# COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE EUROPEAN COMMISSION'S GREEN PAPER ON COPYRIGHT IN THE KNOWLEDGE ECONOMY

The Library Copyright Alliance (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.

LCA is grateful for the opportunity to comment on the important issues raised in the Commission's Green Paper on Copyright in the Knowledge Economy. Over the past two decades, LCA and its member organizations have actively participated in the policy debates in the United States on digital copyright issues. Rather than separately address each question raised in the Green Paper, these comments will briefly discuss three issues – copyright exceptions, contractual restrictions on exceptions, and orphan works – and provide attachments or links to documents that explore these issues in greater detail.

**Copyright Exceptions**

LCA supports the adoption of mandatory specific exceptions in all the areas raised by the Green Paper: libraries and museums, people with disabilities, teaching and research, and user generated content. In addition to mandating the adoption of specific exceptions, the EU should also require enactment of a general fair use exception similar

to that contained in section 107 of the U.S. Copyright Act. In a time of rapid technological change, the legislative process, particularly on a Union-wide basis, simply cannot keep pace with the new uses enabled by new technologies. A flexible and robust fair use provision allows the law to evolve quickly in response to the realities of the marketplace.

Our experience with copyright legislation in the United States bears this out. The existing exception for libraries and archives in the U.S. Copyright Act, section 108, was enacted in 1976. Reflecting a pre-digital world, the provision is largely obsolete. More than two years ago, the Library of Congress assembled a working group consisting of librarians and publishers to study section 108 and propose recommendations for updating it. After many meetings, the working group issued a lengthy report that reflected consensus on only a limited set of issues. The Copyright Office has not yet formally considered the working group's recommendations, nor has legislation implementing them been introduced in Congress. In other words, amendment of section 108 likely will not occur for at least another two years, if at all.

Fortunately, the fair use doctrine in section 107 has permitted libraries to adjust their practices to accommodate the digital revolution of the past twenty years. Section 108(f)(4) specifically provides that "[n]othing in this section … in any way affects the right of fair use as provided by section 107." Thus, the specific library exceptions of section 108, or the classroom use exceptions of section 110(1), or the distance education exceptions of section 110(2), all supplement the basic fair use exception of section 107.

Some argue that fair use is a common law doctrine that is not appropriate to civil law systems. To be sure, courts, not the legislature, originally created the fair use

doctrine. But Congress codified the fair use doctrine in the 1976 Copyright Act, and fair use now is a statutory provision like the other provisions of the Copyright Act. Admittedly, test for fair use is flexible, but civil law courts regularly handle elastic concepts. The fair use factors of "purpose and character of the use" or "effect of the use upon the potential market" are no more ambiguous than the Database Directive's protection of databases which "by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation" or prohibition of the extraction of a "substantial part" of the contents of a database, "evaluated qualitatively."

Attached are three documents that discuss in more detail the benefits of fair use to libraries and educational institutions: 1) detailed comments on fair use submitted by LCA to the Australian government; 2) a memorandum about educational uses permitted by recent fair use decision; and 3) a memorandum about a fair use decision that permits website archiving.

**Contractual Restrictions**

Libraries routinely enter into licensing arrangements that enable online access to content. These licenses can make access more convenient to patrons. But this convenience comes at a significant cost. First, there is the economic cost. Largely because of consolidation, particularly in the science, technology, and medical publishing market, the price of journal subscriptions has increased dramatically over the past twenty years. The long-term solution to this problem involves the authors of these articles – typically university professors -- exerting more control over their copyrights, rather than just assigning them away to publishers. The Commission should work assiduously to

educate authors on how to exercise better control over their copyrights, and to promote the development of alternative distribution channels, such as open access publishers.

The second cost of licensing is the diminution of users' privileges with respect to the content. Publishers routinely include in their licenses prohibitions on reproductions and distributions that the fair use doctrine or other exceptions under the U.S. Copyright Act would otherwise permit. LCA has long taken the position that the Copyright Act and the U.S. Constitution's Intellectual Property and Supremacy Clauses preempt such prohibitions in non-negotiated licenses. The American Law Institute has reached a similar conclusion in its draft Principles of the Law of Software Contracts (August 25, 2008), posted at http://extranet.ali.org/docs/SOFTWARE_PD5_August%202008.pdf. The ALI Principles contain a lengthy discussion of the preemption of license terms inconsistent with federal intellectual property laws at pages 50-73. The Principles also discuss the unenforceability of license terms on the grounds of public policy at pages 74-80, and unconscionability at pages 84-88.

There is precedent in the European Union for invalidating contractual terms that run contrary to intellectual property policy objectives. Article 9(2) of the Software Directive provides that "[a]ny contractual provisions contrary to" the Directive's reverse engineering provisions in Articles 5 and 6 "shall be null and void." The EU should similarly invalidate non-negotiated licenses that diminish the effectiveness of exceptions to copyright protection.

**Orphan Works**

LCA has strongly supported a legislative solution to enable the use of works whose copyright owners cannot be identified or located. Attached are comments LCA

provided the Copyright Office in 2005 demonstrating the need for orphan works legislation. Also attached is testimony submitted by the United States Holocaust Memorial Museum earlier this year explaining how orphan works legislation could assist it fulfill its mission. LCA applauded the Senate's adoption of the Shawn Bentley Orphan Works Act of 2008, S. 2913, in October of this year. Hopefully, both chambers of Congress will enact effective orphan works legislation next year. The EU should also pursue a solution to this problem to facilitate the use of orphaned works of significant cultural and historical value.

Please feel free to contact us at jband@policybandwidth.com if you have any questions about these comments or the attachments.