



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

March 31, 1994

(202) 707-8350

Dear Mr. Speaker:

I have the honor of sending you a copy of the Copyright Office's Report on the Computer Software Rental Amendments Act of 1990: The Nonprofit Library Lending Exemption to the "Rental Right." As required by 17 USC §109 (2)(B), I have consulted with copyright owners and librarians on whether the exemption has "achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function."

I would be pleased to elaborate on any aspect of the Report.

Sincerely,

Barbara Ringer  
Acting Register of Copyrights

The Honorable  
Thomas S. Foley  
Speaker of the House of  
Representatives  
Office of the Speaker  
H-204 The Capitol  
Washington, D.C. 20515

17 U.S.C. §109 (2)(B)

**§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord**

\* \* \* \* \*

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyright considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

THE COMPUTER SOFTWARE  
RENTAL AMENDMENTS  
ACT OF 1990:

THE NONPROFIT LIBRARY  
LENDING EXEMPTION TO THE  
“RENTAL RIGHT”

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**THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1990:  
THE NONPROFIT LIBRARY LENDING EXEMPTION TO THE "RENTAL RIGHT"**

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**THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1990:  
THE NONPROFIT LIBRARY LENDING EXEMPTION TO THE "RENTAL RIGHT"**

**EXECUTIVE SUMMARY**

**INTRODUCTION**

On December 1, 1990, President Bush signed into law the "Computer Software Rental Amendments Act," an amendment of section 109 of the copyright law, prohibiting the rental, lease, or lending of a computer program for direct or indirect commercial gain unless authorized by the owner of copyright in the program. Behind the amendment was a concern that commercial rental of computer programs encourages illegal copying of the rented programs, depriving copyright owners of a return on their investment and discouraging creation of new works.

By granting copyright owners of computer programs a newly created "rental right," Congress created an exception to the "first sale doctrine." This traditional copyright doctrine, which is codified in section 109 of the Copyright Code, limits the copyright owner's exclusive right of distribution by allowing the owner of a particular lawfully made copy of a work, or any person authorized by that owner, to sell or otherwise dispose of possession of that copy without authority of the copyright owner.

The 1990 amendment also includes a special provision permitting nonprofit libraries to lend computer programs for nonprofit purposes, if the packaging contains a prescribed warning of copyright. This "library lending" provision is an express exception to the new "rental right" which is itself an exception to the basic "first sale doctrine." In creating this exceptional

prerogative for nonprofit libraries, Congress was aware that, like commercial lending, nonprofit library lending could trigger unauthorized copying. For this reason, the amendment asked the Register of Copyrights to make a three-year study and prepare a report on the extent to which the exemption for nonprofit libraries "has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function," including any information or recommendations the Register considers necessary to carry out the purposes of the subsection. In carrying out this mandate we published and circulated a notice of inquiry, and sponsored a roundtable discussion.

## I. BACKGROUND AND SCOPE OF THE AMENDMENT

A model for the Software Rental Act of 1990 is found in earlier legislation giving owners of copyright in sound recordings control over commercial rental of phonorecords of their works. The Record Rental Amendment Act of 1984, which was the earliest statutory breach in the "first sale" doctrine, was prompted by concern that commercial lending could encourage unauthorized copying and displace sales, thereby diminishing the incentive for creation of new sound recordings. The same considerations, together with added concerns for better international protection of computer programs, motivated the 1990 software amendments.

The software rental provisions permit owners of lawfully made copies of computer programs acquired before December 1, 1990, to dispose of them without copyright liability. They also exempt from the new right of commercial "rental, lease, or lending" any computer programs embodied in machines or products (such as automobiles or calculators) where the program cannot be copied during ordinary operation, and those embodied in limited purpose computers designed primarily for playing video games.

The rental right is currently scheduled to expire on October 1, 1997. However, this "sunset" provision may well be repealed, and the right extended indefinitely, as part of 1994 legislation implementing the General Agreement on Tariffs and Trade (GATT).

## **II. THE EXEMPTIONS FOR NONPROFIT LIBRARIES AND NONPROFIT EDUCATIONAL INSTITUTIONS**

Section 119 of the Copyright Code makes unauthorized "rental, lease, or lending" of a computer program a copyright infringement if done for "purposes of direct or indirect commercial advantage," but provides two specific exemptions: one covering lending "for nonprofit purposes by a nonprofit library," and a second covering transfer of possession of a lawfully-made copy from one "nonprofit educational institution" to another such institution or to faculty, staff, and students. The intended distinction between these two exemptions is revealed by their legislative history.

At the Senate hearings on the legislation in 1989, software representatives testified that their primary concern was about commercial rental of software, not noncommercial lending by nonprofit libraries. Language exempting nonprofit library lending was added to the bill. However, software interests were opposed to an exemption for educational institutions, pointing out that they constitute a major software market, and that many software companies already make accommodations for educational customers such as discounts and special services. The educational community submitted written statements suggesting that, without an exemption, the software bill might impede legitimate testing and evaluation practices, especially in computer centers and laboratories.

Late in 1989, representatives from the software and educational communities reached a compromise outlined in a letter to Senators DeConcini and Hatch. In the joint letter, the parties offered a draft amendment exempting "transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational

institution and among faculty, staff and students." At 1990 House hearings, the spokesman for the software interests stressed that the aim of the legislation was to control commercial practices that directly result in unauthorized copying, and that legitimate nonprofit practices were not the target. When, later in 1990, the bill passed both Houses its language relating to educational institutions was virtually identical to that proposed in the joint letter.

### **III. COPYRIGHT OFFICE RESPONSIBILITIES**

The 1990 amendments gave the Copyright Office two responsibilities: first, we were to issue regulations governing a required warning of copyright that must be placed on each copy of a program lent by a library; and second, we were asked to prepare a report on the extent to which the exemption for nonprofit libraries had achieved its intended purpose. A regulation specifying a copyright warning was issued on February 26, 1991. On July 13, 1993, we issued a Notice of Inquiry requesting comments and information to help in evaluating how the nonprofit lending provision is working. Included in the Notice were seven questions directed at issues of concern to copyright owners, libraries, and library patrons. We sent copies of the Notice of Inquiry directly to library and software associations and individuals identified as interested parties. After examining the comments received, we also held a roundtable discussion inviting interested parties to comment more fully.

#### **IV. SUMMARY AND ANALYSIS OF THE PUBLIC COMMENTS**

##### **A. FULFILLING THE LIBRARY FUNCTION: DOES THE LENDING EXEMPTION TO THE RENTAL RIGHT PROVIDE NONPROFIT LIBRARIES THE CAPABILITY TO FULFILL THEIR FUNCTION?**

Of the library associations and individual librarians responding to our inquiry, most, but not all, reported that they are currently meeting patron needs and fulfilling their function as a library with respect to computer software. Most expressed strong support for the library lending exemption to the rental right. Ten commentators -- including representatives of three library associations, staff in two public libraries and four educational institutions, and one library patron -- stressed the importance of the exemption to the rental right in fulfilling patrons' requests for access to software. Nine of the responding library and educational institutions reported they are meeting patrons' requests for software loans, while three indicated that they are not. Several of the comments raised questions indicating that librarians who are dissatisfied with the law may not be sure what the Computer Software Rental Amendments Act permits them to do or how their prerogatives may be affected by "shrink wrap" licensing agreements.

##### **B. FREQUENCY OF LENDING: HOW OFTEN ARE COPIES OF COMPUTER PROGRAMS LENT?**

The responses to this question fail to provide enough evidence on the extent of lending of computer programs by libraries to draw any firm conclusions. The comments revealed that some software lending is going on and that practices vary from library to library, but we were not given information that would allow quantification of how many libraries are lending

programs or the general volume of lending at present. The Business Software Alliance reported that it lacks adequate knowledge of library lending practices, adding that it would be interested in obtaining information about the type and volume of software lent to library patrons to help in determining the scope of software piracy. Some libraries pointed to the need for money to acquire software for lending and for more information about what the amendment permits, while others seemed unaware that the law gives them the prerogative of lending copies of computer programs for their patrons' home use.

The limited and general nature of the responses suggests that eventually we should try to elicit detailed statistical information about frequency of library lending, but that there may not yet be enough experience from which to draw meaningful data. Questions that need to be addressed include the reasons why libraries seem to be reluctant to lend software, and how to clear up confusion and misunderstandings about their prerogatives under the statute.

**C. DO THE REGULATIONS REQUIRING A WARNING OF COPYRIGHT REPRESENT AN ONEROUS BURDEN?**

This question was directed at the statutory requirement that the packaging of each copy of a program lent by a library contain a warning of copyright conforming to Copyright Office regulations. Most, though not all, of the responding libraries or associations reported that they did not find the requirement an undue burden. Some commentators considered the requirement an administrative and budgetary burden, and others raised the difficulty of providing a copyright warning where copies of computer programs are transmitted electronically.

The responses raised some important questions which Congress or the Copyright Office should address: Are nonprofit educational institutions transferring possession of copies of computer programs under section 119 obliged to provide a warning? How should warning notices for electronic transmissions be handled? Should the wording of the warning for software packages be shortened or simplified?

**D. IS UNAUTHORIZED COPYING, ADAPTATION, REDISTRIBUTION, PUBLIC PERFORMANCE OR DISPLAY OF COMPUTER PROGRAMS TAKING PLACE? IS THERE EVIDENCE OF UNAUTHORIZED COPYING?**

The first of these questions was supposed to find out what people thought was happening, and the second was aimed at eliciting any direct evidence. The answers, which were speculative and inconclusive at best, suggest that there is little or no direct evidence, and that suppositions are based on conviction, not fact.

In general, software representatives asserted that unauthorized copying is taking place; library representatives said that librarians are making every effort to ensure that the law is followed and that there is no evidence of unauthorized copying; and individual commentators responded with a variety of positions.

More than anything else, responses to two related questions indicate how difficult it is to get specific evidence on whether unauthorized copying is occurring in the privacy of the borrower's home. Questions that arose include whether there is any practical way to ascertain if nonprofit lending results in unauthorized copying and whether a survey or experiment could be developed to investigate the issue.

**E. IS THE 109(A) EXEMPTION HARMFUL TO THE INTEREST AND INCOME OF COPYRIGHT OWNERS?**

On the general question of whether the exemptions harm copyright owners, the software publishers drew an economic distinction between loans by nonprofit libraries and loans or other transfers by educational institutions. With respect to the latter, they stressed the great importance to them of the educational market, and that they are already offering a variety of licensing programs permitting educational institutions to make multiple copies. They also asserted that loans by nonprofit libraries hurt software owners because unauthorized copying by patrons inevitably occurs, which in turn results in lost sales, a problem that will increase with the expansion of digital storage.

For their part, the librarians and library representatives took the position that the benefits of software lending to copyright owners outweigh any harm from copying by patrons. Without denying that some unauthorized reproduction is taking place, they emphasized that the total amount of library lending is small, that a prohibition against lending would reduce sales to libraries, and that lending actually enhances the market for software generally and increases the sales of particular programs or updates. Their point, which they emphasized strongly, was that there is a real connection between trial and purchase of a product -- that permitting software to be available for evaluation by potential buyers realistically increases the likelihood of sale. In light of these arguments, additional questions to explore are whether there is a quantifiable nexus between software trial and purchase, and whether a survey could document such a link.

## **F. REQUESTS FOR LEGISLATIVE CHANGES OR CLARIFICATION**

In responding to the Office's question as to whether new legislation is needed to clarify existing law or to rectify imbalances between owners and users, the Software Publishers Association took the position that changes should be made. First, they argued that libraries should be required to treat computer programs as they now do reference books, limiting patrons to on-site use and forbidding removal from the library premises. In addition, they urged that a clear warning, stating that it is illegal to copy computer programs without permission of the copyright owner, should be required to be affixed to each computer available for use, and that this warning should specify the civil and criminal penalties for unauthorized copying. The SPA asked the Copyright Office to join in its recommendations or, alternatively, to review the question within one year to assess the impact of new optical storage media such as compact disks on the needs of libraries and the commercial impact on software publishers. Finally, the software publishers encouraged the Office to review the denial of rental rights to computer programs "embodied in or used in connection with a limited purpose computer that is designed for playing video games and may be designed for other purposes."

The comments of library associations took the position that no statutory amendments were necessary to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users. There were, however, some individual comments from the library community suggesting the need for clarification of the law. One public library proposed an amendment making clear that the exemption applies in all cases, regardless of whether the library is the owner of the physical object embodying the computer program, or holds a license from the copyright owner of the program, or is otherwise lawfully in possession of the copy of

the program. It also sought a second amendment making clear that the lending exemption prevails over any private agreement between a library and a software company because "as long as software companies can prohibit the library's circulation by private agreement, any protection under the Act is vitiated." The director of a university library, noting that recent technological and institutional changes raise questions about the ability of libraries to lend software, asked for statutory clarification of the status of lending in various networking situations and the meaning of the terms "software" and "library." A specific question was whether lending occurs when a workstation permits off-site location access or simultaneous use of one program on different computers at different times.

#### **V. HAS THE COMPUTER SOFTWARE LENDING EXEMPTION FOR NONPROFIT LIBRARIES ACHIEVED ITS PURPOSE?**

The specific question that Congress asked the Copyright Office to study was whether the nonprofit library lending exemption to the rental right for computer programs has succeeded in achieving its purpose during its first three years. Our mandate was to determine whether the exemption provides libraries the capability to fulfill their function, and to determine whether it hurts copyright owners of computer programs by displacing sales. In response to this mandate we tried to obtain from the broadest possible community of owners and users the most relevant information available.

The results of our efforts were, on the whole, inconclusive and somewhat disappointing. The only honest conclusion we can reach at present is that there is as yet no body of facts on

which informed judgments and recommendations can be based, and that more study and analysis will be needed as patterns of software lending by libraries eventually emerge.

## **VI. QUESTIONS OF INTERPRETATION PRESENTED BY THE STUDY**

Although the Copyright Office has been unable to quantify the impact of the section 109 exemption on libraries and their users on the basis of the responses to our inquiries, we have identified certain questions of legal interpretation that deserve analysis. These can be grouped under four headings: (a) what constitutes infringing "copying" in various situations? (b) what is a "computer program"? (c) what is a "nonprofit library"? and (d) what constitutes "nonprofit lending"?

### **A. WHAT CONSTITUTES INFRINGING "COPYING"?**

Under section 106(1) of the Copyright Code, a basic exclusive right of the copyright owner is "to reproduce the copyright work in copies or phonorecords" (or, as it is known loosely, the "copying" right). The 1990 Software Rental Act amended section 109 to give the copyright owner of a computer program exclusive rights with respect to "rental, lease, or lending" and made certain exceptions to these rights for the benefit of nonprofit libraries and educational institutions. There is nothing in the text of section 109 to suggest that unauthorized "copying" is either forbidden or permitted under that section; with respect to copying, the exclusive rights of the copyright owner and the prerogatives of users are governed by other provisions of the Code, notably sections 107 (fair use), 108 (library reproductions), and 117

(rights in computer programs). The legislative history of section 109 makes clear that, unless the use is licensed or covered by one of the statutory limitations, there is nothing in the 1990 amendment to authorize any copying.

Nevertheless, two basic situations arise under the lending exemptions of section 109 which may involve unauthorized copying: (1) activities of individual library patrons and educational users; and (2) activities of the libraries and educational institutions themselves.

**1. Copying by Library Patrons or Transferees.**

Whenever a computer program is put to routine use, the act of reproduction in copies, or "copying," can occur at any or all of several stages, including storage in RAM, ROM, and floppy disk, transfer to a file server or another computer, and so on. While RAM can be erased by turning off the computer, it cannot be assumed that no unauthorized copying has occurred; there is judicial authority to the effect that RAM storage, even for a short time, is "reproduction in copies." Library patrons and borrowers cannot rely on the section 117 "essential step" provisions when loading computer programs into RAM or ROM because that section applies only to "the owner of a copy of a computer program," and borrowers are not owners.

Although loading a borrowed computer program into RAM is copying, the mere act in itself probably would not be considered unauthorized copying under the library lending exceptions. Because it is impossible to use a borrowed copy of a program without downloading the program into RAM, an implied license would have to be inferred from section 109. However, the same is not true for permanent ROM storage. As one commentator said, "The crime is not copying the software, it is failing to delete it." To what extent borrowers are

making further copies for hard-disk or external storage, for how long, and to what extent the further copies are being erased are matters that can only be answered by the borrowers.

## **2. Copying by Libraries and Educational Institutions.**

Section 108 of the Copyright Code allows libraries and archives to make copies of copyrighted works for their patrons and for other libraries under certain narrowly-defined conditions. To what extent section 108 applies to computer programs is unclear, since it was drafted without computer programs in mind and many of its provisions do not fit them.

A particularly difficult question involves interlibrary "loan" of computer programs. There are provisions in section 108 dealing with the practice of "interlibrary loan" in which a library reproduces a copy -- usually a journal article or a short excerpt from a work in its collections -- and sends the reproduction to another library without expectation of return. It would be hard to stretch the provisions of section 108 dealing with this practice to embrace making and distributing copies of computer programs. We recognize that the relationship of sections 108 and 109 merits much closer study, but we believe that neither section authorizes a library to make a copy of a computer program and transfer that copy -- electronically or otherwise -- to another library for a patron's use.

What libraries may do under the "archival copy" provisions of sections 108 and 117 is another debatable question. The library's prerogatives under section 117 appear extremely limited: the provision allows the owner of a copy of a computer program to make a copy or an adaptation of the program for archival purposes, or as an "essential step" in the use of a program, but any exact copies so made may be leased, sold, or transferred "only as part of the lease, or other transfer of all rights in the program." Under section 108 a library may make an

archival copy for purposes of "preservation and security," but today it is usually the "archival copy" of a computer program that is being lent, and the original that is being kept as backup. This practice, while sensible, may be contrary to the plain language of the statute.

## **B. WHAT IS A "COMPUTER PROGRAM"?**

The Copyright Code defines a "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." What constitutes a "computer program" for purposes of section 109 is an important and difficult question: the text of the 1990 amendment refers only to "computer programs" and the term "software" (which may be broader than "computer program") appears only in the title of the 1990 Act. As used in section 109, does "computer program" include informational works and databases on CD-ROM, office applications, educational materials, and multimedia works including interactive video programs?

The status of CD-ROMs under section 109 is particularly difficult. A CD-ROM is not a computer program or copyrightable work, but an optical storage medium considered a "copy" under copyright law. Search and retrieval software, however, is essential to gain access to material stored on a CD-ROM. If the search and retrieval program is such an integral part that the CD-ROM cannot be lent without it, then a library would have to look to the terms of section 109 to determine its prerogatives. As long as the lender and loan are nonprofit in nature and a copyright warning is affixed to the packaging, a library may lend a CD-ROM it owns, even if the CD-ROM incorporates a computer program. On the other hand, if the library does not

own the CD-ROM but is party to a negotiated license restricting lending, it would presumably be bound by the terms of the license.

### **C. WHAT IS A "NONPROFIT LIBRARY"?**

Confusion exists as to the criteria necessary to qualify as a "nonprofit library" under the section 109 lending exemption. The question is not so much what is "nonprofit" but what is a "library" in various educational contexts. "Libraries" may lend to anyone, but educational institutions are limited in those to whom they may make a "transfer of possession." The scope of the term "library" under section 109 is one that deserves more study and clarification.

### **D. WHAT CONSTITUTES "NONPROFIT LIBRARY LENDING"?**

#### **1. "Lending" and "Transfer of Possession."**

Under the section 109 exemptions libraries may "lend" and educational institutions may "transfer possession," but "lending" is certainly a "transfer of possession," and when educational institutions "transfer possession" in this context the act is almost always a loan. The real distinction involves the organizational unit within an educational institution that does the "lending" or "transferring." If the unit is a library within the school, it may lend to anyone as long as the packaging includes a copyright warning. If the unit is a curriculum center or other subdivision rather than a library, it need not include the warning but is constrained as to the recipients of its "transfers."

## **2. Lending and Access.**

Although the library exemption envisions "lending," which implies circulation beyond library premises, a number of libraries indicated that their software lending is for "on-premises" use only. The Software Publishers Association advocated limiting the practice of "lending" to on-premises use only.

## **3. Lending and On-line Transmission.**

Some libraries have extended services beyond lending a physical copy of a program to one patron at a time. They have developed network facilities that permit multiple users simultaneous access to the same program, or that give users access to a library's computer programs via a telephone line. Librarians also reported that electronic lending occurs by installing a program on a local network file server or computer hard drive. This practice requires the patron to use the program on the library's premises, but it is not the purchased or archival copy that is used. Instead, a transmission of the program from the host computer runs to the user's computer and a copy is loaded in the resident random access memory of the user's computer. The end result for the user may be the same, but there is nothing in section 109 or elsewhere in the Copyright Code sanctioning the unlicensed transmission of copies of copyrighted works by nonprofit libraries or educational institutions.

## **E. RECOMMENDATIONS FOR CHANGES IN LAW OR REGULATIONS.**

### **1. "Shrink Wrap" Licenses.**

Mass-marketing of computer programs means that individually negotiated, signed license agreements are no longer feasible. Software publishers have responded by developing "shrink

wrap," "break the seal," or "box top" licenses to control the customer's use and further distribution of their programs. With many variations, this device involves including a printed license with the sealed program package purporting to bind the purchaser to the terms of the license if the package is opened. While there are serious questions as to the enforceability of these "licenses," one library declared that it is refraining from lending computer programs because of the concern that shrink wrap licenses may prohibit circulation, and urged that section 109 be amended to make clear that its exemptions prevail over these "agreements."

The questions of whether the language in some shrink wrap licenses prohibiting rental or lending is enforceable, and whether such language overrides the specific exemptions in section 109, are serious and need to be discussed further. It may be, however, that the problem can be resolved without legislative action, since representatives of software publishers have declared that their industry has no interest in asserting that shrink wrap licenses override the section 109 exemptions.

## **2. Warning of Copyright Required by Regulations.**

Section 109(b)(2)(A) requires nonprofit libraries to affix a warning of copyright to each software package lent. The warning must conform to regulations prescribed by the Register of Copyrights in 37 C.F.R. §201.24. Most libraries reported that they are complying with the regulations and do not find them to be an undue burden. The question was raised, however, as to whether the copyright warning can be simplified. Some have difficulty affixing the lengthy warning to a small space, or find the label expensive to create, difficult to read, and an administrative and budgetary burden. The Office recognizes the regulation as unnecessarily long and plans to simplify it.

Some nonprofit educational institutions stated that they affix the copyright warning when lending copies of computer programs, but this does not appear to be a statutory requirement. The language of section 109 relating to "transfers" is separate from that governing the lending exemption and notice requirements. The National School Boards Association noted that during development of the amendments educational interests specifically asked that their activities not be covered by the library language.

As the law is now written, the warning of copyright need only appear on the packaging of copies of computer programs lent by a nonprofit library (including a library in an educational institution). There are other situations in which a copyright warning could be useful: warnings in connection with exchanges of copies among computer centers, laboratories, media centers, and the like; warnings affixed directly to computers used by patrons; warnings on screen when a program is loaded on a user's hard drive; warnings in connection with electronic transmissions; and so on. The Software Publishers Association proposed an amendment requiring libraries to post a clear warning on every computer in a library available to use by patrons, stating clearly that it is illegal to copy computer software without permission of the copyright owners, and that violators are subject to civil and criminal penalties.

The Copyright Office is impressed by the vulnerability of computer programs to the kind of copying that displaces sales. In the absence of legislation, we urge libraries and educators to work with copyright owners to develop standard warning language for voluntary use in various situations. For their part, we think that copyright proprietors should provide clear guidelines delineating what they expect of their licensees when copies of computer programs are lent or transferred under license rather than section 109.

