white papers. A separate advisory committee might come with a cost of losing the development of copyright expertise among newer members to the committee. If we follow the GRC model, the committee chair would work with the membership to decide which subcommittees would be needed and staff should volunteer. Kelly offered to revise the proposal and to re-submit it to the committee by next week.

3.) UPDATE ON THE ANNUAL MEETING

A. Google print

Alison Ewing reported that we are still waiting for Google to respond. If Google continues to drag its heels, Jonathan Band could cover our side. From the publisher's side, we could invite Peter Gobal, Alan Adler, or Sandy Thatcher. Alison will try to e-mail the schedule by next week.
B. Connell

Having someone at Connell is a good idea to represent what we do. Dennis volunteered to represent the committee at Connell.

C. Table at the exhibit hall

The GRC tries to get a table/booth next to the Copyright Committee. We should encourage members to attend committee meetings. It would be helpful to have a list of committee initiatives. Among the things that we might wish to highlight are Orphan Works and the Section 108 study. Paul will reserve the table and Carol volunteered to put together the information packet that we would choose to hand out. Mary Alice will help Carol.

4.) DMCA ANTICIRCUMVENTION EXEMPTIONS

There has been a call for someone to testify on anticircumvention. Jonathan Band, on behalf of the library coalition, will testify.

5.) SECTION 108

Sally Wiant will represent AALL at the roundtable. There are predominately four significant issues: website preservation, eligibility for Section 108 exceptions, new exception for preservation - only restricted access, and Section 108(b) and (c) to allow access offsite.

6.) PROGRESS ON THE MODEL LAW FIRM COPYRIGHT POLICY

http://www.aallnet.org/about/model_law.asp

Dennis and Mike will identify what needs to be changed and will redraft the policy for our consideration.

Time did not permit a discussion of the Google image thumbnails, the revision of the government relations statement, the update on the web site, nor a discussion of the creative commons law review licensing, and Hague Convention opposition.

The conference call concluded at noon EST.
Minutes
Copyright Committee-Teleconference
April 11, 2006
3 p.m. EDT

Present: Kelly Browne, Paul Callister, Alison Ewing, Michael Reddy, Kira Zaporski

Paul briefed the committee on what Sally Wiant told him about her participation in the Section 108 Roundtable discussions. There were four main discussions and none were as contentious as expected. Publishers appear to be concerned about the difference between academic and public libraries and are also concerned that libraries are becoming “publishers,” especially the academic libraries. They don’t have a problem with archives per se, but do with the idea of academic libraries providing unlimited access to their digital reserves. The question then becomes who gets access to the digital reserves? Just scholars in that institution? Just people who are on site?

There was agreement that the 3 copy limit under 108 (b) and (c) needs to be increased. It was also agreed by librarians and publishers that the TEACH Act is inadequate. There did not seem to be a push or consensus to limit section 108 eligibility to non-profits.

Paul noted that section 108 reform could be undermined by the DMCA because of the lack of fair use in the latter, especially when it comes to anticircumvention. With technology and formats constantly migrating, it will become necessary for preservation under 108 to use anticircumvention technologies at some point. Preservation in the digital world is different than in the analog, because there are no gradations of quality, you either have a copy or you don’t.
Publishers are also worried about archiving old web pages that have dated and incorrect information on them. Should there be an opt-out or opt-in system for web page archives?

Mike agreed to be the contact person for future questions about the new Model Law Firm Copyright Policy. Notice will be given to members in Spectrum and on the Copyright Com’tee web page. He also agreed to draft a short comment regarding 108’s eligibility criteria to be submitted to the Study Group by April 28th (deadline extended after the meeting from April 17th).

Kelly and Carol have made some revisions to the Copyright Com’tee web site, added some links including to the 108 Study Group, deleted a link to a porn site. Are continuing to work on updating the Com’tee site.

Paul summarized his efforts on behalf of the Creative Commons Model License Agreement in conjunction with the Open Access Com’tee. The Board does not want to exclusively endorse one agreement since there are a number of good ones available. They will take up the issue at their July meeting.

