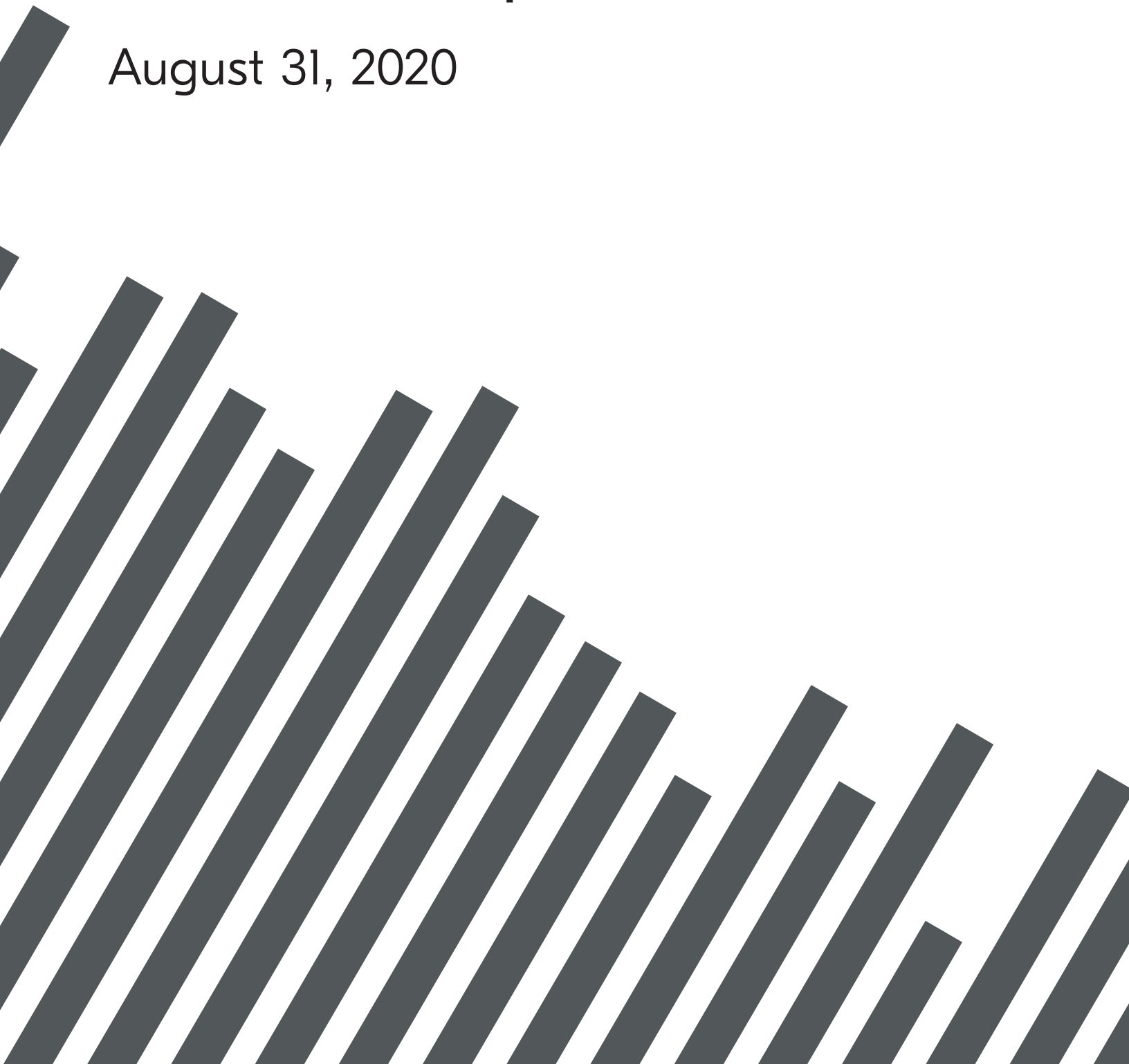


# **Modern Interlibrary Loan Practices: Moving beyond the CONTU Guidelines**

**ASSOCIATION  
OF RESEARCH  
LIBRARIES**

**An ARL White Paper**

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## Authors and Acknowledgments

This report is authored by:

**Meg Oakley**, Director, Copyright and Scholarly Communication,  
Georgetown University

**Laura Quilter**, Copyright and Information Policy Librarian,  
University of Massachusetts Amherst

**Sara Benson**, Copyright Librarian and Assistant Professor,  
University of Illinois at Urbana Champaign

The authors wish to thank **Jonathan Band**, [policybandwidth.com](http://policybandwidth.com) and counsel to the Library Copyright Alliance; **Carla Myers**, Coordinator of Scholarly Communications, Miami University; and **Nancy Sims**, Copyright Program Librarian, University of Minnesota Libraries, for reviewing a draft of this paper.

## **Executive Summary**

The purpose of this white paper is to provide background and guidance to Association of Research Libraries (ARL) member libraries in the United States that wish to reconsider interlibrary loan (ILL) policies and practices concerning the Commission on New Technological Uses of Copyrighted Works (CONTU) Guidelines. The CONTU Guidelines were published more than four decades ago at a time when scholarly research and publishing operated in a very different environment from today. Libraries are paying dramatically higher prices per title, have vastly more journal titles from which to choose, and are spending a far greater portion of their budgets for serials than they did in 1978. Even with a substantial portion of a typical academic library's budget devoted to serials, no library can afford to subscribe to all the journals their researchers may request. Thus, the ability to borrow through ILL is critical for researchers to obtain needed materials to advance research and scholarship, an important goal of copyright law.

The CONTU Guidelines place strict limits on the number of articles a library may borrow from a given journal (the “rule of five”) and require that copyright fees be paid when those limits are exceeded. CONTU was established based on an economic analysis of scholarly publishing, library acquisitions, and ILL arrangements current in the 1970s. The guidelines called for periodic reassessments and updates. After 40 years without an update, it is clear that the economic analysis of the 1970s is no longer valid, calling into question the continuing relevance of the CONTU Guidelines’ “rule of five.”

We conclude that the CONTU Guidelines are outdated and should no longer be relied on as an appropriate measure of when ILL borrowing exceeds the statutory exemption in 17 U.S.C. § 108(g)(2). We recommend adopting an updated, more flexible, and more appropriate standard grounded in the text of the law rather than relying on CONTU for copyright compliance. A careful analysis of the language of § 108(g)(2) in the context of today's scholarly publishing environment

should set the standard for interpreting the law. Borrowing libraries, informed by such an analysis, will be in a position to make principled determinations of when their ILL borrowing exceeds the statutory limitations.