### 3. Limitation to On-Premises Use.

Both software proprietors and libraries understand that lending software to patrons for off-premises use is within the meaning of the present exemption, but the Software Publishers Association recommended that this exemption be narrowed. SPA argued that treating programs as reference materials would discourage unauthorized copying while permitting patron access, and urged that the statute be amended to allow libraries to make computer programs available for use by patrons within the premises but not for check-out.

Some libraries countered that the ability to lend software is vital to a library's role in making information accessible to everyone, that there is no proof that lending has resulted in unauthorized copying, and that home use promotes sales since most people do not purchase software without reviewing it. Even so, a significant number of libraries have restricted their software to on-site use; among the reasons for their caution is uncertainty as to what the law permits and, notably, lack of funds to establish full-scale lending programs.

Given the clear statutory intention to allow circulation of programs, we believe that there is insufficient justification at this point to recommend narrowing the lending right. At the same time, we concur with SPA's request to review our decision in the future in order to assess the impact of new optical storage media on the needs of library patrons and its commercial impact on software publishers. We believe that this subject would benefit from further exploration and discussion among all parties affected, including library patrons.

## **F. EXTENSION OF RENTAL RIGHT TO VIDEO GAMES**

The Software Publishers Association also favored extension of the rental right to video games and encouraged the Office to review the denial of rental rights to certain video games under section 109(b)(1)(B)(ii). This issue, an important one, is beyond the scope of this report, but we agree that it should be raised with the appropriate Congressional committees either separately or as part of legislation aimed at implementing the General Agreement on Tariffs and Trade (GATT).

## **CONCLUSION**

Although we recommend no legislative changes to the 1990 Computer Software Rental Amendments Act at this time, we hope that this initial study will serve as a catalyst for further investigation. The Copyright Office is pledged to continue this study and will work with the interested parties to develop more specific information. Specifically, we believe that in the coming months we need to work with libraries and their associations, and with computer software owners and their representatives, to develop methodologies for determining and measuring what is actually happening with respect to software lending, copying by libraries and their patrons, and patterns in local networking and electronic transmission of software. We need to know more about practices within schools and other educational institutions, uses of optical storage media, and the perceived link between trial of software in the home and ultimate sales. A focal point of our efforts should be to develop understandings on all sides of what the current

law permits and forbids, and how better and more widely used warnings of copyright could benefit libraries, schools, and copyright owners alike.

We are acutely aware that the entire structure of the world of communications and information transfer is undergoing fundamental and rapid change, and that library services are at the center of this revolution. It is safe to predict that the questions and answers reviewed in this report will be entirely different a few years from now, and that urgent new problems will arise to confront us. Recognizing this, Congress added to its direction for a three-year study a mandate for further studies "at such times thereafter as the Register of Copyrights considers appropriate." It is our hope that the present report will serve as a starting point in what must necessarily be a continuing evaluation of the problem, and that meanwhile, the information it contains can prevent mistakes and provide a better understanding of what the law is and what it may become.

**THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1990:  
THE NONPROFIT LIBRARY LENDING EXEMPTION TO THE "RENTAL RIGHT"**

**A REPORT OF THE REGISTER OF COPYRIGHTS  
MARCH 1994**

**INTRODUCTION**

The Computer Software Rental Amendments Act of 1990 prohibits the rental, lease, or lending of a computer program for direct or indirect commercial advantage, unless authorized by the owner of copyright in the program. Placing this "rental right" for computer programs in the copyright proprietor created an exception to the "first sale" doctrine, which is codified in section 109 of the Copyright Act of 1976, title 17, United States Code. As a specific exemption to the newly created rental right, Congress expressly permitted nonprofit libraries to lend computer programs for nonprofit purposes, if the packaging contains a prescribed warning of copyright.

As required by §109b(2)(B) of the Copyright Code, we have prepared this Report for Congress on the extent to which the exemption for nonprofit libraries "has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function." The statute also asks us to give Congress any information or recommendations we consider necessary to carry out the purposes of the subsection.

# I. THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT AND THE NONPROFIT LIBRARY LENDING EXEMPTION

## A. THE RENTAL RIGHT AS A LIMIT ON THE FIRST SALE DOCTRINE

A fundamental provision of the copyright law is the grant of exclusive rights to the owner of copyright in section 106.<sup>1</sup> Section 109 contains an important limitation on these exclusive rights of copyright owners: under the "first sale" doctrine,<sup>2</sup> the owner of a lawfully made copy of a work, or any person authorized by such owner, is entitled without authority of the copyright owner to sell or otherwise dispose of possession of that copy.<sup>3</sup>

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<sup>1</sup> Under section 106, subject to sections 107 through 120, "the owner of copyright has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. . . . "

17 U.S.C. §106 (1992).

<sup>2</sup> Section 109 provides:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. §109(a)(1992).

<sup>3</sup> See H.R. Rep. No. 735, 101st Cong., 2d Sess. 4 (1990) (first-sale doctrine stands for proposition that owner of lawfully obtained copy of work ". . . is entitled, as with other personal property, to dispose of it as he or she chooses, with certain limited exceptions"). See generally Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); (continued...)

The first sale doctrine modifies the section 106(3) right of distribution with respect to a particular copy,<sup>4</sup> but it does not authorize the owner of a particular copy to reproduce the underlying copyrighted work.<sup>5</sup> Copyright ownership is distinct from ownership of the material object embodying the work; so, for example, the owner of a book is free to sell it, but not to make copies from it.<sup>6</sup>

On December 1, 1990, President Bush signed into law the "Computer Software Rental Amendments Act,"<sup>7</sup> which amended section 109 to require the authorization of the copyright owner to engage in commercial rental, lease, or lending of computer programs.<sup>8</sup> Section 101

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<sup>3</sup>(...continued)

Sebastian Int'l v. Consumer Contacts (PTY) Ltd., 847 F.2d 1093, 1099 (3d Cir. 1988); United States v. Wise, 550 F.2d 1180 (9th Cir. 1977) *cert. denied* 434 U.S. 929 (1977), *and rehearing denied*, 434 U.S. 977 (1977); T.B. Harms Co. v. JEM Records, Inc., 655 F. Supp. 1575 (D.N.J. 1987); Walt Disney Prods. v. Basmajian, 600 F. Supp. 439 (S.D.N.Y. 1984); Fawcett Publications, Inc. v. Elliott Publishing Co., 46 F.Supp. 717 (S.D.N.Y. 1942).

<sup>4</sup> See 17 U.S.C. §109(a) (1992). The first sale doctrine in section 109 also modifies the section 106(5) public display right. Section 109(c) provides:

(c) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

See also *id.* at §109(e) (delineating public performance and display right of owners of copies of electronic audiovisual games).

<sup>5</sup> See 17 U.S.C. §106(1) (1992) (owner of copyright has exclusive right to reproduce copyrighted work).

<sup>6</sup> *Id.* at §202. Transfer of ownership of any material object does not of itself convey any rights in the copyrighted work embodied in the object. *Id.*

<sup>7</sup> Computer Software Rental Amendments Act of 1990, Title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134 (codified at 17 U.S.C. §109(b)). Despite its namesake, the Computer Software Rental Amendments Act refers to copies of computer programs. The terms computer program and software may be used almost interchangeably throughout this Report, but we discuss their differences in Part II.

<sup>8</sup> 17 U.S.C. §109(b)(1)(A) (1992).

defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."<sup>9</sup>

Congress amended §109 to limit the first sale doctrine with respect to computer programs because it was convinced that commercial lending of computer programs could encourage unauthorized copying that would deprive copyright owners of a return on their investment, and discourage creation of new products.<sup>10</sup>

Congress had become increasingly aware of the potential impact of commercial software rental.<sup>11</sup> Perfect copies of software could be easily and cheaply duplicated,<sup>12</sup> and technological devices to prevent illegal software copying were ineffective.<sup>13</sup> At the 1990 House subcommittee hearings on software rental Chairman Robert Kastenmeier observed that "[l]egislation to reform the [first sale] doctrine for computer programs, arises from a collision course between intellectual property and technological change."<sup>14</sup>

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<sup>9</sup> *Id.* at §101. This definition was added to the Copyright Act in 1980. Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980).

<sup>10</sup> H. R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990).

<sup>11</sup> *Id.*

<sup>12</sup> The software industry has been called the "only industry that empowers every customer to become a manufacturing subsidiary." Jeff Borden, "Software Cops Take a Byte Out of Crime," Crain's Chicago Business (Jan. 28, 1991). See also Comment 5 (Software Publishers Association) at 4 (computers make "perfect copies of computer programs . . . with the push of a few keys or the click of a mouse . . .").

<sup>13</sup> Copy protection devices installed in computer programs can be counteracted by anti-copy protection programs, can decrease program performance, and can add to production costs. See James A. Eidelman & Carol R. Shepherd, Living Among Pirates: Practical Strategies to Protect Computer Software, 65 Mich. B.J. 284, 285 (1984); and Charles P. Kootz, Software Piracy Now Costs Industry Billions, LAN TIMES 75 (Mar. 18, 1991), cited in Kenneth A. Corsello, Note, The Computer Software Rental Amendments Act of 1990: Another Bend in the First Sale Doctrine, 41 Cath. U. L. Rev. 177, 193 (1991) [hereinafter "Corsello"].

<sup>14</sup> Computer Software Rental Amendments Act (H.R. 2740, H.R. 5297, and S. 198): Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, (continued...)

At the Senate software rental hearings, the Register of Copyrights echoed Chairman Kastenmeier's concerns about an impending collision and noted his belief ". . . that rentals almost always displace sales."<sup>15</sup> The chair of the American Association of Law Libraries' Copyright Committee conceded that "[w]ith some justice, the creators of computer programs state a case that theirs is the only type of copyrighted work that can be easily, quickly, totally, and perfectly copied by an infringer."<sup>16</sup>

Although Congress granted the rental right to software developers without waiting for further direct evidence, the software rental law was not without precedent. In 1984, Congress amended the first sale doctrine to give owners of copyright in sound recordings control over commercial rental of phonorecords by prohibiting commercial rental of phonorecords without authorization of the copyright owner.<sup>17</sup> Congress was presented with evidence that the record rental business "posed a genuine threat to the record industry. Copies of phonorecords were being rented at a fraction of their cost, in conjunction with advertisements exhorting customers to 'never buy another record'."<sup>18</sup>

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<sup>14</sup>(...continued)

101st Cong., 2d Sess. 1-2 (1990) [hereinafter "*House Software Rental Hearing*"] (statement of Rep. Robert W. Kastenmeier).

<sup>15</sup> *Computer Software Rental Amendments Act of 1989 (S.198): Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 13 (1989) [hereinafter "*Senate Software Rental Hearing*"] (statement of Register Ralph Oman). See also Corsello, *supra* note 13, at 198-201 (one reason for lack of evidence is that ". . . rental industry never became very large.").

<sup>16</sup> *Senate Software Rental Hearing*, *supra* note 15, at 68 (statement of Bruce Kennedy, chair of the American Association of Law Libraries' Copyright Committee).

<sup>17</sup> Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amendments to 17 U.S.C. §§101 and 115 (1993)).

<sup>18</sup> H.R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990). An earlier proposed rental right for video cassette tapes was not enacted. See *Copyright Infringements (Audio and Video Recorders) S.1758: Hearings before the Committee on the Judiciary*, 97th Cong., 1st and 2d Sess. (1981-82).

Following enactment of the Record Rental Amendment Act of 1989, the computer software industry began to lobby Congress for a similar rental right for computer programs.<sup>19</sup> Simultaneously, because of fear of retaliation against its computer programs by other countries, the United States began pushing very hard for a rental right for computer programs in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Better international protection of computer programs, therefore, was an additional incentive for a software rental law.<sup>20</sup> Hearings were held on computers and intellectual property in 1989,<sup>21</sup> and again in 1990.<sup>22</sup> The Computer Software Rental Amendments Act became law on December 1, 1990.<sup>23</sup>

## **B. PERMANENT RENTAL RIGHT FOR COMPUTER PROGRAMS AND SOUND RECORDINGS**

The North American Free Trade Agreement (NAFTA),<sup>24</sup> obligates the United States to make the rental right for both sound recordings and computer programs permanent. Congress

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<sup>19</sup> See Edward J. Valauskas, Copyright: Know Your Electronic Rights!, 117 Library Journal 41 (1992).

<sup>20</sup> *House Software Rental Hearing*, *supra* note 14, at 40 (statement of Register Ralph Oman).

<sup>21</sup> See *Senate Software Rental Hearing*, *supra* note 15; and *Computers and Intellectual Property -- Oversight: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. (1989-90).

<sup>22</sup> See *House Software Rental Hearing*, *supra* note 14. See *infra* notes 41-78 and accompanying text (discussing legislative history).

<sup>23</sup> Computer Software Rental Amendments Act of 1990, Title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134 (codified at 17 U.S.C. §109(b) (1993)).

<sup>24</sup> North America Free Trade Agreement of December 8, 11, 14, & 17, 1992. H.R. Doc. No. 159, Vol. 1, 103d Cong., 1st Sess. (1993).

has already amended the Copyright Code to make the rental right for sound recordings permanent and is under a treaty obligation to do the same with computer programs.

Congress initially set the Record Rental Amendment Act of 1984 to expire after five years, but renewed it in 1988.<sup>25</sup> The record rental right now has become permanent in the United States as part of the North American Free Trade Agreement (NAFTA) implementing legislation, which became effective on January 1, 1994.<sup>26</sup> The software rental law is scheduled to expire after seven years, on October 1, 1997, the same year that the record rental right was to expire after its first extension.<sup>27</sup> NAFTA requires signatories to provide a rental right for computer programs.<sup>28</sup> As originally drafted, the implementing legislation for NAFTA also contained a provision eliminating the "sunset" (that is, automatic termination) of statutory protection for computer program rentals. However, representatives of a Japanese company sought to expand the computer program rental right to cover all video games. At the last minute,

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<sup>25</sup> Extension of Record Rental Amendment Act, Pub. L. No. 100-617, 102 Stat. 3194 (1988). As extended in 1988, the amendments would "not apply to rentals, leasing, lending (or acts or practices in the nature of rentals, leasing, or lending) occurring after the date which is 13 years after [October 4, 1984]." *Id.*

<sup>26</sup> North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

<sup>27</sup> Amendments to section 109(b) would "not apply to rentals, leasing, or lending (or acts or practices in the nature of rentals, leasing, or lending) occurring on or after October 1, 1997." Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134. *See also* H.R. Rep. No. 735, 101st Cong., 2d Sess. 10 (1990). The language applying to practices "in the nature of" rental, lease, or lending was intended to address activities involving indirect commercial advantage, such as "where a store offers to repurchase software for a substantial part of the purchase price and offers free blank diskettes for copying." *See* 136 Cong. Rec. H13,315 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier). *See also* H.R. Rep. No. 987, 98th Cong., 2d Sess. 4 (1984) (discussing similar language in the Record Rental Amendment).

<sup>28</sup> North America Free Trade Agreement, *supra* note 24.

as a compromise, the computer program rental right provision was deleted from the NAFTA implementing legislation.<sup>29</sup>

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which was concluded on December 15, 1993, contains an annex known as TRIPs (Agreement on Trade-Related Intellectual Property Rights). The TRIPs text is scheduled to come into force on July 1, 1995. Since the TRIPs text also provides an obligation to provide a computer program rental right,<sup>30</sup> the issue will again be before Congress in the near future, and it seems likely that the issue of videogames will once again be raised.

## **C. DESCRIPTION OF COMPUTER SOFTWARE RENTAL AMENDMENTS**

### **1. Prospective Application.**

The software rental amendments were prospective in their application. Anyone who acquired lawfully made copies of a computer program before enactment of the rental right may dispose of those copies in any manner that was permitted before the amendments to section

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<sup>29</sup> Telephone conversation between Marybeth Peters, Acting General Counsel, and William F. Patry, Counsel, Subcommittee on Intellectual Property and Judicial Administration. (March 23, 1994).

<sup>30</sup> The Agreement on TRIPS provides:

In respect of at least computer programs . . . , a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. . . . In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Part II, Sec. 1, Art. 11, TRIPS Agreement, Annex 1C of the Agreement Establishing the World Trade Organization of 15 December 1993, MTN/FA, 15 Dec. 1993; MTN/FA/Corr. 1, 15 Dec. 1993; MTN/FA/Add. 1, 15 Dec. 1993.

109.<sup>31</sup> Congress believed that prospective application would satisfy any constitutional concerns raised by earlier versions of the bill. Earlier bills applied to rentals of all existing programs, and could have been interpreted as an unlawful taking under the "just compensation clause" of the Fifth Amendment to the United States Constitution.<sup>32</sup>

## **2. Remedies for Infringement.**

Under the software rental amendments, any person who distributes a copy of a computer program in violation of §109(b)(1) is an infringer of copyright under section 501 of the Copyright Code, and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509.<sup>33</sup>

## **3. Programs in Machines and Other Products.**

The Computer Software Rental Amendments Act does not provide a rental right for computer programs embodied in a machine or product (such as an automobile or calculator) that cannot be copied during the ordinary operation or use of the device.<sup>34</sup> Without this exclusion, the bill could have been interpreted to interfere with day-to-day business operations: that is, the

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<sup>31</sup> Pub. L. No. 101-650, 104 Stat. 5089, 5134. (1990). The Record Rental Act was also made prospective. Record Rental Amendment Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727. (1984). See H.R. Rep. No. 735, 101st Cong., 2d Sess. 10 (1990).

<sup>32</sup> ". . . nor shall any person be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation . . ." U.S. Const. amend. V. See H.R. Rep. No. 735, 101st Cong., 2d Sess. 10 (1990) (discussing prospective application).

<sup>33</sup> 17 U.S.C. §109(b)(4) (1992). Such a violation is not to be considered a criminal offense under section 506, or to subject the infringer to the criminal penalties set forth in section 2319 of title 18 of the United States Code. *Id.*

<sup>34</sup> 17 U.S.C. §109(b)(1)(B)(i) (1992).

"first sale and subsequent rental of computer programs found in . . . automobiles, personal computers, telefaxes, charter airplanes, apartment houses and condominiums."<sup>35</sup>

#### 4. Exclusion for Audiovisual Games.

The law also does not extend a rental right to computer programs embodied in limited-purpose computers that are designed primarily for playing video games.<sup>36</sup> Congress recognized that there is a "substantial rental market" for electronic audiovisual games played on these computers, but concluded that computers of this sort are "generally used solely for the playing of these games and not used to copy the computer programs that generate the game."<sup>37</sup>

Although the House Judiciary Committee was aware that some computers on which electronic audiovisual games are played may be designed for other purposes not involving the playing of these games, the Committee determined that, "[s]o long as these other purposes do not involve the copying of computer programs, these computers are exempt under new clause (ii) of section 109(b)(1)(B)."<sup>38</sup> The Committee stipulated that the phrase "may be designed for other purposes," as contained in new clause (ii) of section 109(b)(1)(B), is "intended to refer to other limited uses and would not apply to a computer program embodied or used in conjunction with a general purpose computer that is also capable of being used to play video games."<sup>39</sup>

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<sup>35</sup> *House Software Rental Hearing*, *supra* note 14 at 15 (statement of Rep. Kastenmeier). *See also id.* at 15-16 (statement of Rep. Synar) (A result affecting a computer program "which . . . runs a microwave or a household kitchen utensil . . . was not intended and [the problem] will be addressed in this legislation.").

<sup>36</sup> 17 U.S.C. §109(b)(1)(B)(ii)(1992).

<sup>37</sup> H.R. Rep. No. 735, 101st Cong., 2d Sess. 8-9 (1990).

<sup>38</sup> *Id.*

<sup>39</sup> H.R. Rep. No. 735, 101st Cong., 2d Sess. 9 n. 12 (1990). In its comments directed to this report, the Software Publishers Association encourages the Office to review denial of rental rights to video games  
(continued...)

## 5. Nonprofit Libraries and Nonprofit Educational Institutions.

Congress did not wish "to prohibit nonprofit lending by nonprofit libraries and nonprofit educational institutions" because these institutions "serve a valuable public purpose by making computer software available to students who would not otherwise have access to it."<sup>40</sup> The Computer Software Rental Amendments Act therefore permits nonprofit lending of computer programs by nonprofit libraries.<sup>41</sup> The Act also provides that the transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes.<sup>42</sup>

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<sup>39</sup>(...continued)

under 17 U.S.C. §109(b)(1)(B)(ii). Comment 5 (Software Publishers Association) at 6. SPA argues that the phrase "and may be designed for other purposes" creates "an ambiguity in the statute that cannot be resolved without referring to the nonbinding legislative history." *Id.* SPA argues that "the video game and computer industries have technologically converged to the point where clarification is now needed . . . ." According to SPA, computer programs, particularly those embodied in CDs, that may be copied in whole or in part by the user, should enjoy an exclusive rental right under Section 109(b) regardless of the nature of the computer being used." *Id.* See *infra* Part V(C)(4) (discussing SPA proposal).

<sup>40</sup> H.R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990).

<sup>41</sup> 17 U.S.C. §109(b)(2)(A) (1992).

<sup>42</sup> *Id.* at §109(b)(1)(A).

## II. THE LEGISLATIVE HISTORY OF THE EXEMPTIONS FOR NONPROFIT LIBRARIES AND NONPROFIT EDUCATIONAL INSTITUTIONS

The parameters of and distinctions between the lending exemption for nonprofit libraries and the transfer exemption for nonprofit educational institutions lie somewhat obscured in a tangled legislative chronology.

On January 1989, Senator Orrin G. Hatch introduced S.198, the Computer Software Rental Amendments Act of 1989.<sup>43</sup> Unlike the Record Rental Act, the Senate software bill did not contain an exemption for either nonprofit libraries or nonprofit educational institutions. On June 22, 1989, Representative Mike Synar introduced a similar bill, H.R. 2740; it contained an exemption for nonprofit libraries but not educational institutions.<sup>44</sup> By the time the software rental legislation was enacted,<sup>45</sup> it contained exemptions for both nonprofit libraries and nonprofit educational institutions.<sup>46</sup>

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<sup>43</sup> See 135 Cong. Rec. 865 (1989).

<sup>44</sup> Representative Barton introduced a similar bill, H.R. 5297, on July 18, 1990. The Barton bill contained identical language permitting a nonprofit library exemption that was found in H.R. 2740.

<sup>45</sup> Computer Software Rental Amendments Act of 1990, Title VIII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134 (codified at 17 U.S.C. §109(b) (1993)).

<sup>46</sup> The House Report accompanying Pub.L. No. 101-650 states:

An exemption for the rental, lease, or lending for nonprofit purposes by nonprofit libraries and nonprofit educational institutions is provided. Additionally, the bill states that the transfer of possession of a lawfully made copy of a computer program by one nonprofit educational institution to another or to faculty, staff, or students is also exempt.

H.R. Rep. No. 735, 101st Cong., 2d Sess. 15 (1990).