The Board will also deal with the new Copyright Com’tee charge at that meeting. We are recommending that the committee be enlarged from its current membership of 6 to 10 or
12. This will allow the committee to better deal with the large number of copyright-related issues that continually affect AALL members. It will also allow it to broaden its charge to specifically include educating the membership on copyright issues and provide more support to the DC Office. It is recommended that the Copyright Com’tee use the Government Relations Com’tee as a model for restructuring itself, allowing for possible committee officers who will make the month-to-month management of committee business more efficient.

Paul thought that the Board should also be made aware of the licensing problems that adoption of the Hague Convention on Court Selection will create for members. He said that it was the equivalent of an end-run by UCITA supporters who would be able to use this treaty to force litigation in pro-publisher overseas forums, while legitimizing non-negotiated shrink-wrap and click-wrap agreements. This convention would take away the fair use rights that even UCITA backers conceded.

Lastly, it was announced that the Com’tee will meet in St. Louis on Saturday at 4 p.m. and Wednesday at 7:30 a.m.

Respectfully submitted,

Michael Reddy
Attachment B

DMCA Copyright Office Rulemaking Exemptions

Comments of the Library Copyright Alliance

and

Music Library Association
BEFORE THE COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  

IN THE MATTER OF  
EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES  

Docket No. RM 2005-11  

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE AND THE MUSIC LIBRARY ASSOCIATION  

Pursuant to the Notice of Inquiry (NOI) published by the Copyright Office in the Federal Register on October 3, 2005, the Library Copyright Alliance (LCA) and the Music Library Association (MLA) submit the following comments on exceptions that the Library of Congress should grant pursuant to 17 U.S.C. § 1201(a)(1)(C). The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. These five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA’s mission is to foster global access to information for creative, research, and educational uses. The MLA is the professional association for music libraries and librarianship in the United States. It has an international membership of librarians, musicians, scholars, educators, and members of the book and music trades. The MLA’s purpose is to promote the establishment, growth, and use of music libraries; to encourage the collection of music and music literature in libraries; to increase
efficiency in music library service and administration; and to promote the profession of music librarianship.

I. Legal Standards

LCA and MLA are pleased to observe that in the NOI, the Office seems to have backed away from rigid application of the "substantial adverse impact" standard articulated in the previous rulemakings. See 70 Fed. Reg. 57528. Moreover, the Office has qualified the standard for actual harm from always requiring a showing of "actual instances of verifiable problems" to "generally" requiring such a showing. Id.

Nonetheless, the Office continues to interpret the "likely" adverse effects standard as "require[ing] proof that adverse effects are more likely than not to occur." Id. The Office further states that the proponent of an exception must prove "that the expected adverse effect is more likely than other possible outcomes ...." Id. This level of certainty has no basis in the language of section 1201(a)(1)(B) or (C). It places on the proponent a burden of prediction that is too difficult to meet. A fairer reading of the statute is that the proponent must show more than a theoretical possibility of an adverse impact, yet need not prove that there is a greater than 50% probability of such an outcome, nor that such an outcome is more probable than any other possible outcome.

The Office also continues to interpret the term "class of works" based upon "attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works." Id. at 57529. However, the Assistant Secretary for Communications and Information of the Department of Commerce in her August 11, 2003 letter to the Register of Copyrights noted that "in some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to
allow circumvention of a technological access control.” The Office appears, as a practical matter, to have recognized that a focus on the “attributes of the works themselves” may be too limiting. Thus, several of the exemptions granted in 2003 address attributes of the protection measures — e.g., “dongles that prevent access due to malfunction or damage,” or “access controls that prevent the enabling of the ebook’s read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.” 70 Fed. Reg. 57529. We hope that the Office will continue to consider the attributes of the protection measures as well as the works they protect.

II. Renewal of Existing Exemptions

A. Classes of Works For Which Exemptions Are Requested

(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or a computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.

(2) Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.