## **Recommendations**

1. Libraries and library associations should use this white paper as a springboard for engaging in informed discussions of journal subscriptions, licensing practices, and interlibrary lending (ILL) under Section 108 of the Copyright Act and fair use, and how those activities all interact with one another. More than 40 years have passed since the CONTU Guidelines were drafted, and they are well beyond their useful life. Now is an appropriate time for abandoning the guidelines and setting out a more rational standard that aligns with the Copyright Act and the current research and publishing environment.
2. Informed by a greater understanding of CONTU, libraries should review their ILL policies and procedures to make a reasoned determination about whether the quantity of ILL borrowing falls within the scope of § 108(g)(2).
3. Borrowing libraries should be aware that particular ILL transactions may also be justified under the fair use statute, 17 U.S.C. § 107.
4. Lending libraries should negotiate license agreements without language referencing CONTU. Instead, libraries should negotiate for an agreement with an ILL provision that requires only compliance with copyright law, not CONTU. If it is not possible to delete or otherwise meaningfully modify a provision referencing CONTU, libraries should negotiate to have a fair use provision included in the license agreement.
5. Libraries that prefer a simpler and less flexible approach for their ILL activity may decide they wish to continue to follow CONTU.

## Introduction

Interlibrary loan (ILL) service is essential for libraries to support the research and teaching missions of their institutions. Through ILL, libraries can borrow other libraries' materials needed for research, scholarship, and private study. ILL is a reciprocal service: libraries both request materials for their users from other library collections and provide materials from their collections for other libraries' users. Using national and international resource sharing systems, ILL thus offers researchers and scholars a way to obtain needed materials that are available in collections otherwise available only through travel.

An interlibrary loan may be a physical item (such as a book or DVD) that will be returned to the lending library or a copy of a work (typically a journal article or a selection from a book) that will be delivered to the borrowing library for the requestor, usually in electronic form (such as a PDF). While lending physical items to another library does not raise any copyright concerns since no copies are being made and the lending falls within the scope of first sale under Section 109(a) of the Copyright Act, making and delivering electronic or print copies of materials implicates the reproduction and distribution rights.<sup>1</sup> Fortunately, exceptions within United States copyright law enable libraries to support researchers and scholars. Section 107,<sup>2</sup> fair use, is available to support ILL practices within the scope of that exception. And 17 U.S.C. § 108(g)(2) specifically allows libraries to participate in ILL arrangements to lend copies of works as long as the lending is not “in such aggregate quantities as to substitute for a subscription to or purchase of the work.”<sup>3</sup> In 1978, shortly after the Copyright Act was enacted, the Commission on New Technological Uses of Copyrighted Works (CONTU) published its final report including a set of guidelines designed to help libraries interpret the scope of ILL activity allowed by § 108(g)(2).<sup>4</sup> Those guidelines are still in wide use in academic libraries today.

The purpose of this white paper is to provide background and guidance to Association of Research Libraries (ARL) member libraries in the United States that wish to reconsider ILL policies and practices concerning the CONTU Guidelines. The guidelines were published at a time when scholarly research and publishing operated in a dramatically different environment than today. Since the guidelines have never been revised or modified in response to the enormous changes that have occurred in libraries and publishing over the last 40 years, they are manifestly outdated, and we question their continuing relevance. We recommend libraries adopt an updated, more flexible, and more responsive standard grounded in the text of the law rather than relying on the CONTU Guidelines for copyright compliance.

## Statutory Authority for Interlibrary Loan

### Section 108

Section 108(d) provides a specific exception that allows a library to make a copy of an article from a periodical issue at the request of a user of that library or another library:

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

Section 108(g) clarifies this exception does “not extend to cases where the library or archives, or its employee...engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).” However, this limitation is followed by this proviso: “Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”



In sum, for libraries that meet the conditions set out in Section 108(a),<sup>5</sup> the statutory limitation for borrowing libraries is that such activity must not be done “in such aggregate quantities as to substitute for a subscription to or purchase of such work.”<sup>6</sup> The statute does not define the phrases “aggregate quantities” and “substitute for a subscription to or purchase of.” Recognizing that it would be challenging for libraries and publishers to understand the scope of this new provision, in 1976 the House of Representatives addressed this concern in a committee report:

To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide good offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).<sup>7</sup>

The CONTU Guidelines were first published in 1976 in a conference committee report and were republished in 1978. The history of their development was included in the *Final Report of the National Commission on New Technology Uses of Copyrighted Works*.<sup>8</sup> They are still referenced today in the Copyright Office’s Circular 21, “Reproduction of Copyrighted Works by Educators and Librarians.”<sup>9</sup> Forty years after their initial publication, the CONTU Guidelines have never been updated or revised. Yet, they are still being followed by libraries to determine when copyright fees should be paid for ILL article requests.

## Fair Use

In addition to the specific statutory authority set out in § 108(g)(2), libraries may also consider whether their ILL activities fall within the scope of fair use, 17 U.S.C. § 107. Fair use is a legal test, first codified by the 1976 Copyright Act, but long a part of copyright case law. First articulated in the United States in 1841,<sup>10</sup> the test has evolved over the years, while still retaining much of its original character. Section 107, when incorporated into the 1976 Copyright Act, included a prefatory text with six examples of types of activities protected by fair use; five of the six uses listed are central to the mission of universities and libraries: “criticism, comment,...teaching (including multiple copies for classroom use), scholarship, or research.” Section 107 currently reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair use famously is a flexible test, and this flexibility has frequently been cited for allowing copyright to adapt to new technological and industry practices.<sup>11</sup> By directing the examination of facts and circumstances of particular uses, fair use enables uses of copyrighted works that were unforeseen when the statute was drafted, but upon scrutiny and application of the four factors, are deemed “fair.” Fair uses may include innovative new uses and novel uses that are similar to those previously granted safe harbors in specific statutory exemptions. In fact, the statutory text makes it clear that specific statutory exemptions of Section 108 are meant to coexist with and not preclude reliance on fair use. Section 108(f) notes that “Nothing in this section... in any way affects the right of fair use as provided by section 107,”<sup>12</sup> and the only court to thus far comment on the relationship of Section 107 to 108 held that “fair use does not undermine Section 108, but rather supplements it.”<sup>13</sup>

The flexibility of fair use, and in particular its role in adapting copyright law to changed circumstances, makes it particularly relevant to libraries today interpreting Section 108. With no case law interpreting the ILL provisions of Section 108, and the CONTU Guidelines 40 years out of date, fair use offers a supplementary and alternate path to supporting libraries’ interlibrary lending. In applying fair use to interlibrary lending, libraries should remember that they already have specific exceptions to copyright in Section 108. Fair use, therefore, may be considered as either an alternate rationale for ILL or a supplementary rationale.

Fair use is applied on a case-by-case basis, taking into account the particular facts of a use.<sup>14</sup> In an ILL context, that would require examination of borrowings in the broader context of subscriptions and purchases. We describe below an approach to applying fair use to ILL.