## A. THE SENATE HEARING

By the time of the Senate hearing on S.198 it was clear that the bill would have to be amended. In fact, Senator Hatch had earlier encouraged software publishers and librarians to meet and work out an agreeable solution, and in his opening statement at the April 19, 1989, hearing, he reported that they had done so.<sup>47</sup>

At the hearing the Copyright Office favored an exemption for nonprofit libraries and educational institutions similar to that applicable to record rentals.<sup>48</sup> The Register of Copyrights characterized the apparent agreement as containing three major parts:

First, the software rental right of S.198 would be qualified by an exemption for nonprofit libraries, including libraries in educational institutions. Second, in exchange for an exemption, libraries will be required to include a warning regarding the copyright law prohibitions on copying when they lend a computer program. The notice will presumably be similar to that now required to be displayed by libraries on their photocopying machines. Third, S. 198 may include a provision requiring the Copyright Office to review the legal and economic impact of library lending of computer programs and report its findings to Congress . . . .<sup>49</sup>

### 1. Position of Software Community.

The Software Publishers Association (SPA) confirmed that it was primarily concerned about commercial rental of software, not noncommercial lending by nonprofit libraries.<sup>50</sup> The Microsoft Corporation, a leading software manufacturer, also indicated that it would support an

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<sup>47</sup> *Senate Software Rental Hearing*, *supra* note 15, at 6 (statement of Sen. Orrin Hatch). The agreement would propose that the bill include an exemption for nonprofit libraries and require libraries to "affix to each software package a notice stating that it is illegal to copy software without permission." *Id.*

<sup>48</sup> Section 109(b)(1)(A) of the Copyright Code provides that the rental right in phonorecords shall not "apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution."

<sup>49</sup> *Senate Software Rental Hearing*, *supra* note 15, at 30.

<sup>50</sup> *Id.* at 33 (statement of Heidi Roizen, President, SPA).

exemption for libraries.<sup>51</sup> Software interests were opposed, however, to any broader exemption for educational institutions. Both SPA<sup>52</sup>, and the Microsoft Corporation<sup>53</sup> asserted that educational institutions are a major market for software publishers, and that many software publishers already provide some kind of price break or licensing program to accommodate the educational community.

## 2. Position of Educational Community.

Although the educational community did not testify at the Senate hearing, it began to press its concerns and submitted letters for the hearing record.<sup>54</sup> These letters suggested that the software bill might impede legitimate practices in educational institutions, in particular the

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<sup>51</sup> *Id.* at 57 (statement of Jon Shirley, President, Microsoft Corporation).

<sup>52</sup> *See* Comment 5 (Software Publishers Association) at 3 n. 2 ("The distinction between the nonprofit library lending exemption and the nonprofit educational institution exemption is important. First, nonprofit educational institutions are a large and important market for many software publishers . . . . Second, a variety of licensing programs developed by individual software publishers enable educational institutions to meet their needs by making multiple copies of computer programs.").

<sup>53</sup> The president of Microsoft Corporation stated:

Many software programs are created specifically for use by educational institutions, and frequently educational institutions, themselves, are copyright owners. We are concerned that lending or renting of software could be used to circumvent copyright law in the educational market.

Finally, most software companies, including ourselves, provide very deep discounts -- and often specialized software -- for the educational institutions and for other nonprofit organizations. We believe that these special programs will fully meet the needs of the educational community.

*Senate Software Rental Hearing, supra* note 15, at 56, 57.

<sup>54</sup> *See* Letter from Steven W. Gilbert, Vice President of EDUCOM, to Ed Baxter, Chief Counsel of the Subcommittee on Patents, Copyrights and Trademarks of the Senate Judiciary Committee, (May 3, 1989), *reprinted in Senate Software Rental Hearing, supra* note 15, at 85-87.

activities of computer centers and laboratories. In his letter of May 3, 1989, Steven W. Gilbert, Vice President of EDUCOM<sup>55</sup> summed up the educational community's position:

An exclusion for nonprofit libraries, without a parallel exclusion for nonprofit educational institutions, would press colleges and universities to house *all* software collections in formal libraries instead of in computing centers, microcomputer laboratories, or other locations as is often current practice. While we welcome the possibility of libraries providing services related to the distribution of computer software, many college or university libraries are not yet prepared to do so. Individual colleges or universities should be able to assign such responsibilities wherever optimal for the local conditions and resources.<sup>56</sup>

Frank W. Connolly,<sup>57</sup> another EDUCOM representative, also expressed concerns about the ability of campus computer centers and laboratories to make computer programs available to students and faculty for purposes such as evaluating software.<sup>58</sup> A letter from an assistant director of a public library in Liverpool, New York, noted with approval the proposal to amend S.198 to exempt nonprofit libraries, but urged legislators to consider a specific educational exemption.<sup>59</sup>

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<sup>55</sup> EDUCOM is a consortium of academic institutions and corporate organizations founded in 1964 and focused on the use of computing in higher education. At the time of Gilbert's letter, EDUCOM included 580 colleges and universities and 125 corporate associations. *Id.* at 85.

<sup>56</sup> *Id.* at 87.

<sup>57</sup> A professor of information systems and Director of Academic Computing at The American University, Connolly was the University's representative to EDUCOM, and later would become EDUCOM Vice President. *See House Software Rental Hearing, supra* note 14, at 86, 87.

<sup>58</sup> *Senate Software Rental Hearing, supra* note 15, at 92-94.

<sup>59</sup> *Reprinted in Senate Software Rental Hearing, supra* note 15, at 108.

This bill may still affect school district labs and academic labs. The bill's language, as now proposed, has no specific educational exemption. Only the phrase 'non-profit libraries' is used in regard to exemptions.

We urge legislators to protect the rights of library patrons, nonprofit institutions, and educational institutions when they consider the language of this bill.

*Id.* This letter is reproduced at p. 11 of the Appendix of this Report.

## B. THE COMPROMISE

In November, 1989, before markup of the Senate bill by the Judiciary Committee, representatives of the software industry met with representatives of the higher educational community and elementary and secondary school systems, and came to an agreement that was reflected in a joint letter to Senators DeConcini and Hatch.<sup>60</sup> Their letter attached a draft amendment<sup>61</sup> which, they asserted, would make clear that the Computer Software Rental Amendments Act did "not apply to faculty, staff and students who exchange copies of software in the ordinary course of their academic activities."<sup>62</sup> The group also proposed draft report language to accompany S.198.<sup>63</sup>

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<sup>60</sup> Joint Letter from August W. Steinhilber, General Counsel, National School Boards Association, Sheldon E. Steinbach, Vice President and General Counsel, American Council on Education, and Bruce A. Lehman, Counsel, The Software Rental Coalition, to Senators Dennis DeConcini and Orrin G. Hatch [hereinafter "Joint Letter"], *reprinted in House Software Rental Hearing, supra* note 14, at 50. The letter bears no date, but its attachments are dated November 13, 1989. The Joint Letter and attachments are reproduced at pages 1-2 of the Appendix to this Report.

<sup>61</sup> The draft amendment stated: "The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution and among faculty, staff and students does not constitute rental, lease or lending for direct or indirect commercial purposes under this Act." *Reprinted in House Software Rental Hearing, supra* note 14, at 52.

<sup>62</sup> Joint Letter, *supra* note 60. "We are requesting that the attached amendment and accompanying Committee Report language be included in S.198 when it is considered by the full Judiciary Committee and when the Committee's Report is filed." *Id.*

<sup>63</sup> Draft Report Language to Accompany S.198 (Nov. 13, 1989), *reprinted in House Software Rental Hearing, supra* note 14, at 51.

The Committee understands that many educational institutions legally acquire copies of computer programs for use by multiple users . . . This practice or other practices involving transfer of possession of an authorized copy of a computer program owned by an educational institution among faculty and students for individual use, which does not involve the making of unauthorized copies, does not constitute rental, lease or lending for direct or indirect commercial purposes under this act.

*Id.* The draft report language specified that "any copies of the program made incidental to its use must be erased following completion of the class assignment or educational use involved." It further noted that "nothing  
(continued...)"

## C. HOUSE HEARING

Meanwhile, in the House of Representatives, Representative Synar informed Chairman Kastenmeier of his understanding that, with proposed amendments, the educational community would support the software rental legislation.<sup>64</sup> On July 30, 1990, the House Judiciary Subcommittee held a hearing on software rental.<sup>65</sup>

### 1. Position of Educational Institutions.

Frank W. Connolly, Vice-President of EDUCOM<sup>66</sup> testified in favor of amending the bill to preserve an educational institution's computer laboratory activities. He believed that the rental right should not restrict operation of school and university computer laboratories where students electronically acquire one of a limited number of legally acquired copies of the software.<sup>67</sup> He described the most common model as one where --

. . . students come to laboratories to use software facilities either by borrowing a diskette or by down-loading it from a file server electronically.

While a student uses a particular copy of the software, it is not available to other users. The computer laboratory is granting temporary use and

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<sup>63</sup>(...continued)  
in [t]his act restricts the ability of copyright owners and users to enter into license agreements regarding the use of computer programs." *Id.*

<sup>64</sup> Letter from Representative Mike Synar to Chairman Robert Kastenmeier (March 5, 1990), *reprinted in House Software Rental Hearing, supra* note 14, at 165-66.

<sup>65</sup> The hearing considered all three software rental bills: H.R.2740, S.198, and H.R.5297.

<sup>66</sup> At the time of the hearing the EDUCOM consortium included 650 academic institutions and 125 corporate organizations. *House Software Rental Hearing, supra* note 14, at 92 (statement of EDUCOM Vice-President Frank W. Connolly).

<sup>67</sup> *House Software Rental Hearing, supra* note 14, at 94.  
*See also* Corsello, *supra* note 13, at 202 n. 131 (suggesting that the exemptions for libraries and educational institutions were shaped by "fear . . . that the physical or electronic acquisition of software would be considered 'in the nature of rental' [and hence] covered by the Software Act.").

possession of the institution's software to students. At least by my understanding of the term, this constitutes doing something, "in the nature of," lending software.<sup>68</sup>

## **2. Position of Software Associations.**

On behalf of the Software Rental Coalition,<sup>69</sup> R. Duff Thompson, Vice-President and General Counsel of WordPerfect Corporation, stated that the software rental legislation was drafted to achieve a limited purpose -- to give copyright owners the ability to control commercial practices which directly result in unauthorized copying. He argued that it should not impose needless restrictions on other practices, including the legitimate practices of not-for-profit libraries.<sup>70</sup> He asked that the joint letter reflecting the Coalition's agreement be placed in the record, and this was done.<sup>71</sup>

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<sup>68</sup> *House Software Rental Hearing, supra* note 14, at 86. At the *House hearing*, Connolly argued that the following sorts of curriculum-related software uses also were legitimate lending activities which educational institutions should be free to engage in: lending faculty members software for use on faculty member's personal systems to prepare materials for class; lending specialized software for students to use on their own machines; lending software and hardware for short periods of time for evaluation purposes; lending software and hardware to faculty for special projects such as writing a book or evaluating class materials; renting computer laboratories including software to conduct specialized training or to do projects.  
*Id.* at 94-95.

<sup>69</sup> The Software Rental Coalition included "WordPerfect Corporation, Microsoft, Ashton-Tate, Lotus Development Corporation, Autodesk, Aldus, and more than 650 members of the Software Publishers Association. Collectively, we represent an overwhelming majority of U.S. companies which develop and sell software for personal computers." *House Software Rental Hearing, supra* note 14, at 46 (statement of R. Duff Thompson, Vice President and General Counsel, WordPerfect Corporation).

<sup>70</sup> *Id.* at 49 (statement of R. Duff Thompson, WordPerfect Vice President and General Counsel).

<sup>71</sup> *Id.* The draft report language and proposed amendment to the Senate bill was also made part of the record of the House hearing.

## D. PASSAGE OF BILL

The stage had now been set in both the House and the Senate for enactment of the Software Rental Bill.<sup>72</sup> As amended, S.198 contained both the exemption for nonprofit library lending<sup>73</sup> and the language exempting from the rental right transfers by nonprofit educational institutions of lawfully made copies of computer programs.

The transfer language in S.198 was virtually identical to that proposed in the joint letter.<sup>74</sup> The Senate Report noted:

[M]any educational institutions legally acquire copies of computer programs for use by multiple users. Examples of this include the lending by instructors to students of programs to be used by the student in completing a class assignment. This practice or other practices involving the transfer of possession of an authorized copy of a computer program owned by an educational institution among faculty, students, and staff for individual use, or to another nonprofit educational institution, which does not involve the making of unauthorized copies, does not constitute rental, lease or lending for direct or indirect commercial purposes under this act.

. . . .

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<sup>72</sup> See S. Rep. No. 265, 101st Cong., 2d Sess. 1, 7 (1990).

<sup>73</sup> S.198 provided:

(2)(A) Nothing in this subsection shall apply to the lending of a computer center program by a nonprofit library, providing that each copy of a copyrighted computer program which is lent by such library shall have affixed to the packaging containing the program the following notice . . . [warning of copyright].

*Reprinted in* S. Rep. No. 265, 101st Cong., 2d Sess. 1, 2 (1990) and in *House Software Rental Hearing, supra* note 14, at 9.

<sup>74</sup> S. 198 provided:

The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff and students does not constitute rental, lease or lending for direct or indirect commercial purposes under this Act.

*Reprinted in* S. Rep. No. 265, 101st Cong., 2d Sess. 2 (1990).

. . . Under this paragraph, the prohibition against renting phonorecords does not apply in the case of nonprofit libraries or educational institutions that lend copies for nonprofit purposes. Furthermore, the transfer of possession of a lawfully made copy of computer software by a nonprofit educational institution among faculty, staff, students, or to another school is not prohibited.<sup>75</sup>

The Senate passed S.198, as amended, on May 1, 1990.<sup>76</sup> Explaining the amendments on the Senate floor, Senator Hatch remarked that the changes to the bill addressed concerns raised by libraries and the educational community, and "make it clear that the bill would not prohibit the lending of authorized copies of software by nonprofit libraries and nonprofit educational institutions."<sup>77</sup>

The House passed the rental amendments as part of the Copyright Amendments Act of 1990.<sup>78</sup> In the accompanying Report, the House stated that it was Congress' intent not "to prohibit nonprofit lending by nonprofit libraries and nonprofit educational institutions."<sup>79</sup> The House Report mirrored the Senate language on transfer by an educational institution.<sup>80</sup> President Bush signed the Computer Software Rental Amendments Act on December 1, 1990.<sup>81</sup>

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<sup>75</sup> S. Rep. No. 265, 101st Cong., 2d Sess. 6-7 (1990). See Appendix p. 3 (reproducing the portion of the Senate Report relating to "Lending by Libraries and Educational Institutions").

<sup>76</sup> 136 Cong. Rec. S5533 (daily ed. May 1, 1990).

<sup>77</sup> *Id.* (remarks of Senator Orrin Hatch).

<sup>78</sup> 136 Cong. Rec. H8266 (daily ed. September 27, 1990).

<sup>79</sup> H.R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990).

<sup>80</sup> See *id.* at 15 ("Additionally, the bill states that the transfer of possession of a lawfully made copy of a computer program by one nonprofit educational institution to another or to faculty, staff, or students is also exempt.")

<sup>81</sup> Pub. L. No. 101-650 (1990). [Title VII of the "Judicial Improvements Act of 1990)].

### III. COPYRIGHT OFFICE RESPONSIBILITIES

In amending §109, Congress gave the Copyright Office two responsibilities: to issue regulations on the copyright warning required and, within three years, to prepare a report on the extent to which the exemption for nonprofit libraries had achieved its intended purpose.

#### A. REGULATION ON WARNING OF COPYRIGHT FOR COMPUTER PROGRAMS

The nonprofit library exemption requires librarians to place a warning of copyright on every computer program lent. On March 28, 1991, the Copyright Office issued regulations establishing requirements for the warning; these regulations can be found in 37 CFR 201.24.<sup>82</sup> The "Warning of Copyright for Software Rental" to be affixed to the packaging must consist of a verbatim reproduction of the following notice:

**Notice: Warning of Copyright Restrictions**

The copyright law of the United States (Title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material.

Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement.

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<sup>82</sup> The regulation went into effect on March 28, 1991. 56 Fed. Reg. 7,811 (1991).

This institution reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.<sup>83</sup>

Librarians must ensure that this warning appears on the packaging of every copy of a computer program they lend to patrons.<sup>84</sup> The notice must be legible, comprehensible, and readily apparent to a casual user of the computer program.<sup>85</sup>

## **B. PREPARATION OF REPORT**

Under section 109(b)(2)(B), the Copyright Office is directed to report to Congress<sup>86</sup> as to whether the legislation "has achieved its intended purposes of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function." The Office is also asked "to advise the Congress as to any information or recommendations that the

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<sup>83</sup> 37 C.F.R. §201.24 (1992).

<sup>84</sup> The warning may be affixed by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> The Report was due on December 1, 1993, but we were granted an extension of time until March 31, 1994. *See* pp. 4-7 of the Appendix to this Report for letters requesting the extension.

Register of Copyrights considers necessary to carry out the purposes of the subsection."<sup>87</sup>

Later studies and reports after this one are also authorized.<sup>88</sup>

**1. Notice of Inquiry.**

On July 13, 1993, the Copyright Office issued a Notice of Inquiry requesting public comments on and information about lending of computer programs for nonprofit purposes by nonprofit libraries, for the purpose of evaluating how the nonprofit lending provision is working.<sup>89</sup> The Office invited comment "from all interested parties including software proprietors, librarians, and library patrons."<sup>90</sup>

The Office expressed interest in "receiving comments about any issues relevant to §109(b)(2) which concern copyright owners, librarians, and library patrons" and identified seven areas of particular interest:

1. If you are a nonprofit library or educational institution, do you feel you are meeting the needs of

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<sup>87</sup> Section 109(b)(2)(B) provides:

(B) Not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990, and at such times thereafter as the Register of Copyrights considers appropriate, the Register of Copyrights, after consultation with representatives of copyright owners and librarians, shall submit to the Congress a report stating whether this paragraph has achieved its intended purposes of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. Such report shall advise the Congress as to any information or recommendations that the Register of Copyrights considers necessary to carry out the purposes of this subsection.

*See also* H.R. Rep. No. 735, 101st Cong., 2d Sess. 15 (1990) (law requires Register to state "whether the provisions of the bill have served their intended purpose").

<sup>88</sup> 17 U.S.C. §109(b)(2)(B)(1992).

<sup>89</sup> 58 Fed. Reg. 37,757 (1993).

<sup>90</sup> *Id.* Comments were due by October 12, 1993.

your patrons with regard to computer software? Does §109(b)(2)(A) facilitate or impede fulfillment of your function as a nonprofit library or educational institution?

2. How often do you lend copies of computer programs to other nonprofit libraries, or nonprofit educational institutions? How often do you lend computer programs to staff or users of your own institution?
3. Do the regulations in 37 CFR 201.24 pertaining to warning of copyright for software rental represent an onerous burden?
4. Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display of computer programs is occurring as a result of the nonprofit lending permitted by §109(b)?
5. Do you feel the §109(b) exemption for nonprofit libraries and educational institutions is harmful to the interests of copyright owners? Has there been any change in authors' income as a result of nonprofit lending of software?
6. Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?
7. Do you feel that new legislation is needed either to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If so, please specify as precisely as possible what provisions such legislation should contain.<sup>91</sup>

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<sup>91</sup> See pp. 12-13 of the Appendix of this Report for entire text of the Federal Register Notice.

## 2. Publication and Distribution.

Copies of the Federal Register Notice were sent directly to library and software organizations or individuals identified as interested parties.<sup>92</sup> In addition, Edward Valauskas, the Chair of the American Library Association Copyright Ad Hoc Subcommittee, distributed the questions electronically via Internet to 30 "discussion lists,"<sup>93</sup> devoted to issues of interest to software

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<sup>92</sup> The Notice of Inquiry was mailed directly to:

Robert Holleyman, Businesses Software Alliance; Steven Metalitz, Information Industry Association; John L. Pickitt, Computer and Business Equipment Manufacturers Association (CBEMA); Ronald Palenski, Information Technology Association of America; Kenneth Wasch, Software Publishers Association; Barbara Fieser, Computer Law Association; Nicholas Veliotis, Association of American Publishers; August Steinhilber, National School Boards Association; Dwayne Webster, Association of Research Libraries; Carla Funk, Medical Library Association; Judy Genesen, American Association of Law Libraries; Fay Golden, Liverpool, N.Y. Public Library; Eileen Cooke, American Library Association; David Bender, Special Library Association; Sheldon Steinbach, American Council on Education; Peter Young, National Commission on Libraries and Information Science; Robert Atwell, American Council on Education.

<sup>93</sup> Discussion lists are digital conferences on specific topics, moderated by one or several editors and hosted on a given computer. According to Mr. Valauskas, there are 1,152 academic discussion lists available electronically, with hundreds devoted to specific topics in education and librarianship. See Comment 4 (American Library Association) at 1.

developers as well as librarians.<sup>94</sup> The Notice was also sent via Internet to specific organizations and individuals.<sup>95</sup>

### 3. Scope of Inquiry.

Although the Notice of Inquiry asked about issues of interest to "copyright owners, librarians, and library patrons,"<sup>96</sup> the Office's mailing and the Internet distribution went to educators as well as librarians and software representatives. As we examined the initial comments and began to prepare our Report, we became aware that some confusion exists about the relationship between lending by nonprofit libraries and transfer by nonprofit educational

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<sup>94</sup> The Notice of Inquiry was sent to the following Internet discussion lists:

PUBLIB (public libraries); CNI-Copyright (copyright); KIDSPHERE (K-12 computing & education); ARLIS-L (art libraries); CIRCPLUS (library circulation); COLLDV-L (library collections development); GEONET-L (geoscience librarians); ILL-L (interlibrary loan); INFO+REF (information and referral services); LIBRARY (libraries); LAW-LIB (law libraries); LIBADMIN (library administration); LM-NET (school library media); MEDLIB-L (medical libraries); EDAD-L (educational administration); EDNET (education & the Internet); EDTECH (educational technology); ICU-L (computing in education); AAUA-L (university administration); COMMCOLL (administration at two-year institutions); COMP-ACADEMIC-FREEDOM-TALK (academic freedom); IPCT-L (educational and computing connectivity); SOFTPATS (software patents); COMP-CEN (computer centers); HDESK-L (computer help desks); SLA-PAM (special libraries).

Comment 4 (American Library Association).

<sup>95</sup> Requests for comments were sent via Internet to the following organizations and individuals:

Niles & Associates (software developers); CASPR (software developers); Northwestern Univ. Computer Center (academic); Balloons Software (software developers); Univ. of Houston (academic); Meckler Corp. (publishers); Voyager Corp. (software developers); Brown Univ. (academic); Microsoft Corp. (software developers); Faxon Corp. (periodical distributors); Digital Publishing Association (professional association); Computer Professionals for Social Responsibility.

Comment 4 (American Library Association).

<sup>96</sup> 58 Fed. Reg. 37,757 (1993).

institutions. Mark Traphagen, for the Software Publishers Association, argued that our Notice of Inquiry was overbroad. He emphasized that the exemption for transfers by nonprofit educational institutions "is in a separate paragraph"<sup>97</sup> and should not be covered in our Report.<sup>98</sup> Mr. Traphagen iterated the concerns raised at the hearings on the software rental bill: that nonprofit educational institutions are an important market, and that software publishers already offer a variety of licensing programs to enable educational institutions to meet their needs.<sup>99</sup> He asked for an opportunity to address this issue again if the Office planned to deal with educational institutions in its report.<sup>100</sup>

#### **4. Roundtable Discussion.**

In order to address SPA's concerns and to elicit more information on some of the issues that had been raised in the Notice and in the comments, the Office decided to hold a Roundtable Discussion and invite interested parties to comment more fully.<sup>101</sup> Since this informal roundtable was scheduled for January 12, 1994, a day when there was also a meeting of the Librarian of Congress's Advisory Committee on Copyright Registration and Deposit (ACCORD)

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<sup>97</sup> "Transfers" of lawfully made copies of computer programs from nonprofit educational institutions to faculty, staff, students, and like institutions "do not constitute" commercial rental, lease or lending under section 109(b)(1)(A).