(3) Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

(4) Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook’s read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

B. Argument

LCA and MLA support the renewal of the exemptions granted in 2003. The exemptions have had, to our knowledge, no adverse impact on the market for or value of
the classes of copyrighted works to which the exemptions applied. Even if the
exemptions have been seldom used, that rare use may result from the exemption changing
the behavior of content providers in a positive manner. For example, if the evidence
shows that the screen reader exemption has been rarely used, that may be the result of
ebook vendors' enabling the ebooks' read-aloud functions precisely because of the
existence of the exemption. In other words, vendors may have decided not to use a
technological measure to prevent a lawful use because they knew that users would be
permitted to circumvent the measure for that lawful purpose. In that event, the exemption
has fulfilled its purpose, and should be renewed.

If the exemption is not renewed, ebook publishers might "backslide," and start
disabling the ebooks' read-aloud function to the detriment of the visually impaired
community. After struggling for three years without an exemption, the visually impaired
community in 2009 would likely succeed in convincing the Librarian to grant an
exemption, at which point the ebook publishers would once again start enabling the read-
aloud function. Obviously, a repeating cycle of three years with an exemption followed
by three years without one makes no sense.

III. An Exemption Should Be Granted For Works Whose Access Controls
Prevent The Creation of Clip Compilations And Other Educational Uses

A. Class of Works For Which Exemption Is Requested

Audiovisual works and sound recordings distributed in digital format when all
commercially available editions contain access controls that prevent the creation of clip
compilations and other educational uses.

B. Summary of Argument

Teachers of a wide variety of subjects at all educational levels need to assemble
clip compilations to teach their classes effectively. Many films now are distributed only
on DVDs that are protected by the Content Scrambling System (CSS). Computers licensed to decrypt CSS will not make copies of the DVDs protected by CSS, making it impossible for teachers to assemble compilations of film clips. The increased use of technological measures by record companies and other distributors of sound recordings means that music teachers will encounter the same difficulty in assembling clips of sound recordings or making other educational uses.

C. Facts

Because of the pervasiveness of films and television in our culture, more high schools and colleges are offering courses in media studies. Moreover, many English and humanities courses now study films in addition to literature. In the past, films were often available in unprotected formats, such as VHS videotapes. But increasingly, films and television shows are being distributed to the public only on DVDs. The content on these DVDs typically is protected by the Content Scrambling System (CSS), a form of encryption. The consortium that controls CSS licenses the decryption algorithm only to device manufacturers that agree contractually not to allow their devices to make copies of DVDs protected by CSS. Thus, a computer that can decrypt a DVD protected by CSS cannot copy excerpts of the content on the DVD.

This means that a media studies professor cannot assemble a "clip compilation" for display to her class. Instead, if she wants to show clips of several different motion pictures in one class, she needs to advance each film manually to the precise location she wishes to display, wasting valuable class time. Further, many DVDs contain navigation restrictions that force viewers to watch advertisements or copyright warnings, consuming
more class time. Additionally, the teacher cannot show any part of a foreign film protected by regional coding.

This problem extends far beyond the media studies or humanities departments. A law professor, for example, cannot assemble a clip compilation of scenes of lawyers engaged in ethically questionable behavior, or police conducting unlawful searches or interrogations.

Moreover, record companies and other distributors of sound recordings are beginning to use a variety of technological measures; Sony’s Super Audio CD (SACD), for example, cannot be played on PCs with unlicensed drives. Thus, it is likely that music teachers will soon encounter technological obstacles as they try to assemble clips of sound recordings to demonstrate points in music theory and history classes. The world premiere recording of Roy Harris’s Symphony no. 2 and Morton Gould’s Symphony no. 3 is available only on a SACD distributed by Albany Records (Troy 515). To include clips of these symphonies in a compilation, a teacher must circumvent the technological measure that prevents the SACD from playing on a PC. The inability to play an SACD on a PC prevents other lawful educational uses, such as streaming a sound recording for classroom use or electronic reserves.

In short, CSS currently prevents effective use of film clips in the educational environment, and other technological measures will prevent similar uses of music clips. And because the DVDs and CDs the instructors seek to use are part of the library collection at the institution that employs the instructors, technological measures prevent efficient use of library resources.
D. Argument

A teacher’s performance of film or music clips in a classroom is permitted under 17 U.S.C. § 110(1). Likewise, the assembly of a clip compilation for classroom use is permitted under the fair use doctrine, 17 U.S.C. § 107. Thus, CSS and other technological measures prevent unquestionably lawful uses.