When applying the first factor (the “purpose and character of the use”) to ILL practices generally, the purpose and character of the use weighs in favor of many ILL practices as they support scholarship, research,

or teaching, which are specifically listed in the preface as clear examples of fair uses.<sup>15</sup> The first factor is also the factor most attuned to the borrower's proposed use; libraries' intellectual freedom policies generally limit inquiries into users' detailed plans, but uses such as scholarship, research, teaching, and accessibility, would all be favored purposes.

The second factor, "the nature of the copyrighted work," may vary depending on the work. Aspects of the copyrighted work that may be relevant to the second factor include its genre, such as whether it is fictional or factual; this inquiry rarely shifts the analysis. It is also common to consider whether the work was published or unpublished, which is rarely a factor in general ILL. However, other aspects of the nature of the work might also offer relevant considerations. For instance, the work's in-print or market availability status, its general availability in libraries (whether widespread or rare), its availability in the second-hand marketplace,<sup>16</sup> the condition of available copies, availability of the work in databases, and so on.

The third factor, the "amount and substantiality...used in relation to the copyrighted work as a whole," offers considerable room for examination. The third factor is an inquiry into whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole...are reasonable in relation to the purpose of the copying."<sup>17</sup> Mechanistic applications of rules such as "no more than 10%" or "one chapter" misrepresent this inquiry, which must be a relative consideration of the quantity **and** the "substantiality" of the portion used, in relation to the copyrighted work as a whole, and as part of a holistic consideration of the four factors, and in light of the first factor's purpose of the use.<sup>18</sup>

Thus, the third factor requires consideration of what constitutes the entire work. In the case of chapters of books or individual papers from journal issues, the borrowed material would usually constitute an excerpt from a work of compilation. Even if a journal article or book

chapter constituted an entire work, however, most common scholarly uses require the complete work for a reader to review or understand it. (We have heard of non-U.S. interlibrary lenders that have sent the top half of every page in a multi-page article, in order to comply with a national standard of lending only 50% of the work. Whether apocryphal or not, this offers an example of how a mechanistic quantity rule could render ILL ineffective.) Another consideration, in the case of journals, could be how many issues and articles the journal publishes each year; a single article borrowed from a journal that publishes hundreds or thousands of articles would be a significantly smaller quantity than a single article borrowed from a journal that publishes a single annual issue, with half a dozen articles. None of these factors, however relevant they may be to authors, publishers, or scholars, were considered in the CONTU Guidelines.

The fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” also allows libraries to consider a variety of facts that might not have been relevant in the 1970s. Indeed, this factor has likely changed the most, as scholarly publishing has completely transformed over the past four decades. New considerations include whether alternate versions of the work (such as preprints and public repositories) are available. If the copyrightable portion of a work is available in an open access preprint, borrowing requests to receive a copy of the “version of record” are, effectively, borrowing the non-copyrightable formatting, not the copyrightable content. Their purpose may be primarily for fact-checking or proper citation rather than to access the intellectual content which is elsewhere available. It is unclear whether publishers even have a reasonable copyright market for these uses (page numbers are not themselves copyrightable),<sup>19</sup> or how we would compare this market to the market for the subscriptions.

Even when licensing markets are available, many works are not readily licensed for scholarly or research uses, and licenses for some other kinds of works may be bundled together in “big deals” or other

packages that are not accessible for various reasons. As courts have made clear, an available license that is not appropriate for the need does not weigh against fair use.<sup>20</sup> While some companies such as the Copyright Clearance Center and Reprints Desk focus on licensing journal articles, significant amounts of content are still not readily licensable through their services. Small independent publishers and creators, similarly, may not have contemplated licensing arrangements for scholarly uses. Many licensing options are focused on commercial uses and distributions, with little or no option for individual scholarly or research use. For instance, licensing options for popular fiction, Hollywood films, images, and music, is all generally aimed at other commercial uses. In each of these cases, the use of the work for individual scholarship or research is rarely envisioned. Even in situations where works are readily licensed for academic use, the licenses may only permit subscription to particular packages of back issues, current material, or other bundled content, that would make this license infeasible.

Finally, in considering the market factor, a key question is how to assess the different potential markets. Specifically, to assess “the effect of the use upon the potential market for or value of the copyrighted work,” we have to consider whether the relevant “copyrighted work” is the individual article or the journal. The primary market for scholarly publishers selling to libraries is, by any measure, journal subscriptions and backfile databases. In 2012, academic libraries spent \$1.4 billion on current electronic serial subscriptions; this doesn’t even account for backfiles. By comparison, interlibrary loan and document delivery were \$32 million, of which only a fraction would actually be copyright clearance.<sup>21</sup> Viewed another way, the large majority of academic works are marketed primarily to libraries rather than to individual users. The market needs that article license companies best fulfill, therefore, are those needs not met by library subscriptions. These needs include access to articles for businesses or individuals who cannot readily participate in the library subscription market, or just-in-time access to content that is not yet available in the library subscription market, or other content that is not available in the library markets at all.

In this light, it is clear that, as indicated by Section 108, the most relevant market for publishers and libraries alike is the subscription and backfile market. Libraries participate in the library subscription market and are directed by Section 108 to consider that market in constructing interlibrary loan programs. When libraries run interlibrary loan programs, Section 108 specifies that the borrowing of individual articles should not be done “in such aggregate quantities as to substitute for a subscription to or purchase of” a “copyrighted collection” or subscription.<sup>22</sup> This requires a reasoned consideration of the particular facts of borrowing practices around a particular title—whether borrowing one article, five, ten, fifty, or a hundred, from a particular issue, volume, year, or run of a particular title, substitutes for a subscription or purchase of particular years or backfiles, in particular package configurations. That same factual assessment is also relevant for the fair use fourth factor market analysis, and in many ways, offers a more sensible way for libraries to balance the fourth factor with the other factors. Courts assess, for instance, whether a use “substitutes” for or “competes” with the original, which again, in the library market, most sensibly applies to the subscription and backfile market.<sup>23</sup> It is also worth noting that the fourth factor is intended to “stimulate creativity among potential authors by enabling them to earn money from their creations.”<sup>24</sup> This consideration rarely applies to academic authors, again directing our attention away from individual articles and toward subscriptions.

Each of the four factors is to be considered holistically, in light of the other factors.<sup>25</sup> While the fourth factor, like the first factor, has often been cited as the most important factor, and the second factor rarely affects the analysis, it is the holistic assessment of each factor, and its relation to the other factors, that drives a judgment about the “fairness” of a use.

Whether assessing ILL services over a period of time, or individual loans, fair use analysis supplements the Section 108 rights. With these statutory analyses in mind, therefore, we review the 1976/78 CONTU Guidelines.