<sup>98</sup> Comment 5 (Software Publishers Association) at 3-4 n. 2.

<sup>99</sup> *Id.* at 3-4.

<sup>100</sup> The Office invited the SPA to submit any additional comments that it wished pertaining to subsection 109(b). Telephone call from Dorothy Schrader, General Counsel, Copyright Office, to Mark Traphagen, General Counsel, SPA (November 1993).

<sup>101</sup> See Letter from Barbara Ringer, Acting Register of Copyrights, to Participants in ACCORD and Study on Nonprofit Lending of Computer Programs (Jan. 4, 1994), reprinted at p. 8 of the Appendix to this Report.

committee, we invited participation from the ACCORD members.<sup>102</sup> Following the roundtable meeting and submission of further written comments,<sup>103</sup> we became convinced that our report should clarify the relationship and distinction between lending by nonprofit libraries and transfers by nonprofit educational institutions in our discussions. We also concluded from our review of the legislative history and the comments that the Report should consider nonprofit lending by libraries in nonprofit educational institutions. The information gathered at the roundtable discussion also illuminated other areas and this information will be detailed in the next part of our Report.

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<sup>102</sup> The Library of Congress Advisory Committee on Copyright Registration and Deposit (ACCORD), was appointed by Librarian of Congress James Billington in response to the Copyright Reform Act of 1993 (H.R. 897 and S. 373). The committee, co-chaired by Barbara Ringer and Robert Wedgeworth, was created to evaluate possible improvements to the copyright registration and deposit system.

<sup>103</sup> The parties were invited to submit further written comments by February 11, 1994.

#### IV. SUMMARY AND ANALYSIS OF THE PUBLIC COMMENTS

We received 29 comments in response to our Notice of Inquiry. Twelve responses, including one reply comment, were formal; the other 17 were E-mail comments that came from an Internet inquiry. Of the total responses, 23 were from librarians or educators, and four were from software representatives. One response came from an individual software consumer, and another from an individual library user. Several library administrators and individual librarians, including librarians from nonprofit educational institutions or local community libraries, and the General Counsel for the National School Boards Association, also submitted comments. Two major associations (the Software Publisher's Association<sup>104</sup> and the Business Software Alliance),<sup>105</sup> responded on behalf of software copyright owners.

We did not receive a large volume of comments, but the responses represent a broad range of software and library interests, and the software associations that commented represent a number of interested parties. One individual software developer also responded.<sup>106</sup> Comments were received from the three major library representatives:<sup>107</sup> the American Library

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<sup>104</sup> The Software Publishers Association (SPA) is the principal trade association of the personal computer software industry. It has a membership of over 1,000 large and small companies that "develop and market business, consumer, and education software products." Comment 5 (Software Publishers Association) at 1.

<sup>105</sup> The Business Software Alliance (BSA) is made up of software companies that include Aldus, Apple Computer, Computer Associates, Lotus Development, Microsoft Corporation, Novell and WordPerfect Corporation. The members of the BSA "produce nearly 75% of the world's packaged software published by companies based in the United States." Comment 3 (Business Software Alliance) at 1.

<sup>106</sup> See E-mail Comment 4.1 (Balloons Software).

<sup>107</sup> There are 87,000 public and private school libraries, 9,000 local public libraries, 4,600 college and university libraries, plus hundreds of specialized business libraries and Federal and state libraries in America today. More than 182,000 professionals work in libraries. James H. Billington The Electronic Library, Media Studies Journal, 109-112, Winter 1994.

Association,<sup>108</sup> the Medical Library Association (MLA),<sup>109</sup> and a joint coalition of three library associations comprised of the American Association of Law Libraries (AALL),<sup>110</sup> the Association of Research Libraries (ARL),<sup>111</sup> and the Special Libraries Association (SLA).<sup>112</sup>

We received comments from nonprofit libraries within educational institutions that are lending software. We also received comments from divisions within educational institutions that transfer copies of computer programs under the exemption for educational transfers. We received a number of comments from centers or laboratories that are neither lending nor transferring under section 109, but that have license agreements with publishers permitting them to make broader use of computer programs. In discussing these comments, we attempt to group them in such a way that these distinctions are clear. Follow-up calls to some of the commentators provided us with additional information that permitted us to discuss their computer program uses more accurately.

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<sup>108</sup> Edward Valauskas, Chair of the Copyright Ad Hoc Subcommittee, responded on behalf of the American Library Association (ALA). *See* Comment 4 (American Library Association).

<sup>109</sup> The Medical Library Association (MLA) represents about 5,000 individuals and institutions that are involved in management and "dissemination of biomedical information in support of patient care, education, and research. MLA members include librarians who lend computer programs in their nonprofit institutions." Comment 8 (Medical Library Association) at 1.

<sup>110</sup> The American Association of Law Libraries (AALL), represents more than 5,000 members and serves "the law and law-related information needs of legislators, judges and other public officials at all levels of government, law professors and students, lawyers in private practice, corporate and small business persons, and members of the general public." Comment 2 (Joint Libraries) at 1.

<sup>111</sup> The Association of Research Libraries (ARL) is "an association of 119 research libraries in North America. ARL programs and services promote equitable access to, and effective use of, recorded knowledge in support of teaching, research, scholarship, and community service." Comment 2 (Joint Libraries) at 1.

<sup>112</sup> The Special Libraries Association (SLA) is an international organization made up of librarians and information specialists that manage libraries with "specialized or focused information needs, such as corporations, law firms, news organizations, government agencies, associations, colleges, museums, and hospitals." Comment 2 (Joint Libraries) at 1.

Although the Notice of Inquiry contained specific questions, not all of the commentators answered each question and some raised other questions. The main thrust of the comments will be discussed in connection with the basic subject areas identified in the Notice of Inquiry, and additional or unanswered questions will also be noted.

**A. FULFILLING LIBRARY FUNCTION: DOES THE LENDING EXEMPTION TO THE RENTAL RIGHT PROVIDE NONPROFIT LIBRARIES THE CAPABILITY TO FULFILL THEIR FUNCTION?**

Of the library associations and individual libraries responding to our inquiry, most but not all reported that they are currently meeting patron needs and fulfilling their function as a library with respect to computer software. Most also expressed strong support for the library lending exemption to the rental right. Ten commentators -- including representatives of three library associations, staff in two public libraries and four educational institutions, and one library patron -- stressed the importance of the exemption to the rental right in fulfilling patrons' requests for access to software. Nine of the responding library and educational institutions reported they are meeting patrons' requests for software loans, and three indicated that they are not.

**1. Positive Responses.**

**a. Library associations.** The American Library Association emphasized the importance to them of the exemptions for nonprofit libraries and nonprofit educational institutions.<sup>113</sup> Responding jointly, the American Association of Law Libraries, the Association of Research Libraries, and the Special Libraries Association ("Joint Libraries")<sup>114</sup> asserted that

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<sup>113</sup> Comment 4 (American Library Association) at 3.

<sup>114</sup> This coalition will be referred to as the "Joint Libraries" in this Report.

the Computer Software Rental Amendments Act provides "the appropriate balance between the rights of owners and needs of users" and "has achieved its intended purpose with respect to nonprofit libraries."<sup>115</sup> The Joint Libraries also reported that their members are meeting patrons' requests with respect to the lending of computer software. Taking the position that the software lending provisions "neither facilitate nor impede" fulfillment of their members' institutional functions, this group stated that lending computer software is a legitimate library activity and that the exemption is "appropriate and essential."<sup>116</sup>

The Medical Library Association emphasized that, in its view, providing computer software is an integral service in many health science libraries and is especially critical to those affiliated with academic institutions. The MLA stated that health science librarians, including those affiliated with educational institutions, are typically called upon to provide their users with access to a broad range of software information resources (CD-ROM databases or directories), as well as educational materials and automatic office applications (e.g., word processing, statistics, database management).<sup>117</sup>

**b. Individual librarians or libraries.** The Glendora Public Library reported that it has been circulating software to the public for about five years, and indicated that it is meeting the expressed requests of its patrons. This library allows the public to check out software for seven days, and makes no charge unless the software is returned late, is damaged,

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<sup>115</sup> Comment 2 (Joint Libraries) at 5.

<sup>116</sup> *Id.* at 1-2.

<sup>117</sup> Comment 8 (Medical Library Association) at 1. *See infra* Part V(B)(3) discussing whether statutory term "computer program" includes such "software" as multimedia works, databases, and information in CD-ROM where accompanied by search and retrieval software.

or is not returned.<sup>118</sup> Leslie McKnight, a librarian who has worked in a number of libraries, observed that the ability to lend computer programs helps librarians fulfill their function of providing information to patrons.<sup>119</sup>

c. **Libraries in educational institutions.** Four commentators are librarians from a broad range of libraries in educational institutions: the University of Northern Iowa, the Science Engineering Library at the University of Southern California, North Carolina State University, and an Oklahoma Junior College. All four considered that they are fulfilling the demand for access to software by students and other patrons.<sup>120</sup> One of these commentators expressed the view that the lending exemption does more to facilitate than to impede fulfillment of patrons' requests.<sup>121</sup>

Jinnie Y. Davis, an Assistant Director for Planning and Research for North Carolina State University (NCSU) Libraries, reported that NCSU's library system is responsive to users' requests for access to software. It only acquires certain kinds of software such as data sets or simulation routines, that accompany other publications purchased under collection guidelines; it does not purchase general-purpose applications software such as spreadsheets or word-processing packages because the library is not sufficiently staffed to make general-purpose

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<sup>118</sup> E-mail Comment 4.12 (Glendora Library) at 1.

<sup>119</sup> E-mail Comment 4.11 (McKnight) at 1. *See also* E-mail Comment 4.6 (J.S. Reynolds Community College) at 1.

<sup>120</sup> *See* Comment 9 (Univ. of Northern Iowa) at 2; E-mail Comment 4.10 (Univ. of Southern California) at 1; E-mail Comment 4.5 (Tulsa Jr. College) at 1; and E-mail Comment 4.13 (North Carolina State Univ.) at 1.

<sup>121</sup> E-mail Comment 4.5 (Tulsa Jr. College) at 1.

software available to users. Since the NCSU libraries are not making all software available, according to the commentator, the existing law and regulations pose no impediment.<sup>122</sup>

d. Computer centers or laboratories. Three representatives of computer centers or laboratories in educational institutions that lend software also reported that their institutions are responsive to their patrons.<sup>123</sup> Anita Almond stated that the CCIT Faculty Resources for Instruction Computer Center at the University of Arizona provides software access to a campus of 36,000 students and has been lending software for evaluation purposes for the last five years. The Center lends about 1,106 software packages a year for two weeks at a time. Ms. Almond said that she is meeting patrons' requests in "trying to find the right tool for the job."<sup>124</sup> Pointing to the expressed desire of faculty and staff to be able to look at software in order to find something that they understand and that can do a particular job, and reporting that most customers look at two or three software packages before determining which one to buy, Ms. Almond considered that evaluation before purchase is very important for meeting campus software requests.<sup>125</sup>

The University of Wisconsin-Madison's Instructional Materials Center reported that it "processes computer files in accordance with the software laws" and that the intent of the law meets its needs.<sup>126</sup> Another media center at Niskayuna High School in New York reported

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<sup>122</sup> E-mail Comment 4.13 (Jinnie Y. Davis, North Carolina State Univ.) at 1.

<sup>123</sup> E-mail Comment 4.15 (Univ. of Arizona) at 1; E-mail Comment 4.9 (Univ. of Wisconsin-Madison) at 1; and E-mail Comment 4.3 (Niskayuna High School) at 1.

<sup>124</sup> E-mail Comment 4.15 (Univ. of Arizona) at 1.

<sup>125</sup> *Id.*

<sup>126</sup> E-mail Comment 4.9 (Univ. of Wisconsin-Madison) at 1.

that it is spending "a great deal of money for computer software to support our curriculum, both in single copy and network license."<sup>127</sup>

e. **Library patron.** Someone identified as a longtime library-user who is just beginning to use software emphasized the value of the libraries' resources for self-education in this field, and the public's right to have free access to software information as well as the printed word. This patron urged the library associations in the age of the "information superhighway" to develop a software policy that is clear and coherent, and that makes materials widely accessible to more than a "wealthy elite."<sup>128</sup>

## 2. **Negative Responses.**

Librarians who are not taking advantage of the lending provisions were concerned that only certain kinds of software are being lent or that, in some cases, software is not being lent at all. They attributed this situation to insufficient funds or staff, or to lack of knowledge of the legal requirements.

a. **Individual libraries.** Two library representatives said that they are unable to supply the demands of patrons for access to software.<sup>129</sup> One Pennsylvania library reported that software purchase, maintenance, and instructions for usage make it too expensive to furnish service to patrons in this area. Recently this library was given money to purchase its first computer and start-up software for free public use but budgetary constraints keep it from

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<sup>127</sup> E-mail Comment 4.3 (Niskayuna High School) at 1.

<sup>128</sup> E-mail Comment 4.17 ("longtime library user") at 1.

<sup>129</sup> Comment 1 (John K. Tener Library) at 1; Comment 6 (Jefferson County Library) at 1.

purchasing additional software.<sup>130</sup> The director of a public library in Colorado would like to make software available, but has been advised by the county attorney that it is probably not possible to circulate most software. He commented:

While the Act was probably intended to allow the Library to circulate software programs to its patrons, there appears to be some legal support that the software companies can, by the "shrinkwrap" license agreements affixed to the software, prohibit such circulation. The Act, it could be argued, protects only libraries which own the software program. In most cases, the library is only a license-holder not an owner; thus the library is not protected. Even if the Library were protected under the Act, the companies may prohibit circulation by including such prohibition in the contract or license agreement.<sup>131</sup>

**b. Computer laboratory at educational institution.** A staff member from a personal computer laboratory at the University of Massachusetts at Amherst noted that his laboratory does not circulate copies of computer programs. He did not believe any other facility at this University lends software either.<sup>132</sup> He further asserted that "the Act is ineffective due either to the unwillingness of software firms to participate or the failure of libraries or non-profit agencies in this area [to] provide such a service."<sup>133</sup>

**c. Library associations.** The Joint Libraries stated that the Act has achieved its intended purpose with respect to nonprofit libraries,<sup>134</sup> but they expressed concern about

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<sup>130</sup> Comment 1 (John K. Tener Library) at 1.

<sup>131</sup> Comment 6 (Jefferson County Library) at 1.

<sup>132</sup> E-mail Comment 4.4 (Univ. of Mass.) at 2.

<sup>133</sup> *Id.*

<sup>134</sup> Comment 2 (Joint Libraries) at 4-5.

the general exemption provided by section 109 itself, and the limits it places on the first sale doctrine:

We believe . . . that whether a work of intellectual property may be lent by libraries should not depend on the format of the work. Section 109 of the Copyright Act permits other intellectual property to be lent, sold, or leased that also are easily copied -- for example, print media and audio cassettes. We are concerned that the software amendments portend future diminutions of users['] rights based on the format of a work, a distinction that, with few exceptions, Congress chose not to make in drafting and passing the Copyright Act of 1976.<sup>135</sup>

### 3. Questions Raised.

Some of the comments suggested that librarians who are not satisfied with the present law are uncertain as to what the Software Rental Act allows them to do. Specifically they asked the following questions:

- 1) Does the exemption allowing the lending of "computer programs" cover "a broad range of software" such as information resources (CD-ROM databases or directories), office applications (spreadsheets, word processing programs), educational materials, and multimedia works?<sup>136</sup>
- 2) Can software copyright owners through "shrink wrap" license agreements accompanying purchased

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<sup>135</sup> *Id.*

<sup>136</sup> *See, e.g.*, Comment 8 (Medical Library Association) at 1; E-mail Comment 4.13 (North Carolina State Univ.) at 1.

copies of computer programs prohibit nonprofit lending and thereby override the statutory exemption?<sup>137</sup>

Other questions concern the activities of educational institutions:

- 1) If nonprofit educational institutions are exempt from "the first sale restrictions relating to lending"<sup>138</sup> and if electronic distribution is "transfer" under §109(b)(1)(A), does it follow that computer programs can be distributed by educational institutions on a network to multiple users without a license to do so?
- b) Does "online" electronic transmission of copies of computer programs (from a file server or network) by nonprofit educational institutions constitute "lending" or "transfer?"

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<sup>137</sup> Two trade associations (BSA and SPA) told the Copyright Office that the software industry has no interest in asserting that shrink wrap licenses override the capability of nonprofit libraries under section 109(b) to lend copies of computer programs for nonprofit purposes. *See infra* Part V(C)(1) discussing shrink wrap licenses.

<sup>138</sup> *See* Comment 11 (National School Boards Association) at 1. *See also* 17 U.S.C. §109(b)(1)(A).

**B. FREQUENCY OF LENDING: HOW OFTEN DO YOU LEND COPIES OF COMPUTER PROGRAMS?**

**1. Insufficient Knowledge of Extent and Patterns of Library Software Loans.**

While most commentators addressed this question, the responses fail to provide sufficient evidence on the extent of lending of computer programs by libraries. The Business Software Alliance (BSA) reported that it lacks adequate knowledge of library lending practices, but that it would be interested in the type and volume of software lent to library patrons, adding that this could help it determine the scope of software piracy.<sup>139</sup> Some librarians cited insufficient money to acquire software for lending, or inadequate information about what the amendment permits. Some libraries seemed unaware that the Act allows them to lend copies of computer programs for their patrons' home use. The comments revealed that software lending practices vary from library to library; moreover, the Joint Libraries' comment reported on an Association of Research Libraries (ARL) survey of all of its U.S. members. This survey indicates that some libraries lend software and some do not.<sup>140</sup>

Although most of the librarians responding to our questions reported that their libraries lend software, a 1991 survey on interlibrary loan policies of 1,500 libraries indicates that fewer than 100 of them would lend software.<sup>141</sup> This survey has been updated, and the compiler

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<sup>139</sup> Comment 3 (Business Software Alliance) at 2. Accordingly BSA sought "another opportunity to comment after information regarding the lenders institutions' experience becomes available." *Id.*

<sup>140</sup> Comment 2 (Joint Libraries) at 2. ARL sent our Notice of Inquiry to 104 of its members and 47 responded.

<sup>141</sup> Comment 7 (Niagara University) at 1. Leslie Morris, director of libraries at the Niagara University Library, and compiler of Interlibrary Loan Policies Directory (Fourth edition, Neal-Schuman, 1991) wrote: "I asked 1,500 libraries whether they would loan computer software. Although I never counted the positive responses, I judge the positive response to be less than 100." *Id.*

does not see any increase in the number of libraries willing to lend software. He concluded that library software lending is not a problem at least with respect to interlibrary loan.<sup>142</sup>

a. **Individual libraries.** The responses from individual libraries did not offer much specific information on the frequency of lending. One library said it is unable financially to establish a software lending library;<sup>143</sup> a public library stated that it is not lending software because it is unsure whether its rights under the lending exemption survive the shrink wrap licenses that accompany purchased copies of software.<sup>144</sup>

On the other hand, two libraries who responded are actively lending software. The Glendora Public Library is increasing its software circulation each year; it circulated 255 software items for fiscal year 1990-91, 816 for 1991-92, and 1,178 for 1992-93.<sup>145</sup> The Liverpool Public Library in Liverpool, New York, has been promoting public access to computers and electronic software items for home use since 1981. Its circulation of software is also increasing. In 1988 it circulated more than 13,500 items. During the same year another 12,000 software items were used in the library's computer laboratory.<sup>146</sup> In 1993 it lent 20,192 items for out-of-the-building use; another 13,765 items were used on the library premises, with 16,800 hours being booked in the computer laboratory.<sup>147</sup>

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<sup>142</sup> *Id.* See *infra* Part V(B)(1)(b) discussing §108 and computer programs.

<sup>143</sup> Comment 1 (John K. Tener Library) at 1.

<sup>144</sup> Comment 6 (Jefferson County Library) at 1.

<sup>145</sup> E-mail Comment 4.12 (Glendora Library) at 1.

<sup>146</sup> See p. 11 of the Appendix to this Report for more information on this library's activities.

<sup>147</sup> Telefacsimile from Fay Ann Golden, Library Director (Mar. 25, 1994).

**b. Library associations.** The comments of representatives of library associations suggested that much of what is called "lending" is really on-premise use of software in libraries and educational institutions. In what may seem a contradiction in terms, the Joint Libraries reported that "libraries that lend software generally do so in-house only."<sup>148</sup> On-premise use of software may be more the norm than "take-home" lending. Several responding libraries said they lend software for patrons to take home, but much of the software "lent" in health science libraries, including those affiliated with educational institutions, is used on library premises.<sup>149</sup> Research libraries, law libraries, and special libraries also generally make software available for transmission on local area networks.<sup>150</sup>

**c. Libraries in educational institutions.** Several libraries in educational institutions gave information about software lending, but the data are insufficient to give a concrete picture of what is actually happening. On the average day, the North Carolina State University Libraries lend five or six pieces of software -- virtually all of it accompanying published works -- to its own users; it lends roughly one software item per week to other li-

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<sup>148</sup> See Comment 2 (Joint Libraries) at 2.

Many of our members have licensing agreements with software providers that permit the[m] to load software on library-run computer networks and much software never is lent to library patrons . . . Some copyright owners expressly permit the lending or copying of their software. For example, the Center for Computer-Associated Legal Instruction (CALI) expressly permits their educational programs to be copied to disk and loaded onto personal computers in one's home. Libraries that have acquired CALI software do lend the software to their patrons.

*Id.*

<sup>149</sup> See Comment 8 (Medical Library Association) at 2 ("Lending software is usually confined for use within the library to qualified users, usually predominantly from within the institution.").

<sup>150</sup> Comment 2 (Joint Libraries) at 2.

braries.<sup>151</sup> The Science and Engineering Library at the University of Southern California reported little or no circulation of software materials, adding that the software being lent is usually that accompanying books.<sup>152</sup> A third library also reported that it only circulates software packages about 24 times a year.<sup>153</sup>

d. Computer centers. The Computer Center at the University of Arizona gets software on permanent loan from companies around the world, and has about 950 software packages in its collections available for circulation for two weeks at a time. The center circulated 1,106 software packages in 1992; it also lends 15-20 packages a year to teachers at a local community college.<sup>154</sup>

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<sup>151</sup> E-mail Comment 4.13 (North Carolina State Univ.) at 2.

<sup>152</sup> E-mail Comment 4.10 (Univ. of Southern California) at 1.

<sup>153</sup> See E-mail Comment 4.5 (Tulsa Jr. College) at 1.

<sup>154</sup> E-mail Comment 4.15 (Univ. of Arizona) at 1. According to the university computer center, many software companies agree it is a useful idea to have a central place on campus [the computer center] where people can try out software, and thus provide "permanent loan" copies for that purpose under a verbal or written license agreement. Most companies agree that the copy may be taken out of the computer center and installed on a campus computer or at a professor's home. Students are not permitted to take copies off premises. Some companies require that a program not be circulated at all, and in those cases installation is permitted only at the computer center. Telephone interview with Anita Almond, University of Arizona CCIT Faculty Resources for Instruction Computer Center (Mar. 25, 1994).

## 2. Access Via File Server.

The University of Northern Iowa asserted that student needs cannot be met through lending computer programs. Instead it utilizes file servers to make hundreds of thousands of software transmissions of software items to students every year.<sup>155</sup>

## 3. Questions Raised.

The limited and general nature of the responses to our Notice of Inquiry suggests either that we did not frame this question in a way that would elicit detailed information, or that there is simply not enough experience as yet from which meaningful data could be drawn. The survey done by ALA also responded with general information. As explained further in the next section of this Report, in the coming months we plan to work out with librarians and their associations a methodology for determining and measuring what is actually happening with respect to software lending. Meanwhile, the comments received so far raise troubling questions that need to be addressed:

- 1) Are libraries reluctant to lend software, and, if so, why?<sup>156</sup>
- 2) Assuming that libraries and their patrons would benefit by a better understanding of their prerogatives under the statute with respect to

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<sup>155</sup> Comment 9 (Univ. of Northern Iowa) at 2.