Because of the widespread availability of DeCSS, a program that decrypts CSS without the authorization of the CSS consortium, anyone who wants to make unlawful copies of protected DVDs can do so with little trouble. Nonetheless, CSS places enough of a technical barrier to prevent the vast majority of consumers from copying the DVDs they purchase or rent from the video store. Granting an exemption to section 1201(a)(1)(A) to media teachers will not remove this technical barrier. It will not make DeCSS any more prevalent, nor will it encourage more consumers to use DeCSS. Instead, it will simply permit media teachers to prepare the clip compilations necessary for them to teach effectively. The same will be true in the very near future with respect to music teachers.

IV. An Exemption Should Be Granted For Works Whose Access Controls Threaten Privacy and Critical Infrastructure.

A. Class of Works For Which An Exemption Is Requested

Sound recordings or audiovisual works (including motion pictures) embodied in copies and phonorecords; computer programs or video games; or pictorial, graphic, or literary works or compilations distributed in formats protected by access controls that threaten privacy and security.

B. Summary of Argument

The recent controversy over technological measures used by Sony BMG demonstrates that computer users must have the right to disable access controls that
threaten their privacy and the security of their computers. The existing exceptions to 1201 may not be broad enough to accommodate this critical activity.

C. Facts

Sony BMG employed a copy control technology with over 50 different CD titles which, when installed on a user’s computer, reported back to Sony BMG concerning the user’s activities. The XCP copy control also used a cloaking technology that prevented the user from detecting it. This cloaking technology had the unintended effect of opening up the computer to attack by hackers. Even worse, the technology was difficult to uninstall, and some of the removal patches caused additional security problems. At present it is unclear how many computers Sony BMG infected with this software estimates rage from 500,000 to several million.

While this specific technology is a copy control rather than an access control, future technological measures with similar unfortunate – and perhaps unlawful – features may function as access controls. Libraries across the United States own tens of thousands of computers. Technological measures with features like XCP could compromise the security of these computers, and the privacy of the employees and patrons who use them. Moreover, libraries purchase large volumes of CDs and DVDs for circulation to patrons. Technological measures like XCP could place these patrons’ computers at risk. Therefore, libraries and their patrons need an exception from section 1201(a)(1)(A) to disable such dangerous technological measures.

D. Argument

If a user learns that a technological measure violates his privacy and compromises his computer’s security, he will not make any use of the work that the technological
measure protects. If, for example, an access control on a DVD maintains a log of the
user's keystrokes while the DVD is in the computer, or scans the hard drive to see if the
user possesses any content the copyright owner considers infringing, the user is unlikely
to watch that DVD again. Moreover, if the user inadvertently permanently installs the
technological measure in his computer, he may stop using his computer altogether; this
obviously will adversely affect his lawful use of all the content stored on his computer.

It is not clear that the existing exceptions to section 1201 would allow the user to
disable this technological measure. Section 1201(i) applies only if the measure collects
personally identifiable information (PII). While PII is not defined in section 1201(i), the
information collected by a keystroke log may not necessarily qualify as PII.
Additionally, section 1201(i)(C) permits circumvention only to disable the information
gathering capability. If the information gathering capability is tightly bundled with the
access control function, a user might not be able to disable the former without also
disabling the latter.

Similarly, Section 1201(j) may not permit the disabling of a technological
measure that introduces security vulnerabilities. Section 1201(j) permits circumvention
for purposes of "security testing," defined as "accessing a computer, computer system, or
computer network, solely for the purpose of good faith testing, investigating or
correcting, a security flaw or vulnerability ...." Section 1201(j) appears to permit the
ethical hacking into a computer system for the purpose of detecting security flaws in the
firewall protecting the system. It is not clear that it permits the permanent disabling of a
technological measure on a specific work when the measure causes a vulnerability.
The Sony BMG XCP episode is an example of technological protection run amok. A company placed content control above the legitimate security and privacy interests of its consumers. The Office should take this opportunity to send a clear signal to content providers that they will lose the benefit of section 1201 if they abuse it.