## **CONTU Guidelines**

### **Summary of the Guidelines**

In 1976, the National Commission on New Technological Uses of Copyrighted Works drafted the guidelines to specify, for common ILL activity, what falls within the § 108(g)(2) exception. The CONTU Guidelines state that copyright fees must be paid for all articles requested that exceed the limits provided therein.

The main provisions of the CONTU Guidelines for the borrowing library are:

- A borrowing library may receive copies of up to five articles from a single periodical title each year without paying any copyright fees. For each copy beyond that, a license fee (or a subscription) is required. This rule applies only to articles published within five years prior to the date of the ILL request. This is known as the “rule of five” or “suggestion of five.”
- The guidelines do not define an upper limit for periodicals published more than five years prior to the date when the request is made. For such publications, the borrowing library must determine what quantity of copying is appropriate.
- A borrowing library may receive up to five copies of contributions from a given non-periodical copyrighted collection each year without paying any fees. This guideline is not limited to publications from the most recent five years.
- The borrowing library must keep records of all requests for three full calendar years.

The single provision applicable to the supplying library is that it may only fill a request if the borrowing library has represented that the request was made in conformity with the guidelines.



## Legal Status of the Guidelines

The CONTU Guidelines are not, and never have been, enacted into law. Yet over time, they have been treated as mandatory by many libraries and accorded the deference due to legislative enactments.

Libraries engaged in ILL activity are bound, not by the CONTU Guidelines, but by the scope of the exceptions set out in § 107 and § 108 of the Copyright Act. If a copyright infringement case were brought over ILL practices, the court would be bound to adhere to Sections 108 and 107 of the Copyright Act, not the CONTU Guidelines, which do not have the force of law. Indeed, in one of the few cases in which litigants have attempted to rely on another set of similarly drafted advisory “guidelines,” the court decisively rejected the authority of those guidelines, holding that the “Classroom Guidelines” are non-binding legislative history and that the governing law is the Copyright Act.<sup>26</sup>

In addition to lacking binding legal status, the CONTU Guidelines also lack persuasive authority, because as we discuss below, the guidelines are now more than 40 years old and based on data that is now wildly out of date. The CONTU Guidelines were intended to be updated: the conference report on the 1976 Copyright Act, where the guidelines were first published, clearly and specifically states that the guidelines “are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment.”<sup>27</sup> While the situation has “evolved,” as the guidelines predicted, the guidelines have never been “reevaluat[ed] and adjust[ed].”

In considering the continuing relevance of the CONTU Guidelines in setting policy, therefore, we must review the history of the guidelines, including the economic data and practices on which the guidelines were based. This includes the economics and practices of libraries, educational institutions, and academic publishing. To the extent the underlying facts have changed, they undermine the guidelines’ ability even to offer relevant guidance to a modern library.

## History of the Guidelines

A look back at reports written at the time the CONTU Guidelines were created suggests that they were intended to grow and develop as publishing and ILL practices changed, particularly in light of new technologies. The conference committee report that first published the guidelines begins with a disclaimer regarding the authority of the guidelines, which reads, in part:

The conference committee understands that the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect, to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment. With these qualifications, the conference committee agrees that the guidelines are a reasonable interpretation of the proviso of section 108 (g)(2) in the most common situations to which they apply today.<sup>28</sup>

Almost two years after the conference committee report, the National Commission on New Technological Uses of Copyrighted Works issued its *Final Report*, fulfilling its charge to make “recommendations which recognize the legitimate interests of copyright proprietors in controlling the uses to which their works are put and in improving public access and availability to those works.”<sup>29</sup> The *Final Report* states that “The CONTU guidelines were developed to assist librarians and copyright proprietors in understanding the amount of photocopying for use in interlibrary loan arrangements permitted under the copyright law.”<sup>30</sup> The “principal library, publisher, and author organizations agreed to” the limits on photocopying set out in the guidelines.<sup>31</sup>

In its detailed *Final Report*, the commission looked carefully at library photocopying and its potential financial impact on the publishing industry.<sup>32</sup> Not surprisingly, there are noteworthy differences between the costs associated with subscriptions and interlibrary loans in the 1970s and today:

- Large academic libraries allotted approximately 46% of their budgets to periodicals in 1973<sup>33</sup> (the latest year in the report). Today, academic libraries spend approximately 81% of their budgets on electronic serials.<sup>34</sup>
- Appendix H of the *Final Report* contains a list of reports commissioned by CONTU, one of which is titled *Summary of Costs of Owning, Borrowing, and Disposing of Periodical Publications*.<sup>35</sup> Among the report's conclusions are:
  2. A typical crossover point for the add/drop decision is four or five uses per journal title per year. This is the result, for example, with a subscription price of forty dollars and external lending fees of eight dollars.
  3. It is unlikely, then, that libraries will be engaging in much interlibrary lending activity that falls outside the limits specified by the CONTU guidelines...which permit each requesting library up to five copies of articles from the most recent five years of each journal title to which it does not subscribe. This is especially true given libraries' current tendency to maintain subscriptions even at very low levels of usage.<sup>36</sup>

For comparison purposes, below is a breakdown of estimated costs for journal subscriptions and ILL costs in 1978 and today.

<b>Estimated Average Costs of Journals</b>			
	<b>1978<sup>37</sup></b>	<b>1978 Cost in 2018 Dollars<sup>38</sup></b>	<b>Actual Cost in 2018<sup>39</sup></b>
Average annual subscription price for journals in various disciplines:			
Business journal	\$21.09	\$81.42	\$1,795.00
History journal	\$13.71	\$52.99	\$477.00
Physics journal	\$108.22	\$418.28	\$4,792.00
Political science journal	\$15.62	\$60.37	\$927.00
Psychology journal	\$34.21	\$132.23	\$1,155.00
ILL cost per article <sup>40</sup>	\$9.50	\$36.72	\$43.00–\$48.00
Copyright fee per article	\$1.25	\$4.83	\$10.00–\$38.00

Over the last 40 years, there have been unprecedented changes in the scholarly publishing industry, reflected in the dramatic rise in the price of periodical subscriptions as set out in the table above. As a consequence, it is no longer a valid assumption that borrowing four or five articles per journal per year is a “typical crossover point” when subscribing to a journal makes economic sense rather than borrowing through ILL. Based on the data above (which are necessarily estimated because there is no definitive data on journal subscription costs and libraries often purchase bundles of journals rather than individual titles), that number could be anywhere from ten articles (for a history journal) to over a hundred (for a physics journal).