A file server is simply a computer that serves a local area network. Computer programs that are made available through a local area network would be stored on a file server. See also Mitzi Waltz, *Net Trafficking: the Copyright Rift: File server and file sharing make illegal copying of software far easier, but program licenses lag behind current technology*, MacWeek (August 20, 1991) [hereinafter "Waltz"] (quoting Microsoft manager of corporate accounts marketing Ron Davis).

<sup>156</sup> See, e.g., Comment 7 (Niagara University) at 1.

software lending, what can be done to clear up confusion and misconceptions and to develop that better understanding?

**C. DO THE REGULATIONS REQUIRING A WARNING OF COPYRIGHT REPRESENT AN ONEROUS BURDEN?**

1. **Those Saying No: Not A Burden.** Most responding libraries or associations did not regard the warning of copyright provided by the Copyright Office regulations in 37 C.F.R. §201.24 as a burden.<sup>157</sup>

a. **Library associations.** The Joint Libraries stated that the copyright warning "does not present an undue burden to its members."<sup>158</sup> The Medical Library Association agreed that affixing a copyright warning notice statement is not a burden and can be incorporated into library processing procedures, but it pointed out that the statement is too long for the space available on software packages.<sup>159</sup>

b. **Libraries in educational institutions.** Three librarians from libraries in nonprofit educational institutions reported that they are adhering to the warning of copyright requirement in lending software and that it does not pose a problem.<sup>160</sup> The Planning Director at North Carolina State University Libraries said that, during the initial processing of software

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<sup>157</sup> See *supra* text accompanying note 83 (quoting text of warning).

<sup>158</sup> Comment 2 (Joint Libraries) at 2; see also E-mail Comment 4.12 (Glendora Library) at 1.

<sup>159</sup> Comment 8 (Medical Library Association) at 2.

<sup>160</sup> See E-mail Comment 4.10 (Univ. of Southern California) at 1; E-mail Comment 4.13 (North Carolina State Univ.) at 2; E-mail Comment 4.5 (Tulsa Junior College) at 1.

material, the cataloging staff routinely affixes the warning to the folder with which the material will be circulated.<sup>161</sup> A librarian from the University of Southern California Science and Engineering Library observed that it takes more time to process copies of software with the complete copyright warning, but did not see this as onerous.<sup>162</sup>

c. **Computer centers in educational institutions.** Although it is arguable that educational institutions that "transfer" copies of computer programs to faculty, staff, and students through a computer center, media center, curriculum center, or the like, are exempt under §109(b)(1)(A), it appears that they often adhere to the notice requirement contained in §109(b)(2)(A).<sup>163</sup> At the University of Wisconsin-Madison, the Instructional Materials Center complies with the library lending regulations in 37 C.F.R. §201.24,<sup>164</sup> and a media center specialist from Niskayuna High School in New York said that "we plaster the software with ownership and copyright labels."<sup>165</sup> A library employee at the University of Arizona insisted that they do everything they can to comply with the law, and that this includes a program to ensure that patrons understand the law. She added that they copy the warning on the front side of a page that contains the University's software policy, and that this is "[n]ot a big deal."<sup>166</sup>

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<sup>161</sup> E-mail Comment 4.13 (North Carolina State Univ.) at 2.

<sup>162</sup> E-mail Comment 4.10 (Univ. of Southern California) at 1.

<sup>163</sup> E-mail Comment 4.9 (Univ. of Wisconsin-Madison) at 1; E-mail Comment 4.3 (Niskayuna High School) at 1; E-mail Comment 4.15 (Univ. of Arizona) at 1.

<sup>164</sup> E-mail Comment 4.9 (Univ. of Wisconsin-Madison) at 1.

<sup>165</sup> E-mail Comment 4.3 (Niskayuna High School) at 1.

<sup>166</sup> E-mail Comment 4.15 (Univ. of Arizona) at 1.

2. **Those Saying Yes: The Warning Is A Burden.** Some library representatives objected to the warning of copyright regulations on the ground that the requirements pose administrative and budgetary burdens.

a. **Library associations.** Edward Valauskas, Chair of the American Library Association's Copyright Ad Hoc Subcommittee, found the required software labels "difficult to create, unreadable, and expensive."<sup>167</sup> He argued that they add administrative and budgetary burdens.<sup>168</sup> The Medical Library Association commented that the statement is too long for the space available on computer program packages.<sup>169</sup>

b. **Other commentators.** An employee at a laboratory at the University of Massachusetts at Amherst reported that, at a time when library budgets are being severely cut, the labels may create administrative burdens and unwanted enforcement responsibilities.<sup>170</sup> The Science and Engineering Library of the University of Southern California indicated that the additional processing tasks may become a problem if the amount of software in library collections continues to increase at the present rate.<sup>171</sup>

c. **Materials center in educational institution.** The University of Wisconsin-Madison's Instructional Materials Center -- an institution that may be exempt from the regulation covering lending of software by nonprofit libraries, but which nonetheless is adhering to it -- has also had trouble trying to fit the required notice in a small space:

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<sup>167</sup> Comment 4 (American Library Association) at 3.

<sup>168</sup> *Id.*

<sup>169</sup> Comment 8 (Medical Library Association) at 2.

<sup>170</sup> E-mail Comment 4.4 (Univ. of Mass.) at 2-3.

<sup>171</sup> E-mail Comment 4.10 (Univ. of Southern California) at 1 (emphasis added).

There seems to be no commercial vendor who is selling labels with the exact copyright warning text as specified by law. We had labels typeset, reduced, and printed locally -- which seems like a lot of duplicate effort if everyone is doing the same thing. Also, is the full 3 paragraph text really necessary on every piece of software? We got the copyright warning reduced to a 2"x3" label -- which I'm sure nobody can read.<sup>172</sup>

### 3. Electronic Transmission.

Other commentators raised the problem of providing the copyright warning in cases where copies of computer programs are distributed electronically. Responding jointly, the Association of Research Libraries, the American Association of Law Libraries, and the Special Libraries Association noted that "many patrons never see the software package itself and the accompanying warning" because software "may be loaded onto a personal computer's hard drive or on a local or wide area network."<sup>173</sup>

Because some librarians do not perceive any difference between the lending of the physical object embodying the program and the electronic transmission of the program; the Joint Libraries pointed out that some of their members are improvising ways of complying with the warning regulation. Those member libraries are exploring alternative methods of providing warning notices; for example, some have a warning notice placed on library-owned computers, and others provide a warning notice that appears automatically when the software program is called up.<sup>174</sup>

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<sup>172</sup> E-mail Comment 4.9 (Univ. of Wisconsin-Madison) at 1.

<sup>173</sup> Comment 2 (Joint Libraries) at 2.

<sup>174</sup> *Id.*

The Medical Libraries Association pointed out that, in most of its member libraries, "lending" is accomplished electronically by installing software on a computer hard drive or on a local area network file server. In this environment, many library users never see the physical package. Consequently, in the MLA's opinion, it would be more practical to place the copyright warning information on something users see in the facility or at the computer where the software is used.<sup>175</sup> The University of Northern Iowa observed that asking whether the warning is a "burden" would seem to imply that the requirement could be fulfilled in all cases, but that since there is "no effective way of labeling software launched from a file server, the warning is no burden."<sup>176</sup>

#### **4. Questions Raised.**

The statute and the legislative history of the lending and transfer exemptions recognized a distinction between nonprofit lending and educational transfer. Only lending by nonprofit libraries was conditioned on a copyright warning.<sup>177</sup> August Steinhilber, General Counsel for the National School Board Association, stated:

The entire discussion of library signs does not make sense in our context. If we send a computer and accompanying software to a "homebound handicapped student," where is the sign to be placed? Transfers of school district-owned curriculum material, no matter what the format, will likely come from a curriculum center not a school library.<sup>178</sup>

Comments concerning the copyright warning raised additional issues:

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<sup>175</sup> Comment 8 (Medical Library Association) at 2.

<sup>176</sup> Comment 9 (Univ. of Northern Iowa) at 2.

<sup>177</sup> See *supra* notes 43-81 and accompanying text (discussing legislative history). See also Comment 11 (National School Boards Association) at 1 ("Specifically, we did not want our activities covered by the library language.").

<sup>178</sup> Comment 11 (National School Boards Association) at 2.

- 1) Are libraries in nonprofit educational institutions that lend copies of computer programs required under section 109(b) to label the package in accordance with 37 C.F.R. §201.24?
- 2) Are nonprofit educational institutions that lend physical copies of computer programs to faculty, staff, or students through computer centers or curriculum centers required to label with notice of copyright under §109(b)(2)(A), or are they exempt under §109(b)(1)(A)?<sup>179</sup>
- 3) Is there a copyright warning notice requirement under §109(b) for electronic transmission of copies of computer programs by nonprofit libraries or educational institutions? Should there be a copyright warning requirement for online distribution of copies of computer programs or other software (i.e., a warning placed on-line or posted at on-premises computer work stations?).
- 4) Should the warning of copyright required by 37 C.F.R. §201.24 to be affixed to each package containing a copy of a computer program that is the

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<sup>179</sup> The answer is probably no. These "transfers" are probably exempt under §109(b)(1)(A). *See infra* Part V(C)(2)(b).

subject of a library loan be simplified or reduced in length?

**D. IS UNAUTHORIZED COPYING, ADAPTATION, REDISTRIBUTION, PUBLIC PERFORMANCE OR DISPLAY OF COMPUTER PROGRAMS TAKING PLACE? IS THERE EVIDENCE OF UNAUTHORIZED COPYING?**

This is another area where the responses seemed inconclusive. We asked two related questions in our Notice of Inquiry:

- 1) Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display of computer program is occurring as a result of the nonprofit lending permitted by §109(b)?
- 2) Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?

The first question was supposed to find out what people thought was probably happening; the second was aimed at getting direct evidence, if any. The answers suggest that there is little or no direct evidence and that suppositions are based on convictions rather than fact. Software representatives asserted that copying is in fact taking place. Library representatives asserted that members are making every effort to ensure the law is followed. Individual commentators took varying positions.

**1. Yes, There Probably Is Some Infringement.**

**a. Software associations.** The Software Publishers Association pointed out that, although it "does not have either the resources or the information to present quantitative

evidence of software sales lost to infringement of computer programs lent by nonprofit libraries,"<sup>180</sup> it is convinced that the nonprofit library rental right results in unauthorized copying of software. The SPA asserted that "the nonprofit lending exemption in its current form does not protect the integrity of the copyright system because it facilitates unauthorized copying by library patrons."<sup>181</sup>

Although SPA could cite no specific evidence of unauthorized copying under the lending exemption,<sup>182</sup> it urged that economic factors and the present broad scope of the nonprofit library lending exemption "threaten to eviscerate the critical right of copyright owners to control unauthorized reproduction of computer programs."<sup>183</sup> The SPA comment expressed the belief that unauthorized copying does in fact result from lending by nonprofit libraries, and reported a claim by commercial software rental businesses that community public libraries provide alternative sources of unauthorized computer copying of programs.<sup>184</sup>

Like rental, lending computer programs for use outside the library premises simply invites library patrons to make unauthorized copies in the privacy of their own homes. The only capital equipment needed to make perfect copies of computer programs is the very computer on which the borrowed programs would be used in the first place. Then, with the push of a few keys or the click of a mouse, entire computer programs can be reproduced almost instantaneously. Unlike the burdensome process of photocopying a book, copying a computer program is easy, quick, and makes perfect reproduc-

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<sup>180</sup> Comment 5 (Software Publishers Association) at 5.

<sup>181</sup> *Id.* at 2.

<sup>182</sup> *Id.* at 4-5.

<sup>183</sup> *Id.* at 4. SPA quoted from the House Report accompanying the Computer Software Rental Amendments Act of 1990, where it was acknowledged that "the same economic factors that lead to unauthorized copying in a commercial context may lead library patrons also to engage in such conduct." *Id.*

<sup>184</sup> *Id.* at 4-5 (citing reports given to SPA Executive Director Ken Wasch).

tions. This ease encourages infringement by unscrupulous library patrons that is virtually impossible for the nonprofit library or the copyright owner to detect.<sup>185</sup>

The Business Software Alliance also expressed serious concern about piracy of software in general, and argued that the single greatest threat to the viability of the software industry is unauthorized duplication and distribution of computer software programs.<sup>186</sup> Although BSA conceded that it had been unable to develop empirical data about the extent to which piracy can be traced directly to the lending practices of nonprofit libraries, it passed on reports received "via its domestic piracy hotline, that nonprofit entities, including educational institutions and academic departments are involved in unlawful copying."<sup>187</sup>

Robert M. Kruger, who directs BSA's North American Anti-Piracy campaign, said that federal law enforcement authorities have informed him that "one particular form of software piracy -- piracy carried out by illicit bulletin board and hacker operations -- tends to disproportionately involve inhabitants of the university environment."<sup>188</sup> Kruger argued that library patrons are no different from the general population, adding that the academic environment is quite vulnerable to software abuse, and that existing requirements should not be further relaxed.<sup>189</sup>

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<sup>185</sup> *Id.* at 4.

<sup>186</sup> Comment 3 (Business Software Alliance) at 1. BSA estimated losses to the domestic industry from use of unlicensed software throughout the world total \$12 billion annually, and that losses due to software piracy in the United States run as high as \$1.9 billion annually. *Id.*

<sup>187</sup> *Id.* at 1-2. BSA reported that, in the first nine months of 1993, its domestic hotline "received hundreds of calls reporting illegal duplication of copyrighted software by businesses, organizations and institutions." *Id.*

<sup>188</sup> *Id.* at 2.

<sup>189</sup> *Id.*

b. **Software publisher.** A supporter of the library lending exemption, Balloons Software's Phil Shapiro, emphasized that librarians should impress upon patrons "their legal and moral duty to use the software for legitimate evaluation purposes only." Software publishers, like all copyright owners, he argued,

require assurances that their hard work is not unlawfully appropriated through software piracy. To understand the dimensions of the piracy problem it is sufficient to know that a single floppy disk, representing several thousand hours of programming work, can be easily duplicated in under a minute. The facility with which microcomputer software can be unlawfully appropriated suggests that libraries that choose to circulate commercial microcomputer software ought to take proactive steps to diminish the possibility that circulated software is illegally copied.<sup>190</sup>

c. **Systems programmer.** Gary Warner, a systems programmer at Samford University Computer Services, shared Krüger's concerns. Warner argued that library lending of software will always lead to the illegal copying by some patrons and should be discouraged.<sup>191</sup> As evidence, he pointed out that programs for spreadsheets and word processing call for weeks of use, and that the average user would have no legitimate use for them if limited to a short loan period.<sup>192</sup> He added that, where software must be copied before it can be used, requiring both hard disk space and an hour or more to install,<sup>193</sup> it is highly unlikely that the library patron will delete it.

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<sup>190</sup> E-mail Comment 4.1 (Balloons Software) at 1-2.

<sup>191</sup> E-mail Comment 4.2 (Samford University) at 1.

<sup>192</sup> *Id.* at 2.

<sup>193</sup> *Id.* See also Sajjan G. Shiva, *Computer Design and Architecture* 216 (2d ed. 1991), cited in Corsello, *supra* note 13, at 186 n. 40.

d. **Software user.** One Internet respondent admitted that "on many occasions [he had] copied friends' software."<sup>194</sup> Although his comments do not relate directly to library lending, they do have relevance to the kind of unauthorized copying that may go on outside the library:

On no occasion, have I continued using the software after determining I really wanted the software . . . . even if I have lots of bootlegged software laying [sic] around, I seldom if ever use it. On the occasion when I find something that I really need, I buy it. My experience with other people that do software development and use computers leads me to believe that they are doing the same kind of thing.<sup>195</sup>

His conclusion was that bootlegging software for personal use actually causes more products to be sold than would have been otherwise.<sup>196</sup>

## 2. **No, There Is No Evidence of Unauthorized Copying.**

a. **Library associations.** Library associations reported they have no evidence of unauthorized copying.<sup>197</sup> The Joint Libraries, which commented on behalf of law libraries, research libraries, and special libraries, asserted that, "[b]ased on a survey of selected members we have no evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software."<sup>198</sup> The Joint Libraries emphasized that every effort is made to assure that unauthorized copying, adaptation, redistribution, public performance and display of computer programs do not occur in their member

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<sup>194</sup> E-mail Comment 4.16 (Fittery) at 1,2.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Comment 2 (Joint Libraries) at 2-3.

<sup>198</sup> *Id.* at 4.

libraries as a result of library lending of software. They pointed to librarians' efforts to educate staff, students, faculty, and other users about what may and may not be done with copyrighted works, including computer programs. These educational efforts include both posting notices and issuing policy statements.<sup>199</sup>

The library associations stressed that librarians have a vested interest in the copyright system and in intellectual property protection. They pointed out that librarians -- and library users -- are creators as well as users of intellectual property, and therefore have an added incentive to respect copyright.<sup>200</sup> Recognizing that copyright infringement leads to lost sales and increased costs, as consumers of information librarians want to keep costs for all creative works low.<sup>201</sup> The American Library Association stated: "Libraries and educational institutions manage software in completely different ways from other materials in order to protect the interests of software developers."<sup>202</sup>

**b. Responses of individual public or educational libraries.** Six librarians responded that they have no evidence that unauthorized copying results from the lending of

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<sup>199</sup> *Id.* at 3.

<sup>200</sup> *Id.*

Faculty, librarians, researchers, students, and other institutional employees write books and articles, create audiovisual works, and develop software. While continu[ing] to emphasize the importance of sections 107 and 108 of the Copyright Act in striking the appropriate balance between creators' and users' rights, we have an obligation to our patrons and to our larger institutions to help ensure that owners' rights are not abused within our libraries.

*Id.*

<sup>201</sup> *Id.* at 4-5. *See also* Comment 1 (John K. Tener Library) at 2 (stressing right of software creators to "enjoy the same copyright privilege that books have" so long as privilege does not exclude the right of libraries to lend software).

<sup>202</sup> Comment 4 (American Library Association) at 2.

computer software.<sup>203</sup> The North Carolina State University Libraries was "unaware of any such violations."<sup>204</sup> The Science and Engineering Library at the University of Southern California knew of no evidence that unauthorized copying of software available under these procedures exists.<sup>205</sup> A part-time employee in a personal computer laboratory reasoned that, since he is "unaware of any copyright violations in regard to site-licensed<sup>206</sup> software purchasable from Personal Computer Support Services, a University Computer Services branch, . . . the same might be true of rental software if it were available."<sup>207</sup>

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<sup>203</sup> See E-mail Comment 4.12 (Glendora Library) at 1; E-mail Comment 4.13 (North Carolina State Univ.) at 2; E-mail Comment 4.10 (Univ. of Southern California) at 2; E-mail Comment 4.3 (Niskayuna High School) at 1. See also E-mail Comment 4.5 (Tulsa Jr. College) at 1; E-mail Comment 4.4 (Univ. of Mass.) at 3.

<sup>204</sup> E-mail Comment 4.13 (North Carolina State Univ.) at 2.

<sup>205</sup> E-mail Comment 4.10 (Univ. of Southern California) at 2.

<sup>206</sup> Site licensing is a method of licensing by mass market software vendors, often used in university installations. Site licenses usually provide a blanket license for unlimited use rights to a software product within a defined geographic boundary or other fixed boundary for a fixed price. Site licenses require a separate negotiation for each license. See William H. Neukom and Robert W. Gomulkiewicz, Licensing Rights to Computer Software, Practicing Law Institute, March-April 1993.

<sup>207</sup> E-mail Comment 4.4 (Univ. of Mass.) at 3.

One librarian stressed that librarians take precautions, but cannot police library lending of software.<sup>208</sup> Other librarians admitted that some unauthorized copying takes place,<sup>209</sup> but considered that it is no more than, and probably less than, that which occurs with periodicals or monographs.<sup>210</sup> Another librarian indicated that, though there have been a few situations where she suspected illegal activity, on the whole she regarded users as honest.<sup>211</sup> One employee of a high school media center considered the fact that people continue to sign out the curriculum material as proof that copying is not taking place.<sup>212</sup> However, another commentator suggested that a current flaw exists in the system of software lending: "either software developers or educational institutions are unwilling to experiment to find out if there is a problem with copying."<sup>213</sup>

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<sup>208</sup> Comment 9 (Univ. of Northern Iowa) at 2. Another library has patrons who borrow commercial software fill out an agreement which states:

1. I understand that U.S. Copyright Law prohibits the unauthorized copying of copyrighted software, in borrowing such software from the library, I agree to observe the prohibition against copying.
  - a. I will not copy software to another diskette.
  - b. If software is copied to a hard disk for test or evaluation, I will erase the copy before returning the software to the library.

Agreement for Borrowing Commercial Software from the Ruth H. Hooker Research Library and Technical Information Center.

<sup>209</sup> E-mail Comment 4.11 (McKnight) at 1; E-mail Comment 4.5 (Tulsa Jr. College) at 1.

<sup>210</sup> E-mail Comment 4.11 (McKnight) at 1. *See also* Comment 12 (Univ. of Northern Iowa) at 7.

<sup>211</sup> E-mail Comment 4.15 (Univ. of Arizona) at 2.

<sup>212</sup> E-mail Comment 4.3 (Niskayuna High School) at 1.

<sup>213</sup> E-mail Comment 4.4 (Univ. of Mass.) at 1 (emphasis added).

### 3. Questions Raised.

The comments pertaining to unauthorized copying raise two ultimate questions:

- 1) Is there any practical way to ascertain if nonprofit lending results in unauthorized copying?
- 2) Could a survey or experiment be developed and targeted to libraries and library patrons to investigate whether nonprofit lending of computer programs results in unauthorized copying?

## E. **IS THE 109(A) EXEMPTION HARMFUL TO THE INTERESTS AND INCOME OF COPYRIGHT OWNERS?**

### 1. Those Who Believe the Exemption Is Probably Harmful.

a. Software publishers' position. With respect to the effect of the library lending exemption on authors' income, software interests drew an economic distinction between loans by nonprofit libraries and loans or other transfers by nonprofit educational institutions. The Software Publishers Association again emphasized the importance of the educational market to many software publishers; it stressed that software publishers already offer a variety of licensing programs that permit educational institutions to make multiple copies. SPA noted that the kindergarten through grade 12 educational software market for software totaled 570 million dollars in 1992 alone. SPA did not have figures for the post-secondary market, but asserted that those figures would also be substantial.<sup>214</sup>

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<sup>214</sup> Comment 5 (Software Publishers Association) at 3-4.

As noted above,<sup>215</sup> SPA acknowledged that it lacks the evidence to demonstrate the quantity of sales lost through the actions of unscrupulous patrons who copy computer programs lent by nonprofit libraries, but insisted nevertheless that unauthorized copying is happening.<sup>216</sup> To support its belief, SPA pointed out that commercial software rental businesses believe community public libraries are a source unauthorized copies of computer programs. It also expressed concern that copying could increase with the expansion of works stored in digital form.<sup>217</sup>

b. **Media library.** Only one librarian suggested that library lending might harm copyright owners. Karl Miller, a media librarian at the University of Texas Library, expressed concern about software employed to operate databases stored in CD-ROMs. He believes there is a potential copying problem since most directions begin with the suggestion that the user should load the software onto a hard disk; the danger is that, once the software is loaded, the user will not delete it. For this reason, Miller argued, that libraries should not be permitted to lend informational software.<sup>218</sup>

## 2. **Those Who Believe the Exemption Is Not Harmful.**

Librarians and library representatives considered that the link between trial evaluation and purchase is quite strong, and argued that making software available for evaluation may increase sales of software.