Respectfully submitted,

American Association of Law Libraries
American Library Association
Association of Research Libraries
Medical Library Association
Music Library Association
Special Libraries Association

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW
8th Floor
Washington, D.C., 20036
Counsel to the Library Copyright Alliance

December 1, 2005
April 28, 2006

Mary Rasenberger  
Policy Advisor for Special Programs  
U.S. Copyright Office

Dear Ms. Rasenberger:

We are submitting the following comments to the Section 108 Study Group on behalf of the American Association of Law Libraries (AALL) and the Special Libraries Association (SLA).

Eligibility for Section 108 Exceptions

AALL and SLA believe that the current criteria in Section 108(a) granting exceptions to libraries and archives should be maintained. The current standard is flexible permitting various libraries and archives to copy works for purposes other than “commercial advantage,” under certain circumstances. This language permits law and special libraries to facilitate the administration of justice and the efficient working of the legal system and government institutions. Consequently, amendment of Section 108 must be done without limiting the current flexibility under Section 108(a).

New Exemption for Archiving Electronic Information

In the electronic age, much of the collections of libraries and archives are in electronic form, or if in print, may often need to be digitized. Electronic information is very unstable and subject to inherent risks of corruption and loss. AALL and SLA believe that libraries and archives should be able to preserve at-risk portions of their collections, both print and electronic, when failure to do so may result in the loss of historical, political and cultural information.

AALL and SLA agree with the Study Group that the Section 108 “triggers” permitting archiving are generally not broad enough. At the first indication of damage to electronic information, it is often too late to save it. Consequently, Section 108 needs to be modified to permit archiving and preservation of these materials. In addition, we believe that any modification of Section 108 must recognize the important public benefits that libraries provide by archiving electronic information, which by nature is fragile and easily corrupted or lost.

As law and special libraries move to more electronic environments, materials that they would have previously owned are increasingly licensed. For the most part, such license agreements dictate the terms by which libraries may archive electronic content. However, there are instances when licenses may not apply—because the agreement is silent on the
issue—or should not apply—because the offending terms are void as against public policy. Indeed, AALL and SLA note that licenses that deny libraries their rights and responsibilities to archive electronic information frustrate legitimate public policy objectives. Therefore, the rights and privileges under traditional copyright law, including Section 108, should apply.

As a specific concern, many law and special libraries have “acquired” (through “lump sum” payments) databases with thousands of titles. A specific transaction may involve an online service with a high-quality backup electronic tape containing the entire database. There is a need to provide for technology migration and preservation copies of this information. If such online services cease operations, and libraries have discontinued important items in print, they may often be unable to fill the gaps in their collection created by reliance on licensed electronic media. In the face of this uncertainty, there is significant need for libraries to be privileged under copyright law to access and copy such electronic information for archival purposes under a more permissive standard.

Increasingly, library users are accessing their library’s collections and services remotely. Therefore, AALL and SLA also agree with the Study Group that in some instances, offsite access to items archived under Section 108 is necessary, particularly in an era of remote work and distance education. Accordingly, the present "three copy limit" is unworkable in the electronic environment.

For the reasons cited above, U.S. copyright law needs to be amended to permit access and copying of electronic information for purposes of archiving in anticipation of the inherent risks associated with such information.

New Website Preservation Exception

AALL and SLA view preservation and access to legal and government information, including information on the World Wide Web, as a prerequisite for democratic governance, accountability and the rule of law. In addition, the efficient operation of the legal system and administration of justice depend upon wide-spread access to legal and government information throughout society. AALL and SLA are concerned that primary law and other essential legal and government information are often exclusively published by commercial firms, without recourse to alternative sources within the public domain. This has been particularly problematic with state and foreign legal sources and documents, which are often only published by commercial vendors.