The growth in the number of titles published by discipline, as set out in the table below, highlights another very significant change for libraries

and publishers over the last four decades. The number of journals published has skyrocketed since 1978. While the data in the table below are not directly comparable from 1978 to 2020 because there is not an accurate accounting of the number of scholarly journal titles today, there is no doubt that the true number is many multiples of what it was in 1978. Appendix H’s note about “libraries’ current tendency to maintain subscriptions even at very low levels of usage” is certainly no longer an accurate description of library collection policies. Not to mention the fact that with large publishers bundling journal titles, libraries may be forced to purchase journals they do not wish to acquire along with in-demand journal titles for a large price. And, even with a substantial portion of a typical academic library’s budget devoted to purchasing serials, no library can afford to subscribe to all the journals their researchers may request. The ability to borrow through ILL is critical for researchers to obtain needed materials to advance research and scholarship, an important goal of copyright law.

<b>Number of Journal Titles by Discipline</b>		
	<b>1978<sup>41</sup></b>	<b>2020<sup>42</sup></b>
Physical sciences	1,190	13,312
Natural sciences		7,295
Humanities	299	4,700
Social sciences	970	7,764

Comparing the publishing landscape from 1978 to today, it is clear that libraries are paying higher prices per title, have vastly more journal titles available, and are spending a significantly larger portion of their budgets for serials. Since the CONTU Guidelines were established based on an economic analysis of scholarly publishing, library acquisitions, and ILL arrangements that are no longer valid today, the appropriateness and relevance of the guidelines’ “rule of five” must be questioned. Interlibrary lending is critical for all research libraries in today’s climate since no research library can subscribe to or collect all the journals their researchers may request.

## The Guidelines Today

Despite this historical background, the CONTU Guidelines are still regularly cited by both leading library and copyright organizations, and continue to be followed by a significant number of academic libraries. Given the history of the guidelines and the fact that they were very much a product of their time, it is puzzling that their status has remained relatively unquestioned,<sup>43</sup> and that they still form such a significant role in library services today.

One reason for the staying power of the CONTU Guidelines may be that they provide an easy checklist for libraries who do not have the time, expertise, or desire to evaluate their ILL practices against a more flexible standard. Another reason for the staying power of the guidelines may be that the Copyright Clearance Center (CCC), which directly benefits from copyright fees paid through its permissions service,<sup>44</sup> promotes compliance with the guidelines directly to ILL practitioners through its publications, advertising, and sponsorship of the annual resource sharing conferences. While the CCC has no affiliation with any library association, it features “Jane,” a librarian, in its “fun and informative overview of U.S. copyright law and its impact on colleges and universities.”<sup>45</sup> Through Jane, the CCC discourages reliance on fair use and encourages the payment of royalties as “doing the right thing.”

This false equivalence of “doing the right thing” with paying royalties ignores the statutory rights given to libraries, and the importance of libraries in fulfilling the Constitutional purposes of copyright, “to promote the Progress of Science and useful Arts.”<sup>46</sup> And while the simplicity of incorporating the CCC’s licensing advice into library workflows may seem appealing, if librarians and academic institutions do not assert their rights under § 107 and § 108(g)(2), those rights become effectively meaningless and may ultimately be lost. With a deeper understanding of both the law and the history and current relevance of the CONTU Guidelines, libraries may choose to replace

the guidelines and instead implement an approach that better complies with both the law and contemporary practice. Applying the law itself, rather than the industry-advocated guidelines, might also curtail the ability of financially interested companies to control the narrative about how libraries should interpret provisions of copyright law directly related to our work.

### *Borrowing*

While the best-known aspect of the CONTU Guidelines, the “rule of five,” was developed in the 1970s, it remains widely adopted today.

The excerpts below show how deeply entrenched the guidelines are in ILL policies, practices, and procedures.

### **Copyright Clearance Center**

In its white paper, “Interlibrary Loan: Copyright Guidelines and Best Practices,” the CCC acknowledges that the CONTU Guidelines were “never enacted into law, but were accepted by the library, publishing and author communities at the time as reasonable accommodations for everyday use.”<sup>47</sup> The white paper also refers to the guidelines’ “Suggestion of Five”<sup>48</sup> for periodicals—the term “Suggestion” highlights the fact that the guidelines are not mandatory. However, the same document uses mandatory language when discussing the need to include a compliance statement with an ILL borrowing request: “The borrowing library **must** represent that it has complied with copyright law **and** applicable CONTU guidelines.”<sup>49</sup> (emphasis added) Yet, this language is incorrect. Neither the law, the ILL Code,<sup>50</sup> nor the ILL systems require compliance with the guidelines. Libraries must comply with applicable law, and instead of representing that they comply with the guidelines, may choose to select “CCL” on their ILL requests, indicating the request complies with applicable law. Selecting “CCG,” indicating that the request complies with the CONTU Guidelines, has never been mandatory.



## **ILLiad**

Further prolonging the life of the CONTU Guidelines, ILLiad, the ILL management system widely used in academic libraries, provides a built-in mechanism for tracking borrowing requests against the guidelines and alerting libraries when the “rule of five” has been exceeded.

For automated rights licensing, CCC offers an integrated service with OCLC ILLiad™ Resource Sharing Management Software. This complete solution enables librarians to request copyright permission from Copyright Clearance Center’s extensive rights licensing database and place orders without ever leaving ILLiad, for a streamlined permissions process that reduces paperwork and saves time.<sup>51</sup>

## **American Library Association**

In 2016, the Board of the American Library Association’s Reference and User Services Association approved revisions to the “Interlibrary Loan Code for the United States,” which included revisions to reflect the non-binding status of CONTU. The ILL Code, in its current revision, states that libraries must comply with copyright law and should “be aware of related guidelines for copy requests.”<sup>52</sup> The Explanatory Supplement specifies the “related guidelines” are the CONTU Guidelines. With the 2016 revision, both the Code and Explanatory Supplement now clearly distinguish the mandatory provisions of the Copyright Act from the non-binding nature of the CONTU Guidelines. Also, fair use is now specifically mentioned in the Explanatory Supplement as a relevant provision of the Copyright Act for ILL. While these changes suggest to libraries that they can make their own decisions about how to best comply with copyright law, the CONTU Guidelines are still cited as provisions that libraries may wish to take into consideration.

The previous ILL Code<sup>53</sup> and Explanatory Supplement,<sup>54</sup> both from December 2015, indicated that requesting libraries were “responsible for complying with...108(g)(2) and...CONTU.”