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<sup>215</sup> See Part D above.

<sup>216</sup> See *id.* at 4-5. See also Comment 3 (Business Software Alliance) at 3 ("...[T]here is no reason to believe that library patrons are exempt from the influences and behavior patterns reflected in the general population.").

<sup>217</sup> Comment 5 (Software Publishers Association) at 4-5.

<sup>218</sup> E-mail Comment 4.8 (Univ. of Texas) at 1.

a. **Individual libraries.** The majority of responding libraries expressed the belief that their ability to lend software is not harmful to the interests of copyright owners.<sup>219</sup> A junior college library coordinator emphasized that the volume of loans is low and that some patrons say they are going to buy software after viewing it.<sup>220</sup> Three other commentators agreed that lending is not harmful to software proprietors' interests.<sup>221</sup>

Although librarians, like software representatives, have no direct evidence to support their case, most library respondents considered the exemption beneficial to the interests of software copyright owners. Their feelings are summed up in a comment from Glendora Public Library:

[C]irculating software has a direct link to the public's purchasing of both software and hardware, because it makes the public aware of the vast possibilities of what computers and computer software has to offer. This library service . . . only whets the public's appetite.<sup>222</sup>

b. **Computer centers at educational institutions.** Three respondents from laboratory or computer centers at educational institutions agreed that software lending is beneficial to software proprietors, since people who borrow or have access to software are most apt to purchase it.<sup>223</sup> One comment urged that library lending is "one of the mechanisms

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<sup>219</sup> E-mail Comment 4.5 (Tulsa Jr. College) at 1.5; E-mail Comment 4.10 (Univ. of Southern California) at 2; E-mail Comment 4.12 (Glendora Library) at 2; E-mail Comment 4.13 (North Carolina State Univ.) at 1.

<sup>220</sup> E-mail Comment 4.5 (Tulsa Jr. College) at 1.5.

<sup>221</sup> E-mail Comment 4.10 (Univ. of Southern California) at 2; E-mail Comment 4.12 (Glendora Library) at 2; E-mail Comment 4.13 (North Carolina State Univ.) at 1.

<sup>222</sup> E-mail Comment 4.12 (Glendora Library) at 2.

<sup>223</sup> Comment 9 (Univ. of Northern Iowa) at 2; E-mail Comment 4.4 (Univ. of Mass.) at 3; E-mail Comment 4.14 (Univ. of Arizona) at 2.

which has fueled the dramatic growth in sales of new and of upgraded software."<sup>224</sup> Another submitted that developers benefit more than they lose because "even where some pirating does occur" this only creates a market "for the inevitable upgrade since users tend to stick with a program they are familiar with . . . . The difficult part of selling software is getting someone to try it."<sup>225</sup> A third commentator from a center that lent 1,106 software packages in 1992 argued that software availability gives companies exposure and thus may help their income.<sup>226</sup>

c. **Software publisher.** Phil Shapiro, the sole software publisher to support the lending exemption unequivocally, echoed the view that lending promotes sales. He commented:

Speaking as a software developer and software publisher, I wholeheartedly support the circulation of microcomputer software by nonprofit libraries and educational institutions. Substantial benefits accrue to both patrons and publishers when software can be examined closely before a purchase is made.<sup>227</sup>

d. **Library associations.** The Joint Libraries asserted that a prohibition against all lending would mean fewer sales to libraries of certain kinds of software. Their claim was that lending to other libraries, or to other departments within a larger institution or university, results in more sales if the borrower decides that the software is useful and decides to purchase it.<sup>228</sup>

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<sup>224</sup> Comment 9 (Univ. of Northern Iowa) at 2.

<sup>225</sup> E-mail Comment 4.4 (Univ. of Mass.) at 3.

<sup>226</sup> E-mail Comment 4.14 (Univ. of Arizona) at 2.

<sup>227</sup> E-mail Comment 4.1 (Balloons Software) at 1.

<sup>228</sup> Comment 2 (Joint Libraries) at 3.

The Medical Library Association commented that it is difficult to estimate the effect that software availability in health science libraries has on an author's income, but iterated a point made by other librarians:

Although library users might purchase their own copies of software, more probably they would simply not use it. In educational institutions, faculty would probably be reluctant to require students to purchase software for instructional purposes.<sup>229</sup>

The American Library Association's Copyright Ad Hoc Subcommittee suggested that, "library and educational communities should work together with software developers to test more rigorously . . . [the] link between the availability of software and its sale."

Libraries and educational institutions promote the sale of software, by making it available for intelligent evaluation. Libraries and educational institutions provide uncompensated support to software developers by educating patrons and students in the use of their products and by making equipment and printed materials available to assist in the optimal functioning of programs.<sup>230</sup>

### 3. Question Raised.

Is there a quantifiable nexus between software trial and purchase? Could a survey document such a link?

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<sup>229</sup> Comment 8 (Medical Library Association) at 1. This latter comment may pertain to transfers under §109(b)(1)(A).

<sup>230</sup> Comment 4 (American Library Association) at 2.

## F. REQUESTS FOR LEGISLATIVE CHANGES OR CLARIFICATION

The final question in our Notice of Inquiry asked "whether new legislation is needed either to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users."

### 1. Software Industry Proposals for Legislative Changes.

a. Narrowing the nonprofit lending exemption. The Software Publishers Association argued that under the lending exemption, computer programs should be available for use by patrons only within the library, and not removed from library premises. The association recommended that a clear warning, stating that it is illegal to copy computer programs without permission of the copyright owner should be affixed to each computer available for use by library patrons and that the warning should specify the civil and criminal penalty for unauthorized copying. "This proposal," wrote SPA counsel Mark Traphagan, "balances the needs of copyright owners and nonprofit libraries by treating computer programs like library reference books, and by treating computers for public use like library photocopying machines with respect to the copyright infringement warning."<sup>231</sup> In SPA's view, adoption of its proposal for a narrower lending exemption would discourage unauthorized copying of borrowed computer programs since there are fewer inhibitions and less supervision at home or in the office than in a library, and would still permit nonprofit libraries to make computer programs available to those who would not otherwise have access to them.<sup>232</sup> The Software Publishers Association urged the Copyright Office, in this Report, to join in its recommendation; short of

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<sup>231</sup> Comment 5 (Software Publishers Association) at 2.

<sup>232</sup> *Id.*

this, it suggested that we review the question after a year to assess the impact of new optical storage media, such as compact disks (CDs), on the needs of library patrons and the commercial impact on software publishers.<sup>233</sup>

**b. Review the denial of rental rights to certain computer programs.**

Under §109(b)(1)(B)(ii), there is no rental or lending right for computer programs "embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes."<sup>234</sup> SPA encouraged the Copyright Office to review this issue,<sup>235</sup> and the question is discussed briefly in Part V of this Report.

**2. Librarians' Request for Clarification of the Law.** The Joint Libraries did not consider any statutory amendments necessary to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users,<sup>236</sup> but comments from two libraries called for clarification of the law.

The Jefferson County Public Library in Lakewood, Colorado, sought two specific amendments in order to circulate software "in the way we believe the Act intended."<sup>237</sup> First, it recommended an amendment making clear that the exemption applies in all cases, regardless of whether the library is the owner of the physical object embodying the computer program, holds a license from the copyright owner of the program, or is otherwise lawfully in possession of the copy of the program. The library's second proposal was that the statute make clear that

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<sup>233</sup> *Id.*

<sup>234</sup> 17 U.S.C. §109(b)(1)(B)(ii).

<sup>235</sup> Comment 5 (Software Publishers Association) at 2,6.

<sup>236</sup> Comment 2 (Joint Libraries) at 4.

<sup>237</sup> Comment 6 (Jefferson County Public Library) at 1.

the lending exemption prevails over any private agreement between a library and a software company, because "as long as software companies can prohibit the library's circulation by private agreement, any protection under the Act is vitiated."<sup>238</sup>

At the University of Northern Iowa, the Director of Library Services and the Director of Information Systems and Computing Services, observed that recent technological and institutional changes necessitate statutory clarification on the ability of libraries to lend software.

They asked:

If supplying a copy of a network-licensed program from a file server to a network workstation constitutes "lending?" If so, then colleges and universities across the country would be adversely affected by legislation controlling the lending of software.

They asked for clarification as to whether lending occurs if a workstation is not hard-wired to a network, but accesses it from a remote (off-site) location, and whether it matters if the same copy of software is used on different computers at different times. They also asked whether using software in a classroom (for demonstration, to display information, or for use by students in a class) would constitute "lending." If so, they said, legislation to restrict lending would severely impede the use of technology in education."<sup>239</sup>

With respect to "software" (a term used only in the title of the act amending the Copyright Code, and appearing nowhere in the statutory lending exemption itself), the administrators at the University of Northern Iowa inquired whether the term "software" refers exclusively to computer programs, or if CD-ROM and other databases would also be considered

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

"software".<sup>240</sup> With respect to the term "library," the university administrators questioned how to define library beyond just calling an entity a library.<sup>241</sup> They asked whether a university computer laboratory, university classroom or laboratory, primary or secondary school classroom or laboratory, or an educational media center would be considered a library.<sup>242</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (inquiry whether an entity is a library "if and only if it is called a library? If so, the legislation could be circumvented by merely changing the name of the entity. If not, what is the definition of a library?") *Id.* This presents the same question Congress considered with §108. *See infra* text accompanying note 280-281 (discussing definition of "library" in relation to §108).

<sup>242</sup> *Id.*

**V. HAS THE COMPUTER SOFTWARE LENDING EXEMPTION FOR NONPROFIT LIBRARIES ACHIEVED ITS PURPOSE?**

Under §109(b)(2) of the Copyright Code, the Office was asked to survey the first three years in actual operation of the provision exempting "the lending of a computer program for nonprofit purposes by a nonprofit library" from copyright liability, and to report its findings to the Congress. Specifically, we were directed to determine whether the exemption "has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function." We were asked for "information or recommendations" as to carrying out these purposes, and were expressly given the opportunity to submit later reports if appropriate.

In response to this mandate we tried to obtain from the broadest possible community of owners and users the most relevant and meaningful information available. The results of our efforts are set forth in this Report, and on the whole they are inconclusive and somewhat disappointing. The answers we have received to our inquiries suggest that as yet there is no body of facts on which informed judgments and recommendations can be based. The evidence that has been put forward is anecdotal at best, and the conclusions asserted are a priori and dialectic. Indeed, there appears to be confusion and uncertainty as to what the law in this area permits and requires.

It seems clear to us that more study and analysis will be needed as patterns of software lending by libraries eventually emerge. The Copyright Office is pledged to continue this study,

and will report its findings when they can be founded upon hard facts rather than arguments and speculation. At this time we have no basis for recommending any legislative changes, but we are acutely aware that the entire structure of the world of communications and information transfer are undergoing fundamental and rapid change, and that library services are at the center of this revolution.

We conclude this Report with a survey of the questions and answers that were considered relevant to the issue in 1993. It is safe to predict that the questions and answers will be entirely different a few years from now, but at least this Report provides a starting point for further studies and surveys in the months ahead.

#### **A. RESPONSE TO CONGRESSIONAL MANDATE**

Some librarians have been providing software for use by their patrons ever since it became available for library purchase. In 1990 Congress amended the first sale doctrine of section 109 to give copyright proprietors a broad right (subject to certain exceptions) to control for-profit rental and lending of computer programs ("including any tape, disk, or other medium embodying such program"); the same legislation contained an express exception governing nonprofit lending of computer programs by nonprofit libraries. A few libraries, such as the Liverpool Public Library in Liverpool, New York, already had strong software programs, and continued to develop them after the 1990 amendment went into effect. Nevertheless, despite the explicit exemption for nonprofit library lending of computer programs, it is not yet clear what the majority of libraries are doing in this area; we got too few responses from individual libraries and, although the joint library survey gave us some general information and our own

informal survey gave us some more, there was not enough for us to come to any general conclusions.

Not only is there very little concrete evidence concerning policies and practices with respect to computer program lending by libraries throughout the country, but there is practically no evidence on the equally important related question: does lending increase unauthorized copying of software? The copyright proprietors urged that nonprofit library lending necessarily increases piracy and decreases sales to patrons; librarians argued that they do everything in their power to respect the copyright law and that, by making programs available for evaluation and testing, library lending enhances the likelihood of sales. These are arguments that cry out for empirical testing and analysis, but this has not yet been done.

There are two major factors to consider in evaluating all this. First, the 1990 law was passed during a period when library budgets were shrinking, and by the time of our survey they had been cut to the bone; this dismal picture is not likely to change in the immediate future. Some libraries that would like to invest in the hardware and software necessary to provide their users with extensive electronic and digital information simply do not have the resources to do so. Second, the world of information storage and transfer is going through a fundamental revolution; with no money to waste on trial and error projects, librarians feel it is prudent to await the emergence of a solid information infrastructure before determining how best to serve their patrons in the future.

As we interpret our basic mandate, the Copyright Office was asked to determine two things: (1) whether the explicit and implicit restrictions in section 109, including the lending exemption, are inhibiting libraries from fulfilling their core function of making as much

information as possible available to their patrons, and (2) whether section 109 in operation hurts copyright owners of computer programs by supplanting what realistically would have been sales.

On the first question the answer is no, but not because of section 109. So far not enough libraries are engaging in widespread circulation of computer programs for the lending exemption and its implicit limits to have any effect one way or the other. However, the real question here has nothing to do with the physical lending of artifacts: it involves the copyright implications of a library taking a computer program it owns, storing it in a computer, and putting it on-line for use by patrons and others. On this question we are more at the stage of asking what the copyright law permits and forbids libraries to do than of asking what they are doing, and here there are far more opinions than answers.

As for the effect of the library exemption on the rights of copyright owners, all we have are arguments and opinions. The House Report accompanying the Computer Software Rental Amendments Act of 1990 acknowledged that "the same economic factors that lead to unauthorized copying in a commercial context may lead library patrons also to engage in such conduct."<sup>243</sup> However, as one employee of the library at the University of Massachusetts suggested, a current flaw in the software lending system may be that "either software developers or educational institutions are unwilling to experiment to find out if there is a problem with copying."<sup>244</sup> Empirical data on this important issue are totally lacking.

As we see it, what is needed now is to bring all of the various interests together to work out a mutually-agreed upon methodology for collecting, developing and assessing as much

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<sup>243</sup> H. Rep. No. 735, 101st Cong. 2d Sess. 8 (1990).

<sup>244</sup> E-mail Comment 4.4 (Univ. of Mass.) at 1. *See also* Comment 3 (Business Software Alliance) at 2 (experience of lending institutions could help inform BSA's "view of the scope of the piracy problem").

information on these questions as we can find. We must figure out the questions that need to be asked, try to reach common understandings as to what the law means, evaluate the effect of onrushing technological changes, and agree on how best to find out what is really going on. The Copyright Office is willing to spearhead this effort, under the authority given to us under the 1990 amendment, and we have suggested what some of our next steps might be. Meanwhile we will seek to analyze and comment on some of the questions our study has already raised.

## **B. QUESTIONS PRESENTED**

### **1. Copying.**

a. **Copying by library patrons or transferees.** The legislative history of the Software Rental Act makes it clear that the amendments to section 109 do not authorize any copying. With respect to computer programs, whether copying by patrons and transferees constitutes copyright infringement must be determined under section 107<sup>245</sup> or the terms and conditions of a license agreement with the copyright owner.

As all commentators agreed, there is no empirical evidence one way or the other as to whether, as a result of the library lending exemption, unauthorized copying is occurring. The nonprofit community said it believed that most users are honest. The copyright owners noted that lending invites copying, especially when it can take place in the privacy of one's home. Without going into supporting detail, the Software Publishers Association stated that, according to reports from their investigators, commercial software rental businesses believe that community public

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<sup>245</sup> Section 107 is the fair use section of the law. Section 108, involving copying by libraries, is described below. We will also discuss section 117, though it is not really in question here, since the borrower or transferee is not the "owner of the program," and section 117 copying privileges only apply to owners (not possessors) of programs.

libraries are alternative sources of unauthorized copying of computer programs. Gary Warner of Samford University Computer Services stated that, in his opinion: "Software lending by libraries will always lead to the illegal copying of software by some patrons."<sup>246</sup>

One of the exclusive rights of the copyright owner is "to reproduce the copyrighted work in copies."<sup>247</sup> Whenever a computer program is put to routine use, this act of reproduction in copies, or "copying," can occur at any or all of several stages, including storage in RAM, ROM, and floppy disk, transfer to a file server or another computer, and so on. At the very least, nearly all computer programs will be reproduced in whole or part in the random access memory (RAM) of the computer each time the library patron, student, faculty member, or other person uses the computer program.

While RAM can be erased by turning off the computer, this cannot be taken to mean that there has been no unauthorized copying. The definition of "copies" in the statute covers "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device,"<sup>248</sup> and there is judicial authority supporting the premise that RAM storage, even for a short time, constitutes "reproduction in copies" under the Copyright Code.<sup>249</sup> Library patrons and borrowers cannot

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<sup>246</sup> E-mail Comment 4.2 (Samford University) at 1.

<sup>247</sup> 17 U.S.C. §106(1) (1992).

<sup>248</sup> *Id.* at §101. A work is "fixed . . . when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

<sup>249</sup> See Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp., No. 93-667-A, 1994 U.S. Dist. LEXIS 2156 (E. D. VA. Feb. 3, 1994); MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir.

(continued...)

rely on the "essential step" provisions of section 117 when they load computer programs into RAM or ROM because, as discussed below, that section applies only to "the owner of a copy of a computer program," and borrowers are not owners.

Although the loading of a borrowed computer program into RAM is copying, the copying almost certainly would not be considered unauthorized under the library lending exceptions; the 1990 amendment expressly authorizes libraries to lend programs to borrowers, and it would be impossible for a borrower to use a program without downloading it into RAM. An implied license for temporary RAM storage must be inferred from section 109, but the same is not true for permanent ROM storage on the borrower's hard disk or an external storage device. It follows that borrowers must erase their borrowed programs from their computers' memory before returning the programs to the library or educational institution, if they are to comply with Software Rental Act's conditions. Gary Warner of Samford University Computer Services observed that it may be unlikely that a borrower will delete a copy of software upon its return, since in order to use the software, he or she must make a personal copy of it: "The crime is not copying the software, it is failing to delete it."<sup>250</sup>

Warner went on to argue that "surveys have shown that many computer users do not consider software piracy a crime." He cited John Scully's introduction to the SPA's "White Paper on Computer Piracy," where it was suggested that "people who would never think about stealing a candy bar from a drug store have no qualms about copying a \$500 software package."

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<sup>249</sup>(...continued)  
1993), *cert. dismissed*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 671 (1994); Hubco Data Products Corp. v. Management Assistance, Inc., 219 U.S.P.Q. 450 (D. Idaho 1983).

<sup>250</sup> E-mail Comment 4.2 (Samford University) at 2.

According to Warner, pirates rationalize that there is no harm because they never would have bought the program anyway.

It is clear that programs that are borrowed must necessarily be "reproduced in copies" in the copyright sense in order to be used. What is not clear is what happens after RAM storage: to what extent do borrowers make further copies for hard-disk or external storage? how long are the further copies kept? to what extent are the further copies erased? Only borrowers have these answers, and the answers can only be obtained through surveys -- not impossible, not easy, but very important.

**b. Library copying under section 108, including the issue of interlibrary loan.** Under certain circumstances, section 108 of the Copyright Code allows libraries and archives to make facsimile copies of copyrighted works both for their own patrons and for other libraries.<sup>251</sup> The "copyrighted works" that can be copied under section 108(a) are certainly broad enough to include computer programs, but the conditions under which copies can be made and distributed were obviously not drafted with computer programs in mind and do not fit them very well: no more than one copy is allowed; the copy must be a "facsimile"; the reproduction or distribution must include a "notice of copyright." The general prerogatives given to libraries under section 108(a) are defined further in subsections (b) through (g) of section 108: a library

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<sup>251</sup> Section 108(a) provides that it is -- ". . . not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such a copy or phonorecord, under the conditions specified in this section if--

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) the collections of the library or archives are (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 a work includes a notice of copyright."

17 U.S.C. §108 (1992).

may make a copy of an unpublished work in its collections for preservation, security, or deposit in another library;<sup>252</sup> it may make a copy of a published work to replace one that is damaged, deteriorating, lost or stolen, if an unused replacement copy cannot be obtained at a fair price;<sup>253</sup> under certain circumstances it may reproduce "a small part" of a copyrighted work upon request of one of its users;<sup>254</sup> under more stringent conditions, and where the work cannot be readily obtained for a fair price, the library may reproduce an entire work or a substantial part of it for scholarly purposes.<sup>255</sup> Another provision of section 108 exempts a library from liability for "the unsupervised use of reproducing equipment located on its premises,"<sup>256</sup> though it seems unlikely that "reproducing equipment" could be held to include computers. Section 108(h) provides that the library copying prerogatives of section 108 do not extend to certain works (e.g., music, graphics, motion pictures, and audiovisual works other than news programs); computer programs are not mentioned, but many programs include works that are.

One of the commentators in a telephone conversation asked whether section 108 allowed the interlibrary loan of computer programs.<sup>257</sup> The answer is not simple. Lending an authorized copy of a program -- that is, the physical object or artifact embodying the program --

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<sup>252</sup> *Id.* at §108(b).

<sup>253</sup> *Id.* at §108(c).

<sup>254</sup> *Id.* at §108(d).

<sup>255</sup> *Id.* at §108(e).

<sup>256</sup> *Id.* at §108(f)(1).

<sup>257</sup> Telephone conversation between Jennifer Hall, Attorney-Adviser, U.S. Copyright Office, and Leslie Morris, Director of Libraries, Niagara University (March 24, 1994).

- is allowed under the terms and conditions of section 109(b): nonprofit status of lender and loan; use of the copyright warning. But the question refers to section 108, not 109, and illustrates the very common use of the term "interlibrary loan" to refer to the reproduction by the library of a copy and the transfer of ownership of the copy free of charge or for a fee; the copy reproduced never leaves the library, and the reproduction is sent off, never to return.

There are provisions in section 108 dealing with this kind of interlibrary "loan,"<sup>258</sup> but it would be hard to stretch them beyond what they were intended to cover -- journal articles and very short excerpts -- to embrace computer programs.

We are aware that the relationship between section 108 and the library lending provisions of section 109 has not been sufficiently explored, and that this issue should be part of the agenda of our continuing study of this whole problem. However, to answer the inquirer's question directly, we believe that neither section 108 nor section 109 authorizes a library to make a copy of a computer program and to transfer that copy -- electronically or any other way -- to another library for the use of a patron.

c. **Archival copies made by libraries.** Section 117 of the Copyright Code permits the owner of a copy of a computer program to make a copy or an adaptation of the program for archival purposes, as an "essential step" in the use of the program.<sup>259</sup> The law

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<sup>258</sup> 17 U.S.C. §108(d), §108(g). See H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976) at 72-73.

<sup>259</sup> Section 117 provides:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

- (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(continued...)

further provides that any "exact copies" prepared under section 117 may be leased, sold, or transferred, along with the original copy, but "only as part of the lease, sale, or other transfer of all rights in the program." Thus, if the copy from which the archival copy was reproduced was acquired under an agreement with the copyright owner, the terms of that agreement must govern the transfer of the archival copy. Section 117 also provides that adaptations may be transferred only with the copyright owner's authorization.