We are concerned that, as various states and foreign governments contract with vendors for publication of these materials, these publications will be increasingly delivered in electronic media via the Internet, and as a result may not be archived. If the publisher removes the information or otherwise ceases publication, such information may be permanently lost. Furthermore, efforts to compile significant collections of foreign legal and government materials in electronic formats—a necessity in the face of global trade, communications, and human migrations—are hindered when the information is subject to
copyright restrictions. Consequently libraries and archives perform an essential public function by archiving information from the Web.

Conclusion

AALL and SLA are very concerned about the stability of legal and government information. Stability in the information environment, especially in electronic media, is a prerequisite for the rule of law, administration of justice, and equitable and accountable democratic government. From the opening sentence of Roscoe Pound's monumental treatise, Interpretations of Legal History 17 (1923), "Law must be stable and yet it cannot stand still."

Threats to the stability of government and legal information, including information published by private commercial vendors, must be carefully anticipated and countered. The archiving of legal and government information published in electronic form is consequently of paramount interest to our organizations, to the broader library community and to society as a whole. We therefore call upon Congress and the Copyright Office to propose and implement necessary amendments to 17 U.S.C. § 108 which will facilitate the ability of libraries and archives to carry out their missions in the digital age.

Last but not least, we echo the concerns of other library and archival groups that revision of Section 108 by the Study Group is not the appropriate forum for visiting issues of state sovereign immunity.

Sincerely,

Paul D. Callister
Chair, Copyright Committee
American Association of Law Libraries

Mary Alice Baish
Associate Washington Affairs Representative
American Association of Law Libraries

Douglas Newcomb
Chief Policy Officer
Special Libraries Association
Attachment D

Letter to the House Sub-Committee on Courts,

Intellectual Property and the Internet
June 6, 2006

The Honorable Lamar Smith  
Chairman  
Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property and the Internet  
U.S. House of Representatives  
2184 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Howard Berman  
Ranking Member  
Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property and the Internet  
U.S. House of Representatives  
2221 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Berman:

The undersigned companies and associations, representing the interests of American consumers, information technology and telecommunications companies, consumer electronics companies, broadcasters (including terrestrial radio, satellite radio and webcast services), libraries and educational institutions, write to express our very serious concerns regarding the proposed Section 115 Reform Act of 2006 (“SIRA”). While the reform of section 115 is a worthy goal, provisions of SIRA would constitute an extraordinary expansion of copyright rights that would harm technology, innovation, and consumers. It would threaten the development of new, innovative technologies and services that deliver all forms of content. It would reject considered and well-founded recommendations of the Copyright Office. And, it would encroach in unprecedented ways upon long-held consumer rights to make private, personal uses of copyrighted works – rights that become even more vital and necessary for the public good in the digital age.

We support instead broad consensus approaches to the resolution of copyright issues. This bill apparently reflects a privately negotiated outcome between two interest groups, and does not reflect such a consensus. Any change as major as SIRA merits careful consideration and input from all users of copyrighted works, and from the general public.

We are troubled that the bill will reverse broad, long-standing principles of copyright law, and will be misconstrued by courts to the detriment of technology innovation and consumer welfare. Among our chief concerns are the following:

The bill appears to establish, for the first time, that every incidental, server, cache, network and buffer copy made in digital transmission systems, digital...
networks, and computers and other personal consumer equipment is subject to the control of copyright owners and must be licensed. The bill erroneously suggests that interactive public performances of sound recordings are “digital phonorecord deliveries” (i.e., a transfer of ownership) subject to license for reproductions of copies. The bill goes so far as to provide that even noninteractive public performances require licenses for such copies. There is no justification to so penalize streaming, or, indeed, any other type of licensed transmission made via internet or any digital communications network, based on such a technicality. Virtually every digital transmission and display technology requires some degree of caching or buffering. Such caching or buffering is integral to the nature of digital technology in order for the consumer to hear or display data. These caches and buffers must be made by the transmitting entity, the transmission conduit (an ISP or online service provider) and/or consumer software or hardware, or else digital transmissions simply are not feasible. Where a transmission is lawfully made, there is no basis for giving copyright owners added control because of incidental copies that have no independent economic value apart from the performance itself.