<b>Comparison of Previous and Current ILL Code, American Library Association</b>		
	<b>ILL Code &amp; Explanatory Supplement (through 2015)</b>	<b>ILL Code &amp; Explanatory Supplement (2016 to present)</b>
ILL Code	4.7 For copy requests, comply with the U.S. copyright law (Title 17, U.S. Code) <b>and</b> its accompanying guidelines.	4.8 Comply with U.S. copyright law (Title 17, U.S. Code) <b>and be aware of</b> related guidelines for copy requests.
Explanatory Supplement	<p>4.7 Copy Requests</p> <p>The requesting library is responsible for complying with the provisions of Section 108(g)(2) Copyright Law and the Guidelines for the Proviso of Subsection 108(g)(2) prepared by the National Commission on New Technological Uses of Copyrighted Works (the CONTU Guidelines).</p>	<p>4.8 Copy Requests</p> <p>The requesting library is responsible for complying with U.S. copyright law (Title 17, U.S.C.), in particular, <b>the provisions of sections 107 (Fair use) and 108 (Reproduction by libraries and archives).</b> In addition, <b>there may be related</b> regulations, <b>guidelines</b>, policies, and/or procedures to take into consideration, such as the CONTU Guidelines (1979).</p>

### **American Association of Law Libraries**

The American Association of Law Libraries has published *Guidelines on the Use of Copyrighted Works by Law Libraries*,<sup>55</sup> which include a provision on ILL borrowing. Section 2.2.1, “Interlibrary Loan Copies,” reads in part:

Libraries may request print or electronic copies of works through interlibrary loan, but borrowing libraries of all types should be aware of the CONTU Guidelines (National Commission on New Technological Uses of Copyright Works) suggestion of five. [footnote omitted] The more a library exceeds the suggestion of five, the less likely it is that the interlibrary loan request is exempt.

The AALL guidelines were approved by the AALL Copyright Committee and the AALL Executive Board in May 1997 and revised in January 2001 and June 2014.

### *Lending*

Most libraries are aware of the CONTU Guidelines with respect to their ILL borrowing procedures; however, there is also a provision of the guidelines that covers ILL lending. According to the guidelines, it is the lending library's responsibility to ensure that the borrowing library has complied with the guidelines' restrictions. This is done by confirming that the borrowing library has selected "CCG" on the ILL form for copyright compliance. In fact, since the guidelines are not mandatory, this is not a requirement for filling article requests as long as the borrowing library has represented that it is following the law ("CCL").

Of more importance to lending libraries, however, is the fact that references to the CONTU Guidelines are sometimes written into license agreements for electronic resources. In this way, licensing agreements effectively sustain the life of the guidelines. Indeed, mandates to apply the guidelines references are sometimes included even when they are not relevant or possibly applicable, as, for instance, in agreements for backfiles of journals and public domain materials.

Licenses with the CONTU Guidelines provision may also contain a fair use provision, such as "Nothing in this Agreement is intended to limit any right Licensee or Authorized Users might have under the fair

use provisions of U.S. and international copyright law.” Where such a provision is present in a license, fair use should be considered as a justification for lending to libraries under current ILL procedures and practices.

Regardless of whether there is a fair use provision in a license agreement, whenever possible, libraries should negotiate to have any and all CONTU Guidelines language deleted from license agreements.

## **The Guidelines Are Not Useful Today**

While the CONTU Guidelines were a good faith effort to set useful limits for ILL borrowing at the time of their publication, they do not provide useful guidance today on how to interpret the statutory phrase “aggregate quantities as to substitute for a subscription to or purchase of such work.” Some of the questions raised by the guidelines include:

- **What is the rationale for the CONTU Guidelines to apply only to articles published in the last five years?**

The conference report states that the guidelines cover the “most commonly-encountered interlibrary photocopying situations,”<sup>56</sup> but it is not apparent that this is the case today. Electronic indexes and databases provide easy access to citation information about older articles, which are a significant percentage of ILL requests from academic libraries. Note, too, that publishers generally do not charge variable permission fees (through CCC) or access fees (through their websites) for articles depending on whether or not they were published within the last five years.

- **Do the limits in the CONTU Guidelines make sense on their own terms?**

A library may borrow five articles from a given title per year for five years, for a total of twenty-five articles—this falls within the “rule of five,” and there is no need to obtain permission for any of

the articles. However, if a library requests ten articles from a journal in one year and zero in the preceding four years, under the guidelines, five of those articles exceed the “rule of five,” and copyright fees must be paid. It is not obvious why borrowing an “aggregate quantity” of twenty-five articles is permissible without paying a copyright fee, but borrowing ten articles in the same time period exceeds the scope of § 108(g)(2) and license fees of up to \$300 or more could apply.

Where litigants have attempted to use other non-legal guidelines as the force of law, such as the Circular 21 guidelines, judges have rejected that attempt and noted that the Copyright Act is the standard to follow.<sup>57</sup> If the CONTU Guidelines were challenged in court on a similar premise, the court would most certainly adhere to § 108 of the Copyright Act and not the guidelines, which do not have the force of law. They also lack persuasiveness, as they are decades-old guidelines based on data that is now wildly out of date.

Both the four-factor fair use analysis of § 107 and the language of § 108 leave flexibility for the limits of ILL activity to adapt to changes in the scholarly publishing environment, technology, and other factors that may influence what aggregate quantity of ILL activity is legally acceptable.

An updated, principled analysis of the language of § 108(g)(2), supplemented by the fair use test of § 107, and grounded in the reality of today’s scholarly publishing environment should set the standard for interpreting the law. Borrowing libraries, informed by such an analysis, will be in a position to make a principled determination of whether they should subscribe to a journal rather than obtain articles through ILL. Having made the assessment, a library will be able to confidently represent that it is complying with the law by indicating “CCL” on its ILL requests. Lending libraries can then rely on this representation and also do not need to be bound by the CONTU Guidelines. This more holistic approach will allow for a thoughtful and logical interpretation

of a borrowing library's obligations under the law. When a library determines that its borrowing activity has exceeded the limits of § 107 and § 108(g)(2), it can obtain the articles directly from the publisher, or pay copyright fees to license providers.

## Recommendations

1. Libraries and library associations should use this white paper as a springboard for engaging in informed discussions of journal subscriptions, licensing practices, and interlibrary lending (ILL) under Section 108 of the Copyright Act and fair use, and how those activities all interact with one another. More than 40 years have passed since the CONTU Guidelines were drafted, and they are well beyond their useful life. Now is an appropriate time for abandoning the guidelines and setting out a more rational standard that aligns with the Copyright Act and the current research and publishing environment:
  - Since the publication of CONTU in 1976, there have been dramatic changes in technology, the scholarly publishing industry, and the breadth and depth of research materials available to libraries. These developments mean that today’s publishing environment is not in line with the facts that formed the basis of the analysis leading to the “rule of five.”
  - Obtaining materials through ILL is a significant expense for libraries and is inconvenient for patrons. Therefore, ILL is generally only used to obtain materials outside the scope of the borrowing library’s collections. If ILL borrowing for a title becomes frequent, the library will likely, whenever possible, subscribe to that journal to support the needs of its users effectively.
  - An increasing number of academic libraries have a librarian with copyright expertise who understands the intricacies of copyright law and does not need bright-line rules to understand and interpret the law.
2. Borrowing libraries should review their ILL policies and procedures to determine what are “aggregate quantities as to substitute for a subscription to or purchase of such work.” Rather than relying on

the outdated CONTU Guidelines, borrowing libraries should keep track of borrowing amounts and review the number of articles borrowed from a specific journal the library does not subscribe to periodically (but at a minimum, yearly). Then the borrowing library team should determine if the amount borrowed exceeds the limits of Section 108 and Section 107 of the Copyright Act. “Review factors for potential subscription or ILL royalty payment consideration [could] include, but [should not be] limited to:”<sup>58</sup>