There are many questions about the scope and meaning of section 117, but most of them are outside the range of this Report. There can be little doubt that libraries can make an archival copy for purposes, to use the phrase in section 108, "of preservation and security." This is the usual meaning of "archival copies." The problem here is that, in common practice today, it is the "archival copy" of the computer program -- the reproduction made from the original, purchased program in the library's collections -- that is being lent, and it is the original

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<sup>259</sup>(...continued)

- (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

17 U.S.C. §117 (1988 & Supp. 1992).

Section 117 was amended in 1980 to add certain limitations on computer copyright owners' rights "to protect the public interest." Act of December 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028. See John M. Conley & Vance F. Brown, Revisiting §117 of the Copyright Act: An Economic Approach, 7 *Computer Law* 1 (1990).

that is being kept as backup. On its face, at least, this practice seems to controvert the plain meaning of the law and strain the meaning of the word "archival."

Most installation instructions tell purchasers to store the originals in a safe place and to use the backup copy for day-to-day use. The informal guidelines, drafted by Mary Hutchings Reed, counsel to the American Library Association, and Debra Stanek, and published in 1986,<sup>260</sup> stated that the original may be kept for archival purposes and the "archival copy" circulated. Those guidelines do make it clear that only one copy--either the original or the archival copy--may be used or circulated at any given time. We are not aware of any challenge by copyright owners to this interpretation,<sup>261</sup> which to us seems to make good sense.

Nevertheless, the question is a legitimate one in view of the language of the law. It is another example of how clarifications of the statutory meaning and understandings between librarians and copyright owners are needed to remove inhibitions on legitimate practices and to quiet fears on both sides. If the Copyright Office, through continuing study of the library lending issue, can contribute to these clarifications and understandings, we are eager to do so.

## **2. What Constitutes a "Computer Program" for Purposes of Section 109?**

Several comments raised a question about the scope of the library lending exemption to the rental/lending right; specifically, we were asked whether the definition of "computer program" includes "a broad range of software" such as informational works and databases on CD-ROM, office applications, educational materials, and multimedia works, including interactive

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<sup>260</sup> Mary Hutchings Reed & Debra Stanek, ALA, Library and Classroom Use of Copyrighted Videotapes and Computer Software, American Libraries, Feb. 1986.

<sup>261</sup> The Reed/Stanek guidelines were never formally adopted by the American Library Association, and on points other than the issue of lending of the archival copy, have been the subject of some disagreement.

video programs.<sup>262</sup> These are highly relevant questions, since computer programs, even in the most narrow sense of the term, are integral parts of most if not all multimedia works.<sup>263</sup> Computer programs embodied in floppy disks are increasingly published with books, and some university libraries report that this is the form of software they most often circulate.<sup>264</sup> Two important points made earlier in this Report need to be reiterated and stressed here. First, although the 1990 Act amending section 109 is named, "The Computer Software Rental Amendments Act," the text of the amendments refers only to "computer programs." The word "software" appears nowhere in the operative provisions of section 109.<sup>265</sup> The public often uses the word "software" interchangeably with the term "computer program," but the two terms do not mean the same thing. The term "software" is considerably broader than the term "computer program."

"Software" usually refers to a whole range of things that are connected with the running of a computer or a particular computer application and that are not "hardware:" the basic algorithms devised by a programmer; a program in source code or object code form; and program descriptions, flow charts, instruction and operator manuals, and other materials explaining the operations of a program.<sup>266</sup>

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<sup>262</sup> See e.g., Comment 8 (Medical Library Association) at 1; Comment 9 (Univ. of Northern Iowa) at 3; E-mail Comment 4.10 (Univ. of Southern California) at 1.

<sup>263</sup> Mike Liebhold, A Layered Theory of Design for Optical Disc Software, in *Interactive Multimedia* at 294, cited in Corsello, *supra* note 13 at 207 n.151.

<sup>264</sup> See, e.g., E-mail comment 4.13 (North Carolina State Univ.) at 1; E-mail comment 4.14 (Moser) at 1.

<sup>265</sup> The only use of the term "software" is in §109(b)(2)(B) (referring to the title of the 1990 Act).

<sup>266</sup> M. SCOTT, *SCOTT ON COMPUTER LAW* §2.01 (2d ed. 1992).

The Copyright Code defines a "computer program" as a set of statement or instructions to be used directly or indirectly in a computer in order to bring about a certain result.<sup>267</sup> Under this definition, the program must be "used directly or indirectly in a computer," as distinguished from extrinsic materials underlying, explaining, or otherwise connected with the program. In the early 1980's this statutory definition of computer programs (which are classified as "literary works" under copyright law,<sup>268</sup> was criticized as being too narrow because it did not refer to a "program description" or the "supporting material."<sup>269</sup> The Software Protection Committee of the Association of Data Processing Service Organizations (ADAPSO)<sup>270</sup> made recommendations to change the law to broaden the definition of a computer program. Bills for this purpose were introduced in the House of Representatives in 1982 and 1984,<sup>271</sup> but no action was taken on them.

The second basic point to be emphasized here is that, unless a copyrighted work is of a type that is expressly covered by the exceptions in section 109, the general "first sale" doctrine provided by that section prevails. If a library or educational institution (or anyone else) is the owner of a lawfully-made copy or phonorecord, that person or organization is free to "sell or otherwise dispose" of it unless it is a copy or phonorecord of (1) a sound recording, (2) a

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<sup>267</sup> 17 U.S.C. §101 (1988). See *supra* note 9 and accompanying text.

<sup>268</sup> See H.R.Rep. No. 1476, 94th Cong., 2d Sess. 54 (literary works includes computer programs "to the extent that they incorporate authorship in the programmer's expression of original ideas"). See generally Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); Lotus Development Corp. v. Paperback Software Int'l, 740 F.Supp. 37 (D.Mass. 1990).

<sup>269</sup> Scott, *supra* note 266 at §3.06.

<sup>270</sup> ADAPSO is now known as The Information Technology Association of America (ITAA).

<sup>271</sup> H.R. 6983, 97th Cong., 2d Sess. (1982); H.R. 6024, 98th Cong., 2d Sess. (1984).

musical work embodied in a sound recording, or (3) a computer program. The owners of copyright in those three types of works, and those only, have the right to prevent or license the rental, lease, or lending of copies or phonorecords of their works unless: (1) the renting, leasing, or lending was not "for the purposes of direct or indirect commercial advantage; or (2) the renting, leasing, or lending was of a phonorecord and was done for nonprofit purposes by a nonprofit library or nonprofit educational institution; or (3) consisted of a transfer or possession of a lawfully made copy of a computer program by one nonprofit educational institution to another or to faculty, staff, and student; or (4) consisted of lending a computer program for nonprofit purpose by a nonprofit library, if each copy lent bears a prescribed warning of copyright.

What all this adds up to for our purposes is that a library, whether for-profit or nonprofit, is free to lend anything that it owns in its collections except phonorecords and computer programs. Nonprofit libraries are free to lend phonorecords and computer programs if the loan is not for commercial advantage, though the packaging of a computer program must bear a copyright warning if the program is to be lent without copyright liability. Conversely, if the library is for-profit, if the loan is for direct or indirect commercial advantage, or if the packaging does not bear a copyright warning, unauthorized lending of a computer program would be a copyright violation unless the library has a license from the copyright owner.

Since the 1990 amendments leave open the possibility of copyright violations for library lending of computer programs under certain circumstances, it is important to determine whether a particular work is a "computer program" under section 109. A related question is whether a work that combines a computer program with one or more other types of works is subject to the

restrictions on library lending in section 109. Librarians cautioned that, if they are unable to lend the computer program component of a mixed media work, this could "make the remainder of the work functionally non-circulating, and in certain circumstances may make the entire work unusable."<sup>272</sup> Yet, unless the computer program can be separated from the rest of the package, it may in some cases be a copyright violation for a library to lend the whole package.

A number of commentators raised questions about the status of CD-ROMs under section 109. Considered by itself a CD-ROM (Compact Disk-Read-Only-Memory) is not a computer program or any other type of copyrightable work; it is an optical storage medium which, under copyright law, is considered a "copy" -- that is, a material object in which copyrighted works are stored.

At the same time, search and retrieval software in the form of a computer program is essential to gain access to the material stored on a CD-ROM. If the search and retrieval program is such an integral part that the CD-ROM cannot be lent without it, then a library would have to look to the conditions of section 109 to determine its prerogatives. As long as the lender and the loan are nonprofit and there is a copyright warning on the packaging, a library could lend a CD-ROM it owns even if the CD-ROM incorporates a computer program. If, on the other hand, the library does not own the CD-ROM but is party to a negotiated license agreement restricting lending, it would presumably be bound by the terms of the agreement.

As noted earlier, not all computer programs are covered by section 109. There are two categories of programs for which the copyright owners are given no rights to control rental, lease, or lending.

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<sup>272</sup> Comment 2 (Joint Libraries) at 4.

The first group includes computer programs embodied in a machine or product (such as an automobile or a calculator) that cannot be copied during the ordinary operation or use of the machine or product.<sup>273</sup> Also excluded are computer programs embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes.<sup>274</sup>

### 3. What is a Nonprofit Library?

Our Notice of Inquiry did not raise the question of what is a "nonprofit library," but the responses discussed below in relation to the distinction between nonprofit lending and educational transfer reveal that confusion exists as to the criteria necessary to qualify for the section 109 lending exemption. The question is not so much what is "nonprofit" but what is a "library" in various educational contexts. The point is important because "libraries" may lend to anyone, while educational institutions may make a "transfer of possession" only to other nonprofit institutions or to their own faculty, staff, and students. These are questions that deserve much more study.

The legislative history of the 1990 Amendment is not much help. The Senate Judiciary Report noted that the "Committee understands that many nonprofit libraries legally acquire copies of computer software for use by their patrons at the library or at home."<sup>275</sup> The House Report declared that the "Committee does not wish to prohibit nonprofit lending by nonprofit

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<sup>273</sup> 17 U.S.C. §109(b)(1)(B)(i)(1992). See *House Software Rental Hearing*, *supra* note 14 at 15 (statement of Rep. Kastenmeier). See also *id.* at 15-16 (statement of Rep. Synar) (A result affecting a computer program "which... runs a microwave or a household kitchen utensil... was not intended and will be addressed in this legislation.").

<sup>274</sup> 17 U.S.C. §109 (b)(1)(B)(ii)(1992).

<sup>275</sup> S. Rep. No. 509, 101st Cong. 2d Sess. 5 (1990).

libraries and nonprofit educational institutions. Such institutions provide a valuable public purpose. . . .<sup>276</sup> Both the House and Senate Reports<sup>277</sup> refer to the 1984 Record Rental Amendment to section 109, which exempts "a nonprofit library or nonprofit educational institution from copyright liability for "the rental, lease, or lending of a phonorecord for nonprofit purposes," but the legislative history of that Act is equally unhelpful. The 1984 House Report simply states: "These activities must be directly related to the ordinary lending activity of the nonprofit library or the educational mission of the nonprofit educational institution."<sup>278</sup>

Section 108, which permits qualifying libraries to make facsimile copies under certain circumstances, applies only if the copying is not done for either direct or indirect commercial advantage. Although section 108 does not contain a definition of library, the legislative history emphasized that --

A purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies.<sup>279</sup>

In the section 108 context an issue has also arisen as to how one should distinguish between a library on the one hand and a library system and its members, on the other.<sup>280</sup>

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<sup>276</sup> H.R. Rep. No. 735, 101st Cong. 2d Sess. 8 (1990).

<sup>277</sup> S. Rep. No. 509, 101st Cong. 2d Sess. 5 (1990); H.R. Rep. No. 735, 101st Cong. 2d Sess. 8 (1990).

<sup>278</sup> H.R. Rep. No. 987, 98th Cong. 2d Sess 4-5 (1984).

<sup>279</sup> See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 74 (1976).

<sup>280</sup> Report of the Register of Copyrights, Library Reproduction of Copyrighted Works (17 U.S.C. §108) 66 (Jan. 1983).

#### 4. What Constitutes Nonprofit Library Lending of Computer Programs?

a. "Lending" and "transfer of possession." The distinction between "lending" and "transfer of possession" was discussed earlier<sup>281</sup> and need not be repeated here. As a practical matter the terms are virtually coextensive, since "lending" is certainly a "transfer of possession" and when educational institutions "transfer possession" to faculty, staff, and students, the act is almost always a loan. The real distinction here involves the organizational unit within an educational institution that does the transferring. The General Counsel of the National School Boards Association<sup>282</sup> stated that a curriculum center rather than a school library usually transfers school district owned curriculum material including computer programs. A school system may treat software that it owns as a textbook, and transfer it from student to student. However, it may not reproduce this software without the permission of the copyright proprietor.

For purposes of this report, we gathered information from nonprofit libraries in educational institutions that lend computer software. It is clear that such libraries would fall within the nonprofit library exemption and that their lending is subject to the warning of copyright requirement. Curriculum centers, laboratories, computer centers, and other centers within educational institutions also commented; some of their activity may fall under the educational transfer provision described above. In cases where a laboratory or computer center is doing more than transferring a physical copy, there may be other concerns as discussed below.

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<sup>281</sup> See *supra* notes 43-81 and accompanying text.

<sup>282</sup> Comment 11 (National School Boards Association) at 2.

b. **Lending and access.** The library exemption envisions "lending," which one would normally think of as circulation beyond the library premises. However, a number of libraries responding to our Notice of Inquiry indicated that their library practices regarding software resemble their practices for reference material: a patron may have access to the software at the library but may not check the software out to be used at home. An informal survey confirms that for a variety of reasons, most libraries are not purchasing or lending copies of computer programs. The Software Publishers Association proposed that library "lending" be limited to on-premise use, and we will discuss the issue in more detail in considering that proposal.<sup>283</sup>

c. **Lending and on-line transmission.** Although most nonprofit libraries have not progressed very far in developing computer software lending facilities, some have evolved their services beyond the lending of a physical copy of a program to one patron after another. These libraries have facilities that permit multiple users to have simultaneous access to the same program, or that give patrons access to a library's computer programs via a telephone line.

Librarians also report that "lending" is being done electronically by installing the program on a local network file server or computer hard drive. This practice requires the patron to use the program on the library's premises, but it is not the physical copy of the purchased software or the archival copy of that software that is given to the patron. Instead, there is a transmission of the program from the host computer to the user's computer within the library, and a copy of the program is loaded in the resident random access memory of the user's computer. The end

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<sup>283</sup> See *infra* part C(3).

result for the user may be the same as in the kind of lending of a physical copy envisioned by section 109, but the method for achieving that result, and the copyright implications of this practice, are very different.

There is nothing in section 109, or elsewhere in the Copyright Code, that would sanction the unlicensed electronic transmission of copies of copyrighted works by nonprofit libraries or educational institutions. The Software Publishers Association observed that nonprofit educational institutions are a large and important market and that licensing programs have been developed to enable them to meet their needs.<sup>284</sup>

## C. RECOMMENDATIONS FOR CHANGES IN LAW OR REGULATIONS

### 1. Shrink Wrap Licenses.

As noted earlier,<sup>285</sup> one library is refraining from lending computer programs because of concern that shrink wrap licenses may prohibit circulation. That library has asked for a clarification concerning these licenses, arguing that unless the exemptions of section 109 are made to prevail over these "agreements," the intent of the law would be vitiated.<sup>286</sup>

More and more computer programs are being mass-marketed in the form of software packages through bookstores, computer retail stores and by mail.<sup>287</sup> Individually negotiated, signed license agreements, which are the norm in other situations, are not feasible in a mass-

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<sup>284</sup> Comment 5 (Software Publishers Association) at 3-4.

<sup>285</sup> See *supra* notes 237-258 and accompanying text.

<sup>286</sup> Comment 6 (Jefferson County Library ) at 1.

<sup>287</sup> William Neukom & Robert W. Gomulkiewicz, Licensing Rights to Computer Software, (March-April 1993). See also Raymond T. Nimmer, Falling Prey to a Paper Tiger, Computerworld, Nov. 6, 1984, at 134.

market setting.<sup>288</sup> Still wishing to exercise control over the customer's use and further distribution of their programs, however, software publishers have developed "shrink wrap," "break the seal," or box-top licenses.<sup>289</sup>

The various shrink wrap procedures include:

1. Printing the license agreement on an envelope inside the package in which the software diskettes are sealed, indicating that the user should read the license before opening the envelope and that by opening the envelope the user agrees to all the terms of the license.
2. The same as in 1, except the agreement also states in boldface type at the top of the agreement that a buyer who does not agree with the terms of the license should return the software unopened to the vendor or retailer for a full refund.
3. Writing the computer program in a way that before the user can begin using the program, the user is asked to acknowledge (via the keyboard) that the user read and agrees to the terms of the license enclosed in the package.
4. Placing the license agreement on the outside of the package under the shrink wrap--the plastic covering--with a statement that the buyer should return the package to the vendor unopened for a full refund if the buyer does not agree to the terms of the license.<sup>290</sup>

One other similar device involves asking the buyer to sign and return an acknowledgment card stating that he or she agrees to be bound by the terms of the license.

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<sup>288</sup> Neukom, *supra* note 288.

<sup>289</sup> Scott, *supra* note 266, at sec. 12.08(D).

<sup>290</sup> *Id.*

There is considerable question about the enforceability of shrink wrap licenses.<sup>291</sup> Much has been written and several cases have addressed the issue. It has been argued that these "agreements" are adhesion contracts which are unenforceable against purchasers; there are questions concerning lack of mutual consent and lack of consideration.<sup>292</sup>

In the informal library guidelines referred to earlier, the authors state that these licenses should, in the absence of authority (cases or state statutes) to the contrary, be treated as binding.<sup>293</sup> The authors advise libraries to avoid problems by stating on their purchase orders the intended use of the software by including a legend such as "PURCHASE IS ORDERED FOR LIBRARY CIRCULATION AND PATRON USE."

There are widely varying forms of shrink wrap licenses. Some clearly attempt to prohibit rental or lending. Others limit use of the program to one identified computer. The Copyright Office did not attempt to determine whether licenses used after the 1990 amendments took into account the library lending provisions now in the Copyright Code. However, the question of whether shrink wrap licenses override the specific statutory exemption for library lending

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<sup>291</sup> The enforceability of shrink wrap licenses is currently being considered by the Commission on Uniform Commercial Laws. *Comp. L. & Tax Rep.* (E. Roditti and A. Fontaine ed.) Mar. 1994 at 6.

<sup>292</sup> See Deborah Kemp, Mass Marketed Software: The Legality of the Form License Agreement, 48 La.L. Rev. 87 (1988); Amelia H. Boss, Harold R. Weinberg, & William J. Woodward, Jr., Scope of the Uniform Commercial Code: Advances in Technology and Survey of Computer Contracting Cases, 44 Bus. Law. 1671, (1988-89); Page M. Kaufman, Note, The Enforceability of State "Shrink-Wrap" License Statutes in Light of Vault Corp. v. Quaid Software, Ltd., 74 Cornell L. Rev. 222 (1988). See also Step-Saver Data Systems v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991)(holding that application of warranty provision in shrink-wrap license was invalid under article 2 of the Uniform Commercial Code as applied to a value-added retailer with whom plaintiff had prior agreement); Vault v. Quaid Software, 847 F.2d 255 (5th Cir. 1988)(holding invalid section of Louisiana License statute that permitted copyright owners to restrict right to copy program through included license agreement because state license act "tonches upon an area" of federal copyright law in that section 117 was specific statement on subject of software duplication).

<sup>293</sup> Mary Hutchings Reed & Debra Stanek, ALA, Library and Classroom Use of Copyrighted Videotapes and Computer Software, American Libraries, Feb. 1986, at B.

appears to be resolvable without any legislative action. Representatives of two trade associations (BSA and SPA), have told us that the software industry has no interest in asserting that shrink wrap licenses override the capability of nonprofit libraries under section 109(b) to lend copies of computer programs for nonprofit purposes.<sup>294</sup> We hope this information is correct, and the Office is prepared to bring the parties together to discuss the issue further.

**2. Warning of Copyright Required by Regulations.**

Section 109(b)(2)(A) requires that nonprofit libraries lending software under the exemption affix a warning of copyright to each software package lent. The warning must be in accordance with the regulations prescribed by the Register of Copyrights, and these are found in 37 C.F.R. §201.24. As discussed earlier, most librarians in nonprofit libraries that lend software -- including libraries in educational institutions -- reported that they are complying with the regulations and that they do not find them to be an undue burden.<sup>295</sup> At the same time there were some complaints.

**a. Can the warning of copyright be simplified?** The required warning is a long one, and some commentators reported they have or foresee problems with it. They emphasized the difficulty in affixing the warning to a small space; they criticized the warning in its present form as expensive to create, difficult to read, and an administrative and budgetary burden. Others pointed to problems that may become significant in the future: for example, that the warning on a software package will never be seen by many users of the software under the

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<sup>294</sup> See Letter and Agenda for Roundtable Discussion, App. at 8-9. Participants discussed shrink wrap licenses that accompany computer programs, not informational works embodied in CD-ROMs or multimedia works. We propose to consider library practices relating to CD-ROM in a future study.

<sup>295</sup> See *supra* part II C (discussing copyright warning and related questions).

library exemption, and that, as the number of works that include software increases, the additional time required for library processing of the warning may become a workload problem.

We realize that the warning now required by our regulations is needlessly long and wordy, and we are going forward with a rulemaking procedure to simplify it. Other questions concerning the warning may not be easy to solve.

**b. Is the warning of copyright applicable to nonprofit educational institutions?** A question has come up about the use of the warning in cases where educational institutions are transferring possession of copies of computer programs under the section 109 exemption. The issue is explored in the comments of the National School Boards Association's General Counsel, August Steinhilber, who argued that one cannot expect a library's warning of copyright to accompany the software and computer that may be transferred to a handicapped student who is taking courses at home.<sup>296</sup>

Librarians and other library staff are accustomed to including copyright notices on photocopies and complying with the warning requirements of 17 U.S.C. 108. Librarians not only post warnings of copyright at copying machines but frequently develop written copyright policies of their own and post them as well.

Librarians' efforts to comply with the copyright law include routinely providing the warning of copyright required by section 108, and this established practice has made it easier to set up a routine of placing a warning of copyright on all software packages to be lent under section 109. To qualify for the library lending exemption all libraries, whether in educational institutions or not, must affix a warning of copyright when they lend software. It may also be

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<sup>296</sup> Comment 11 (National School Boards Association) at 2.

a good idea for librarians and staff at computer centers, laboratories, media centers, or other educational divisions that transfer possession of copies of computer programs to comply with the warning of copyright requirement even if it technically does not apply to them. Congress was aware that lending software posed threats to copyright proprietors; that is the reason they asked us to do this study. Software is vulnerable to the kind of copying that displaces sales, and a voluntary effort by librarians and other staffers to inform their users of copyright requirements would be a valuable service to copyright owners and the public.

c. **Should the warning of copyright be required for all computers?** The Software Publishers Association proposed that all librarians do what some are already doing: treat the section 109 warning in the same way they treat that required under section 108 with respect to library photocopying. The SPA would like enactment of legislation requiring libraries to post a clear warning on every computer available for use by patrons that it is illegal to copy computer software without permission of the copyright owners, and that violators are subject to civil and criminal penalties.