The bill also appears to establish, for the first time, that every digital performance or display also is a distribution, for which the transmitter must take additional licenses, and potentially pay duplicative fees, for consumer conduct that long has been considered private, noncommercial “fair use.” The bill eradicates the sharp lines previously drawn in the Copyright Act between performances and displays on the one hand, and distributions and reproductions on the other. If every performance or display that can be reproduced by any consumer is equated with a distribution or reproduction, then
- every consumer timeshift recording on a VCR or TiVo is a “distribution”;
- every text web page is a “distribution”;
- any audio or video clip on any web site is a “distribution”;
- every television that does “freeze frame” or “instant replay” is a “distribution”;
- every analog cassette or CD recorded from FM or HD Radio is a “distribution”;
- and on, and on, and on, and on.

The apparent requirement that fair uses be licensed – even at a zero rate – sets a dangerous precedent for all fair uses of information, news and entertainment, regardless of whether in print, audio or video. The Copyright Office has stated to Congress, in the August 2001 DMCA Section 104 Report and in hearings before your Subcommittee, its view that any reproductions made in the course of a lawful performance have no independent economic significance apart from the performance and are fair use. It is and must remain a fundamental principle for the benefit of the public that fair uses require no licenses whatsoever. SIRA inexplicably rejects the Copyright Office Report, and creates an unnecessary license for such fair use copies. Unless amended, SIRA would undermine fair use as a foundation of the public good.

The bill would effectively declare all home recording – even time-shifting – to be unlawful without a reproduction license. Even the “zero rate” license for noninteractive streaming imposes conditions that restrict fair use by consumers. The bill denies this otherwise unnecessary license to anyone that “takes affirmative steps to authorize, enable, cause, or induce the making of reproductions of musical works by or for end users that are accessible by such end users for future listening, unless a valid license has otherwise
been obtained by such service for such activity.” We cannot recall any time since before the Betamax case when Congress was willing even to consider restricting “future listening” – time-shifting – by consumers. Such a restriction, if applied to video, would outlaw the ability of devices such as TiVo and even the VCR to set recording times based on an electronic program guide. It is equally unacceptable with respect to audio.

The bill is a back-handed technology mandate that will stifle innovation. By requiring – and then effectively denying – additional licenses for entities that make transmissions to consumer receivers and personal recording devices, the bill would stifle technological innovation. If Congress gives content owners a veto over the devices that consumers can use to receive transmissions, they effectively have given the content owners carte blanche control over what innovation should or should not be brought to market. This would eviscerate the protections for innovation that technology industries and consumer interests fought for and obtained in the Audio Home Recording Act, as well as consumers’ reasonable and customary rights to record from radio transmissions.

By diminishing long held rights of fair use, this bill will inflict significant harm on sound copyright policy, technological development, and the public interest. On behalf of our organizations and the constituencies we represent, we strongly urge the Subcommittee to reject this ill-advised incursion on the fair use rights of consumers. Instead, the Subcommittee should seek testimony on this proposed legislation from a broad group of parties that may be affected by the provisions and the implications of this bill, apart from the few online music companies, music publishers, and recording labels that see themselves as SIRA’s primary beneficiaries.

Respectfully submitted,

American Association of Law Libraries
BellSouth Corporation
Bonneville International Corp.
Computer & Communications Industry Association
Consumer Electronics Association
Consumer Project on Technology
Cox Radio, Inc.
Electronic Frontier Foundation
Entercom Communications Corp
Greater Media, Inc.
Home Recording Rights Coalition
Local Radio Internet Coalition
National Religious Broadcasters Music License Committee
Public Knowledge
RadioShack Corporation
Salem Communications Corp.
Sirius Satellite Radio Inc.
U.S. Public Policy Committee of the Association for Computing Machinery (USACM)
XM Satellite Radio Inc.
Attachment E

Agenda Items from Copyright Committee

Previously Submitted for

July 2006 Executive Board Meeting
1. Revision of Committee Charge

It is hereby proposed that the Committee Charge as last amended November, 1997 (Board Meeting - Tab 6, page 2408) be restated (with changes in *italics*):