- Number of borrowing requests for articles from a particular serial title, considering, where relevant, number of requests for particular years and overall trends (The CONTU Guidelines’ five-year limitation may or may not be appropriate or helpful in this consideration as the availability of backfiles and access to and use of older content may be more relevant.)
  - Number of local patrons making those requests
    - For instance, were many requests generated by one researcher in the service of a single research project that will be ending soon? Or, do the numbers of requests indicate growth in a particular department or discipline that will extend into the future?
  - Frequency/pattern of requests within a calendar year and across years, including assessment of short-term spikes in usage
  - Subscription list price and short-term licensing prices through the publisher, CCC, RightsLink, or other providers
  - Patron recommendations/requests for title subscription (for subscription consideration)
  - Publisher/provider website rejections or non-responses (turnaways, for subscription consideration)<sup>59</sup>
3. Borrowing libraries should be aware that particular ILL transactions may also be justified under the fair use statute, 17 U.S.C. § 107.

4. Lending libraries should negotiate license agreements without language referencing CONTU. Instead, libraries should negotiate for an agreement with an ILL provision that requires only compliance with copyright law, not CONTU. If it is not possible to delete or otherwise meaningfully modify a provision referencing CONTU, libraries should negotiate to have a fair use provision included in the license agreement, such as “Nothing in this Agreement is intended to limit any right Licensee or Authorized Users might have under the fair use provisions of U.S. and international copyright law.”
5. Libraries that prefer a simpler and less flexible approach for their ILL activity may decide they wish to continue to follow CONTU.



## Endnotes

1. 17 U.S.C. § 109, <https://www.law.cornell.edu/uscode/text/17/109>; 17 U.S.C. § 106(1) and (3), <https://www.law.cornell.edu/uscode/text/17/106>.
2. 17 U.S.C. § 107, <https://www.law.cornell.edu/uscode/text/17/107>.
3. 17 U.S.C. § 108(g)(2), <https://www.law.cornell.edu/uscode/text/17/108>.
4. “CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements,” in *Final Report of the National Commission on New Technological Uses of Copyrighted Works, July 31, 1978* (Washington, DC: Library of Congress, 1979), 54–55, <http://digital-law-online.info/CONTU/>.
5. 17 U.S.C. § 108(a):
  - (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 (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
  - (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.
6. 17 U.S.C. § 108(g)(2).
7. See H.R. Rep. No. 94-1476, at 78 (1976), [https://www.copyright.gov/history/law/clrev\\_94-1476.pdf](https://www.copyright.gov/history/law/clrev_94-1476.pdf).

8. *Final Report of the National Commission on New Technological Uses of Copyrighted Works, July 31, 1978* (Washington, DC: Library of Congress, 1979), 3–8, <http://digital-law-online.info/CONTU/>.
9. “Reproduction of Copyrighted Works by Educators and Librarians,” Circular 21 (Washington, DC: U.S. Copyright Office, rev. August 2014), 18–20, <https://www.copyright.gov/circs/circ21.pdf>.
10. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).
11. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 479–480 (1984) (Blackmun, J., dissenting) (“The [fair use] inquiry is necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules.”).
12. 17 U.S.C. § 108(f)(4).
13. *Authors Guild v. HathiTrust*, 902 F. Supp. 2d. 445, 457 (S.D.N.Y. 2012), *aff’d* 755 F.3d 87 (2d Cir. 2014).
14. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).
15. 17 U.S.C. § 107. See *Cambridge Univ. Pr. v. Becker* finding teaching to weigh in favor of fair use on factor one, even if uses were held non-transformative. *Cambridge Univ. Pr. v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (“*Cambridge I*”), rev’d on other grounds, 769 F.3d 1232 (11th Cir. 2014) (“*Cambridge II*”).
16. See, for example, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (“If the work is ‘out of print’ and unavailable for purchase through normal channels, the user may have more justification for reproducing it.” (quoting S. Rep. No. 94-473, at 64 (1975))). Works may, of course, be readily available in the marketplace (as remaindered or used copies), even if out of print. For additional discussion of the second factor, see Jennifer Urban, “How Fair Use Can Help Solve the Orphan Works Problem,” *Berkeley Technology Law Journal* 27, no. 3 (2012): 1379, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2089526](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526); and Robert Kasunic, “Is That All There Is? Reflections on the Nature of the Second Fair Use Factor,”

*Columbia Journal of Law & the Arts* 31 (2008): 529. Availability of in-print works would potentially affect the fourth factor, the effect on the market for the work.

17. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).
18. *Cambridge Univ. Pr. v. Becker*, 769 F.3d 1232 (11th Cir. 2014) (“*Cambridge II*”).
19. *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 699, (2d Cir. 1998) (citing *Feist Publications v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991)).
20. See, for example, *Cambridge Univ. Pr.*, and *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).
21. Tai Phan, Laura Hardesty, and Jamie Hug, *Academic Libraries: 2012: First Look* (Washington, DC: National Center for Education Statistics, U.S. Department of Education, January 2014), 12, <https://nces.ed.gov/pubs2014/2014038.pdf>.
22. 17 U.S.C. § 108(g), referencing 17 U.S.C. § 108(d).
23. See, for example, *Authors Guild v. Google*, 804 F.3d 202 (2d Cir. 2015).
24. *Authors Guild v. Google*, 804 F.3d 202.
25. *Campbell v. Acuff-Rose Music*, 510 U.S. 569.
26. In *Cambridge I*, the Court held that the “Classroom Guidelines” are merely non-binding legislative history that do not define fair use. *Cambridge I* at 1224, aff’d *Cambridge II*. The “Classroom Guidelines,” like the CONTU Guidelines, were also developed as an advisory adjunct to the 1976 Copyright Act. See “Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions,” in H.R. Rep. No. 94-1476, at 68 (“Classroom Guidelines”). See also Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” *Ohio State Law Journal* 62, no. 2 (2001): 599–702, <https://kb.osu.edu/bitstream/handle/1811/70447/>

[OSLJ\\_V62N2\\_0599.pdf](#), for a comprehensive review of the array of guidelines, focusing on the fair use guidelines.