The Committee shall represent the Association’s interests regarding copyright and other intellectual property issues in legislative, regulatory, and judicial affairs, including litigation and *international issues*. The Committee shall inform and advise the Board and the Washington Affairs Office on copyright and other intellectual property matters and shall coordinate with the Washington Affairs office to testify or otherwise communicate Association views on copyright and other intellectual property issues to all levels of government. The committee may, on its own initiative, in accordance with Committee and Association policy, prepare and communicate Association positions to appropriate governmental bodies and to other interested groups, while keeping the Executive Board informed of all such efforts. *As an additional charge, the Committee shall also take an active, but not exclusive, role in promoting, sponsoring, and facilitating such educational programs, workshops, and publications, as well as other communications reasonably necessary to serve the interests of the Association with respect to copyright and intellectual property issues.*

2. Increasing Committee Size from 6 to up to 12.

It is hereby proposed that the Committee Size as last amended July, 1999 (Board Meeting - Tab 8A, page 2715, 2717) be restated (with changes in *italics*):

The committee shall consist of a *minimum* of six (6) members and a *maximum* of 12 members (as determined by the Association’s President-Elect in consultation with the Chair and Chair-Elect). The Chair shall serve as an additional member of the committee. The Chair may appoint sub-committees and designate committee members to serve on and chair such sub-committees. When making appointments to this committee, the President-Elect will strive to achieve a balance among the interests of members employed in different settings, and consider the potential impact of publisher interests on the work of the committee. When appointing the Chair of the committee, the President-Elect shall use his or her best judgment to avoid any potential or perceived conflict of interest.
3. **Member Awareness of Open Access Initiatives.**

It is hereby proposed that the Executive Board, through AALL’s President, issue the following statement (or language substantially similar thereto) through Spectrum or other appropriate channels:

The Board wishes to draw to the attention of Association members to the establishment of various open access initiatives, such as the Creative Commons, Science Commons, Law Program (see http://sciencecommons.org/literature/oalaw). Open access initiatives seek to archive and otherwise provide free or affordable access to scholarly works. In connection with the Creative Commons initiative for law journals, the Association’s Copyright Committee recently reviewed the Model Publishing Agreement, which endeavors to preserve open access to legal scholarship. The Committee’s comments are found on p. 24 of the June, 2006 issue of Spectrum.

While the Association does not expressly endorse (exclusively or otherwise) any particular open access initiative, it does encourage its members to inform themselves of the specific projects promoting open access to legal and scholarly information, including model publication agreements that preserve open access to legal and scholarly works. Members should exercise their best judgment, and if appropriate, raise awareness of open access projects at their respective institutions. Before adopting any publishing or licensing agreement as part of an open access initiative, we advise that members consult with appropriate legal counsel.

**Justification**

With respect to the Committee’s charge and size, the Committee has always played an important educational role (even though not addressed in the prior language of its Charge). However, the effort needed to facilitate educational programs often diverts resources from the increasing number of copyright and intellectual property issues before the Committee, whose stated mission is to “inform the Board and Washington Office” concerning copyright and intellectual property matters. There is a steady stream of litigation, proposed legislation, and regulatory rule-making for the Committee to monitor. In addition, the copyright and intellectual property issues attendant to the licensing of information content and new open access initiatives are regular concerns. In order to preserve and cultivate institutional memory and expertise on copyright matters, there is a need to have sufficient numbers on the Committee so that seasoned veterans can train and prepare new talent to deal with the issues. Finally, international issues require significantly more attention and institutional expertise than the current structure of the Committee permits. Increasing the
number serving on the committee as well as modifying its charge will help address these issues.

With respect to a board statement about open access, the Committee was recently honored to review the Model Publishing Agreement for law reviews prepared by Creative Commons. Creative Commons graciously agreed to adopt the Committee’s suggestions with respect to potential copyright issues. Creative Commons also requested that, to the extent possible, AALL help raise awareness of its efforts among its members, law schools, and other institutions. Since the Copyright Committee’s charge is limited, this proposed statement for the Board’s consideration is the Committee’s attempt to respond to Creative Commons’ request.

Dated: June 15, 2006

Respectfully Submitted,

Paul D. Callister
Chair, AALL Copyright Committee