27. H.R. Rep. No. 94-1773, at 71 (1976), [https://www.copyright.gov/history/law/clgrev\\_94-1733.pdf](https://www.copyright.gov/history/law/clgrev_94-1733.pdf).
28. H.R. Rep. No. 94-1773, at 71–72.
29. *Final Report of the National Commission*, preliminary material, transmittal letters.
30. *Final Report of the National Commission*, 54.
31. *Final Report of the National Commission*, 54.
32. *Final Report of the National Commission*, 55–75.
33. *Final Report of the National Commission*, 66.
34. “Share of Serials Budget of Academic Libraries Spent on Electronic Serials in 2016, by Region,” Statista, May 2017, <https://www.statista.com/statistics/715380/electronic-journal-share-of-academic-library-serials-budget-worldwide-by-region/>.
35. *Final Report of the National Commission*, 127–128.
36. *Final Report of the National Commission*, 128.
37. Anthony M. Cummings et al., *University Libraries and Scholarly Communication: A Study Prepared for the Andrew W. Mellon Foundation* (Washington, DC: Association of Research Libraries, 1992), Appendix Table 6.2, <https://eric.ed.gov/?id=ED371758>.
38. Calculated using the “CPI Inflation Calculator,” U.S. Bureau of Labor Statistics, accessed August 18, 2020, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm).
39. Stephen Bosch, Barbara Albee, and Kittie Henderson, “Death by 1,000 Cuts: Periodicals Price Survey 2018,” *Library Journal*, April 23, 2018, <https://www.libraryjournal.com/?detailStory=death-1000-cuts-periodicals-price-survey-2018>. “Flat budgets, price increases,

and a reliance on status journals for tenure and promotion keep familiar pressures on the serials marketplace.”

40. 1978 ILL cost and copyright fee from *Final Report of the National Commission*, 70. 2018 ILL cost from “Interlibrary Loan FAQs,” George Mason University Libraries, accessed August 18, 2020, <https://library.gmu.edu/use/ill/faqs>.
41. *Final Report of the National Commission*, 68. 2018 ILL fee estimated from reviewing permissions fees for selected journals on the Copyright Clearance Center website.
42. *Scopus Content Coverage Guide*, Elsevier, 2020, 20–21, [https://www.elsevier.com/\\_data/assets/pdf\\_file/0007/69451/Scopus\\_ContentCoverage\\_Guide\\_WEB.pdf](https://www.elsevier.com/_data/assets/pdf_file/0007/69451/Scopus_ContentCoverage_Guide_WEB.pdf). Note that a title can fall in more than one subject area.
43. Particularly in light of the decisive rejection of the “Classroom Guidelines”; see above note 26.
44. See, for example, Zick Rubin, “Let’s Spread the Word about Fair Use,” *Chronicle of Higher Education*, September 23, 2012, <https://www.chronicle.com/article/lets-spread-the-word-about-fair-use/>.
45. “Copyright on Campus,” Copyright Clearance Center, 2010, 6-minute video, <http://www.copyright.com/learn/media-download/copyright-on-campus/>.
46. U.S. Const. art. 1, § 8, cl. 8.
47. “Interlibrary Loan: Copyright Guidelines and Best Practices” (Danvers, MA: Copyright Clearance Center, March 2013), 1, [http://www.copyright.com/wp-content/uploads/2015/03/White\\_Paper\\_ILL-Brochure.pdf](http://www.copyright.com/wp-content/uploads/2015/03/White_Paper_ILL-Brochure.pdf).
48. “Interlibrary Loan: Copyright Guidelines and Best Practices,” 3.
49. “Interlibrary Loan: Copyright Guidelines and Best Practices,” 3.

50. Interlibrary Loan Committee, Reference and User Services Association, American Library Association, “Interlibrary Loan Code for the United States,” approved January 11, 2016, <http://www.ala.org/rusa/guidelines/interlibrary>.
51. “Interlibrary Loan: Copyright Guidelines and Best Practices,” 4.
52. Interlibrary Loan Committee, Reference and User Services Association, “Interlibrary Loan Code for the United States,” 2.
53. Interlibrary Loan Committee, Reference and User Services Association, American Library Association, “Interlibrary Loan Code for the United States,” revised 2008, archived December 10, 2015, <https://web.archive.org/web/20151210163949/http://www.ala.org/rusa/resources/guidelines/interlibrary>.
54. Reference and User Services Association, American Library Association, “Interlibrary Loan Code for the United States Explanatory Supplement,” 2008, archived December 24, 2015, <https://web.archive.org/web/20151224215801/http://www.ala.org:80/rusa/resources/guidelines/interlibraryloancode>.
55. *AALL Guidelines on the Use of Copyrighted Works by Law Libraries*, American Association of Law Libraries, approved May 1997, revised January 2001 and June 2014, [https://www.aallnet.org/bok\\_profleadership/aall-guidelines-on-the-use-of-copyrighted-works-by-law-libraries/](https://www.aallnet.org/bok_profleadership/aall-guidelines-on-the-use-of-copyrighted-works-by-law-libraries/).
56. H.R. Rep. No. 94-1773, at 71.
57. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1272 (11th Cir. 2014).
58. “Interlibrary Loan Copyright Compliance Policy,” The Ohio State University Libraries, approved December 12, 2018, <https://library.osu.edu/document-registry/docs/1023/stream>.
59. “Interlibrary Loan Copyright Compliance Policy.”

## Appendix

### Excerpt from the Conference Report Discussing the CONTU Guidelines on Photocopying and Interlibrary Arrangements

Source: H.R. Rep. No. 94-1773, at 71–73 (1976), [https://www.copyright.gov/history/law/clgrev\\_94-1733.pdf](https://www.copyright.gov/history/law/clgrev_94-1733.pdf).

The conference committee understands that the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly-encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment. With these qualifications, the conference committee agrees that the guidelines are a reasonable interpretation of the proviso of section 108(g) (2) in the most common situations to which they apply today.

The text of the guidelines follows:

#### PHOTOCOPYING—INTERLIBRARY ARRANGEMENTS

##### INTRODUCTION

Subsection 108(g)(2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements “that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”



The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of “such aggregate quantities.” The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108(g)(2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library’s obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals—those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g)(2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

### **GUIDELINES FOR THE PROVISIO OF SUBSECTION 108(G)(2)**

1. As used in the proviso of subsection 108(g)(2), the words “... such aggregate quantities as to substitute for a subscription to or purchase of such work” shall mean:



a. with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a “requesting entity”) within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of “...such aggregate quantities as to substitute for a subscription to [such periodical]”.

b. With respect to any other material described in sub-section 108(d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.

2. In the event that a requesting entity—

a. shall have in force or shall have entered an order for a subscription to a periodical, or

b. has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the “supplying entity”), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions

of section 108, to supply such copy from materials in its own collection.

3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.
4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.
5. As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill.

**Association of Research Libraries**

21 Dupont Circle, NW  
Suite 800  
Washington, DC 20036  
T 202.296.2296  
F 202.872.0884

[ARL.org](http://ARL.org)  
[pubs@arl.org](mailto:pubs@arl.org)

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