In the absence of legislation, we recommend that librarians take this additional step voluntarily and, in our future discussions of the copyright warning, we will work with copyright owners and librarians to develop standardized language for this purpose. We also think it would be a good idea to work out a system for showing warnings on the screen when a program is loaded on the user's hard drive. For their part, copyright proprietors should provide clear guidelines delineating what they expect of their licensees when copies of computer programs are lent or transferred under license rather than section 109.

d. **What kind of warning of copyright is appropriate for electronic transmission?** Checking out a software package for a patron to use at a work-station located on library premises or in the patron's home computer is akin to lending. Launching a program via a file server, or networking it so that there can be multiple simultaneous uses, is not, and the provisions of section 109, including the warning requirement, are inapplicable. Nevertheless, a number of librarians stressed that many patrons who use copyrighted computer programs never see the software package, and some of them have been exploring alternate methods to ensure that the library patron sees a copyright warning in an electronic environment.

3. **Limitation to On-Premise Use.**

As mentioned earlier,<sup>297</sup> software proprietors, librarians, and educators have disagreed as to whether a library patron should be permitted under section 109 to check out software and take it off the library premises for his or her personal use. Although it recognized that lending could lead to unauthorized copying, Congress intended the physical copy of a computer software program to be lent to patrons for home use. "Lending" connotes a change of possession of a material object. Both software proprietors and librarians understand that lending software to patrons for off-premise use is within the meaning of the present exemption.

The Software Publishers Association recommends that section 109 be amended to narrow the nonprofit library lending exemption: computer programs should be available for use within a library, but patrons should not be able to check them out. They argued that treating software

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<sup>297</sup> See *supra* notes 231-233 and accompanying text (discussing SPA proposal to narrow lending exemption).

like reference materials would discourage unauthorized copying while permitting access to those who need it.

Some librarians countered that there is no need to limit the present exemption and that the ability to lend software is vital to a library's role in making information accessible to everyone.<sup>298</sup> They argued that there is no proven relationship between lending and unauthorized copying, and that lending for home use promotes sales since most people do not purchase software without reviewing it. Even so, a significant number of libraries have restricted access to their software to on-premise use; librarians are being cautious for a number of reasons, including lack of knowledge of what is legally permitted and, notably, lack of funds to establish full scale lending programs.

Given the clear statutory intention to allow circulation of programs, we believe there is insufficient evidence at this time to justify recommending narrowing the nonprofit library's lending right. Anticipating that this might be our conclusion, SPA asked us to review our decision in one year to assess the impact of new optical storage media on the needs of library patrons and the commercial impact on software publishers. We concur that there should be a continuing review, and in addition we believe that this is a subject that would benefit from further exploration and discussion among all parties affected, including library patrons and users.

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<sup>298</sup> See, e.g., Comment 1 (John K. Tener Library) at 2; Comment 2 (Joint Libraries) at 4; Comment 4 (American Library Association) at 3.

#### **D. EXTENSION OF RENTAL RIGHT TO VIDEO GAMES**

As discussed earlier in this Report, the Software Publishers Association noted that it favored the extension of the rental right to all video games and encouraged the Office to review the denial of rental rights to certain video games under section 109(b)(1)(B)(ii).<sup>299</sup>

The issue of rental rights for computer programs used in limited purpose video game computers is beyond the scope of this report. As noted earlier, this was an issue in the NAFTA Implementation process and it seems likely that it will be an issue in the GATT implementation process.<sup>300</sup> If concerned parties wish to raise this issue, they should do so with the appropriate Congressional committees.

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<sup>299</sup> Comment 5 (Software Publishers Association) at 2, 6.

<sup>300</sup> See *supra* notes 28-30 (discussing rental right in NAFTA and GATT TRIPS).



THE COMPUTER SOFTWARE  
RENTAL AMENDMENTS  
ACT OF 1990:

THE NONPROFIT LIBRARY  
LENDING EXEMPTION TO THE  
“RENTAL RIGHT”

APPENDIX  
LETTERS AND COMMENTS



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**Docket No. 93-7**

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# AMERICAN COUNCIL ON EDUCATION

Division of Governmental Relations

The Honorable Dennis DeConcini  
Chairman,  
Subcommittee on Patents, Copyrights  
and Trademarks  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Orrin G. Hatch  
Subcommittee on Patents, Copyrights  
and Trademarks  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman and Senator Hatch:

Thank you for your leadership on S. 198, the Computer Software Rental Amendments Act of 1989. We appreciate your willingness to work with all concerned parties to ensure that this legislation not only provides the protections of the copyright law which are necessary to the health of the nation's computer software industry, but also to reflect the special needs of nonprofit libraries and educational institutions.

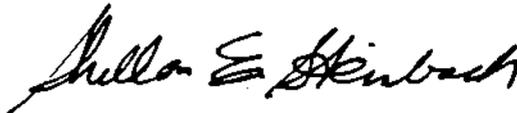
In recognition of the special needs of nonprofit elementary, secondary and higher educational institutions, we are requesting that the attached amendment and accompanying Committee Report language be included in S. 198 when it is considered by the full Judiciary Committee and when the Committee's Report is filed.

The proposed amendment makes clear that the provisions of the Act do not apply to faculty, staff and students who exchange copies of software in the ordinary course of their academic activities. With the adoption of this amendment all organizations represented by the undersigned can endorse the enactment of S. 198.

Sincerely yours,



August W. Steinhilber  
General Counsel  
National School Boards  
Association



Sheldon E. Steinbach  
Vice President and General Counsel  
American Council on Education



Bruce A. Lehman  
The Software Rental Coalition

Attachments

November 13, 1989 Draft

Report Language to Accompany S198

The Committee understands that many educational institutions legally acquire copies of computer programs for use by multiple users. Examples of this include the lending by instructors to students of programs to be used by the student in completing a class assignment. This practice or other practices involving transfer of possession of an authorized copy of a computer program owned by an educational institution among faculty and students for individual use, which does not involve the making of unauthorized copies, does not constitute rental, lease or lending for direct or indirect commercial purposes under this act.

In some areas of the United States primary and secondary educational systems have joined together in cooperative agreements for the purpose of sharing educational materials such as books. Where computer programs are shared among such cooperatives for instructional use by teachers and students, such sharing arrangements do not constitute commercial rental, lease or lending under this act. However, any copies of the program made incidental to its use must be erased following completion of the class assignment or educational use involved.

The Committee is particularly sensitive to the need for libraries and educational institutions to utilize computer programs for the purpose of combatting illiteracy in the United States. It is the Committee's hope that the copyright incentive will encourage programs useful in combatting illiteracy to be created. Programs of the kind used in the battle against illiteracy are examples of the kinds of programs commonly lent without any direct or indirect commercial purpose. The Committee understands that these programs are examples of the kind of copyrighted material which will be shared among faculty and students and lent by libraries and educational institutions.

The Committee understands that nothing in his act restricts the ability of copyright owners and users to enter into license agreements regarding the use of computer programs.

## LENDING BY LIBRARIES AND EDUCATIONAL INSTITUTIONS

The committee understands that many nonprofit libraries legally acquire copies of computer software for use by their patrons either at the library or at home. Because of their nonprofit status and the fact that they were renting records which were generally not being recorded, Congress exempted nonprofit libraries from coverage under the Record Rental Amendments Act. While the committee believes that the differences between software and records make software a much more likely candidate for illegal duplication, the committee has attempted to address in this legislation the libraries' needs. The lending of software to library patrons is therefore not prohibited under this act provided that an adequate warning, as required in the legislation, is affixed to the packaging of the software. The committee will monitor this practice for abuse.

The committee also understands that many educational institutions legally acquire copies of computer programs for use by multiple users. Examples of this include the lending by instructors to students of programs to be used by the student in completing a class assignment. This practice or other practices involving the transfer of possession of an authorized copy of a computer program owned by an educational institution among faculty, students, and staff for individual use, or to another nonprofit educational institution, which does not involve the making of unauthorized copies, does not constitute rental, lease or lending for direct or indirect commercial purposes under this act.

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The committee understands that nothing in this act restricts the ability of copyright owners and users to enter into license agreements regarding the use of computer programs.



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

November 29, 1993

(202) 707-8354

Dear Mr. Chairman:

As you know, today is the first day of my tenure as Acting Register of Copyrights. On Wednesday, December 1, a report, mandated by section 109(b) of the law, is due on whether or not the exemption to the software rental provision for nonprofit lending by nonprofit libraries has achieved its intended purposes of maintaining the integrity of the copyright system while providing nonprofit libraries the capability of fulfilling their function.

I have not been able to focus fully on this report. However, after a quick first reading, I came to the immediate conclusion that more work needed to be done. The questions raised by the language of the law are broader and more complicated than one might believe. Thus, although the staff of the Copyright Office has been diligent in preparing the report, and they believe that a report could be delivered on December 1, my strong belief is that we need additional time to allow for a broader inquiry, including a public hearing.

I talked to your chief counsel, Karen Robb, about the possibility of an extension of the deadline of the study to March 31, 1994. She indicated that under the circumstances (the deadline being only two days after my first day on the job), she thought you might be amenable to an extension. I believe that with this extension we can deliver a first rate, comprehensive report that raises and addresses all of the issues.

I should appreciate your confirmation to permit this extension, and I thank you in advance for your consideration and understanding.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Ringer".

Barbara Ringer  
Acting Register of Copyrights

Enclosure: Section 109(b)

The Honorable Dennis DeConcini  
Chairman, Subcommittee on Patents,  
Copyrights and Trademarks  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20515



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

November 29, 1993

(202) 707-8355

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I talked to your chief counsel, Hayden Gregory, about the possibility of an extension of the deadline of the study to March 31, 1994. He indicated that under the circumstances (the deadline being only two days after my first day on the job), he thought you might be amenable to an extension. I believe that with this extension we can deliver a first rate, comprehensive report that raises and addresses all of the issues.

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Sincerely,

A handwritten signature in cursive script that reads 'Barbara Ringer'.

Barbara Ringer  
Acting Register of Copyrights

Enclosure: Section 109(b)

The Honorable Willim J. Hughes  
Chairman, Subcommittee on Intellectual  
Property and Judicial Administration  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

(202) 707-8335

November 29, 1993

Dear Hayden:

I want to thank you for assistance in the grant of the extension of time for the section 109(b) report on nonprofit library lending of computer software. Some of the questions are complex and controversial, and I would like to devote considerable time to seeing that we deliver a first class report. I plan to broaden the inquiry and hold a public hearing.

I am extremely grateful to you for your support in the past few months, and I look forward to working with you during my tenure in the Copyright Office.

Sincerely,

Barbara Ringer  
Acting Register of Copyrights

Enclosure: Section 109(b)

Hayden Gregory, Esquire  
Chief Counsel  
Subcommittee on Intellectual  
Property & Judicial Administration  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

(202) 707-8350

November 29, 1993

Dear Karen:

I want to thank you for assistance in the grant of the extension of time for the section 109(b) report on nonprofit library lending of computer software. Some of the questions are complex and controversial, and I would like to devote considerable time to seeing that we deliver a first class report. I plan to broaden the inquiry and hold a public hearing.

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Sincerely,

A handwritten signature in cursive script that reads 'Barbara Ringer'.

Barbara Ringer  
Acting Register of Copyrights

Enclosure: Section 109(b)

Karen Robb, Esquire  
Chief Counsel  
Subcommittee on Patents,  
Copyrights & Trademarks  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20515



The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

January 4, 1994

(202) 707-8354

Dear Participant:

As you know, the Copyright Office is preparing a study for Congress on nonprofit lending of computer programs by nonprofit libraries. Several policy issues have emerged from this inquiry.

During the January ACCORD meeting, several of those who participated in the Office's initial comment period, as well as other interested parties, will be present in Washington. We would like to hold an informal discussion of some of the primary software lending issues on January 12, 1994, at 3:00 p.m., in the West Dining Room, of the Madison Building, 101 Independence Avenue, S.E., Washington, D.C. 20540.

Attached is a memo outlining these issues. We hope you can be present on January 12 to share your views on these questions. If you would prefer to submit written responses, please do so by no later than February 11, 1994.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Ringer".

Barbara Ringer  
Acting Register of Copyrights

**AGENDA**  
**Software Lending Study**

Several policy issues have emerged from the Copyright Office study of nonprofit lending of computer programs by nonprofit libraries.

The issues are:

1. What is the distinction between library "lending" and "transfers" by nonprofit educational institutions?
2. Electronic (online) distribution:
  - (a) whether "transfer" or "lending" include electronic distribution;
  - (b) whether the warning notice of copyright requirement applies to online distribution or display;
  - (c) whether the warning notice should be required on line or affixed to library computer terminals.
3. Licenses:
  - (a) do individually negotiated software licenses preempt the lending exemption?
  - (b) do shrink wrap "licenses" preempt the lending exemption?
  - (c) does the lending exemption apply to owners of copies, or to license holders?
  - (d) does first sale doctrine in section 109 which applies to owners of copies also apply to owners of copies of software programs?
4. What is the copyright significance of making a copy for the hard drive in order to use the program?
5. Lending:
  - (a) whether lending means a change of physical possession/allowing patrons to take software out;
  - (b) whether we accept the analogy between library reference books and software,
  - (c) whether a §117 archival "back up" copy may be lent or circulated?
  - (d) what is the definition of a "library"?
6. Software:
  - (a) whether "software" includes CD-ROM and other databases;
  - (b) whether definition of "computer program" in the Copyright Act is adequate.
7. Whether unauthorized copying occurs as a result of nonprofit library lending. Whether there is any way to tell if it is occurring.
8. Whether the copyright warning can be cut down/reduced in size.

**SOFTWARE/ACCORD PUBLIC MEETING ATTENDEES**

**JANUARY 12, 1994**

<u>NAME</u>	<u>COMPANY</u>
Morton David Goldberg	Schwab, Goldberg, Price & Dannay
Sheldon Steinbach	American Council on Education
Bernard R. Sorkin	Time-Warner, Inc.
Peter Young	NCLIS
Robert Oakley	AALL
Prudence Adler	ARL
Edward Valauskas	ALA
Robert M. Kruger	Business Software Alliance
Brian Fitzgerald	Swidler & Berlin (Business Software Alliance)
Ollie Smoot	CBEMA
Ronald J. Palenski	ITAA
Jon Baumgarten	Proskauer, Rose, Goetz & Mendensohn
Bill Ellis	IBM
Mark Traphagen	SPA
Stanley Rothenberg	Moses & Singer
The Honorable Raya S. Dreben	Appeals Court
Robert Wedgeworth	University of Illinois

**COPYRIGHT OFFICE ATTENDEES INCLUDE:**

Barbara Ringer  
Mary Levering  
Marybeth Peters  
Eric Schwartz  
Jennifer Hall



Liverpool Public Library  
Tulip and Second Streets  
Liverpool, N.Y. 13088-4997

Fay Ann Golden Library Director  
(315) 457-0310

### S198 and the ComputerWorks Lab

Compiled by Jean Armour Polly, Assistant Director Public Services

The Liverpool Public Library has promoted public access to computers and electronic information since 1981. The ComputerWorks Lab currently contains many types of computers and about 650 pieces of software. Software circulated for home use topped 13,500 in 1988, while another 12,000 pieces were used in the lab itself. Patrons preview the software and many later buy their own copies. Many patrons enjoy the entertainment and educational programs for short-term use.

The public computer lab at Liverpool Public Library was booked for over 12,000 hours in 1988, and most of the usage was by adults. They utilized public computers and software to generate résumés, newsletters, wedding invitations, and many other near-typeset quality items. The most popular computers were the Macintoshes, which are easy to learn and use.

This year was extremely busy, as reflected in the following statistics.

Total	Adults		Kids/YAs/Families		Other (User Groups, etc)
12,321	7,999	67.9%	2,684	22.9%	1,638 9.1%

Of great concern to our patrons is the amendment to Copyright Law, S. 198, the Computer Software Rental Act. The text of the legislation is similar to that of the Record Rental Act of 1985, however, the latter contains an exemption for both libraries and educational institutions. In S. 198's originally proposed form, no such exemption was allowed. Passage would have precluded circulation both out of the library as well as in-house, unless individual contracts were negotiated with software publishers. Libraries have neither the time nor funds to do this. Software collections would have been limited to titles whose publishers chose to negotiate. This might have made collection balance difficult.

Since the beginning of 1989, we have been working closely with representatives of the American Library Association and the Software Publisher's Association to make sure that both Library, and copyright owners', needs are met. During the 4/19/89 hearing before the Copyright, Trademarks, and Patents Subcommittee, an amendment to S. 198 will be proposed. It will contain an exemption for non-profit libraries. It is gratifying to see that the software industry was willing to address our concerns with the bill. And that libraries have agreed to provide additional copyright information labels on the software materials they collect and circulate. We welcome this mood of cooperation and hope that we may continue this relationship.

Prior to this meeting of the minds, software publishers had urged us to believe that software is a special case for copyright law. However, we suggested that the cost, and ease of copying factors, are not pertinent. Many library materials are expensive and may be easily duplicated. The issue was that this bill, as proposed, would have infringed on the library's right to collect and make available whatever it sees fit, which will provide services to its patrons. Libraries have the right to collect and circulate whatever their patrons need to further their personal advancement.

This bill may still affect school district labs and academic labs. The bill's language, as now proposed, has no specific educational exemption. Only the phrase "non-profit libraries" is used in regard to exemptions.

We urge legislators to protect the rights of library patrons, non-profit institutions, and educational institutions when they consider the language of this bill.





# ANNOUNCEMENT

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

## NOTICE OF INQUIRY

### COMPUTER PROGRAM RENTAL BY LIBRARIES: REPORT OF THE REGISTER OF COPYRIGHTS ON THE EFFECTS OF 17 U.S.C. 109(b)(2).

The following excerpt is taken from Volume 58, Number 132 of the Federal Register for Tuesday, July 13, 1993 (pp.37757-37758)

#### LIBRARY OF CONGRESS

##### Copyright Office

[Docket No. RM 93-7]

**Computer Program Rental by Libraries: Report of the Register of Copyrights on the Effects of 17 U.S.C. 109(b)(2).**

**AGENCY:** Copyright Office; Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Copyright Office of the Library of Congress is preparing a report for Congress on the extent to which the Computer Software Rental Amendments Act of 1990 has achieved its intended purpose with respect to lending by nonprofit libraries. This Act permits lending of a computer program for nonprofit purposes by a nonprofit library, if each copy lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with regulations prescribed by the Register of Copyrights. The Act also requires the Office to report to Congress by December 1, 1993, on whether 17 U.S.C. 109(b)(2) has achieved its intended purpose of maintaining the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function. This report shall also advise Congress as to any information or recommendations that the Register considers necessary to carry out Congress's intent.

The Office seeks public comments on and information about lending of computer programs for nonprofit purposes by nonprofit libraries, for the purpose of evaluating how the nonprofit lending

provision is working. The Office invites comment from all interested parties including software proprietors, librarians, and library patrons.

**EFFECTIVE DATE:** Comments should be received on or before October 12, 1993.

**ADDRESSES:** Interested persons should submit ten copies of their written comments as follows: If sent by mail: Dorothy Schrader, General Counsel, United States Copyright Office, Library of Congress, Department 17, Washington, D.C. 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, room 407, First Street and Independence Avenue, S.E., Washington, D.C. 20559.

**FOR ADDITIONAL INFORMATION CONTACT:** Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department 17, Washington, D.C. 20540. Telephone: (202) 707-8380.

#### SUPPLEMENTARY INFORMATION:

##### 1. Background

Section 109 of the Copyright Act contains an important limitation on the exclusive rights of copyright owners; this limitation is known as the first-sale doctrine. Under this doctrine, the owner of a lawfully made copy of a work, or any person authorized by such owner, is entitled without authority of the copyright owner to sell or otherwise dispose of the possession of that copy.

On December 1, 1990, President Bush signed into law, Pub. L. 101-650, 104 Stat. 5059 containing the "Computer Software Rental Amendments Act." Section 109(b)(1)(A) of that Act prevents the commercial rental, lease, or lending of computer programs without the authorization of the copyright owner. Congress enacted this limitation on the first sale doctrine because it recognized that the commercial

lending of computer software could encourage unauthorized copying and deprive copyright owners of a return on their investment.<sup>1</sup>

Congress had already amended the first sale doctrine in 1984 to give owners of copyright in sound recordings control over commercial rental of phonorecords by prohibiting the commercial rental of these works without the authorization of the copyright owner. In 1988, the Record Rental Amendment Act was renewed, with expiration set for October 1, 1997.

The Computer Software Rental Amendments Act does not accord a rental right with respect to computer programs embodied in a machine or product (such as automobiles or calculators) that cannot be copied during the ordinary operation or use of the machine or product; or computer programs embodied in video games. 17 U.S.C. 109(b)(1)(B). The Act also provides that the transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes. 17 U.S.C. 109(b)(1)(A).

Congress also did not wish to prohibit the nonprofit lending of computer programs by nonprofit libraries and nonprofit educational institutions. These institutions serve a valuable public purpose by making computer software available to students and others who would not otherwise have access to it. At the same time, Congress recognized that library patrons could engage in the same type of unauthorized copying that occurs in a commercial context.<sup>2</sup> The Computer

<sup>1</sup> H. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990).

<sup>2</sup> *Id.*

Software Rental Amendments Act therefore permits nonprofit lending of computer programs by nonprofit libraries, if each copy lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with regulations prescribed by the Register. 17 U.S.C. 109(b)(2)(A).

The regulations governing warning of copyright for software lending by nonprofit libraries are contained in 37 CFR 201.24. Under that section, the "Warning of Copyright for Software Rental" to be affixed to the packaging containing the computer program lent by the nonprofit library shall consist of a verbatim reproduction of the following notice:

**Notice: Warning of Copyright Restrictions**  
The copyright law of the United States (Title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material.

Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement.

This institution reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.

This warning shall be affixed to the packaging that contains the copy of the computer program which is the subject of a library loan to patrons, by means of a label cemented, gummed, or otherwise durably attached to the copies or to a box, reel, cartridge, cassette, or other container used as a permanent receptacle for the copy of the computer program. The notice shall be printed in such a manner as to be clearly legible, comprehensible, and readily apparent to a casual user of the computer program. See 37 CFR 201.24 (1992).

## 2. Reporting Requirement

Section 109(b)(2)(B) of title 17, United States Code, established under the Computer Software Rental Amendments Act, requires the Register of Copyrights, not later than three years from the date of enactment, and such times thereafter as the Register considers appropriate, to submit to Congress a report stating whether the library lending provisions of the Act have served their intended purpose of maintaining the integrity of the copyright system, while still providing nonprofit libraries the capacity to fulfill their function. The report shall also advise the Congress as to any information or recommendations that the Register considers necessary to carry out the purposes of the subsection. The report is due on December 1, 1993, that is, not later than three years after the date of the enactment of the Computer Software Rental Amendments Act of 1990.

In order to assist the Copyright Office in preparing this report, public comment on the subject of nonprofit lending of computer programs is invited. The Office is interested in surveying the practices of libraries with regard to computer software. We also seek advisory comments on whether and how the purposes of § 109(b)(2) could be better carried out.

## 3. Specific Questions

The Copyright Office is interested in receiving comments about any issues relevant to § 109(b)(2) which concern copyright owners, librarians, and library patrons. Of particular interest are the following questions.

(1) If you are a nonprofit library or educational institution, do you feel you are meeting the needs of your patrons with regard to computer software? Does § 109(b)(2)(A) facilitate or impede fulfillment of your function as a nonprofit library or educational institution?

(2) How often do you lend copies of computer programs to other nonprofit libraries, or nonprofit educational institutions? How often do you lend computer programs to staff or users of your own institution?

(3) Do the regulations in 37 CFR 201.24 pertaining to warning of copyright for software rental represent an onerous burden?

(4) Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display of computer programs is occurring as a result of the nonprofit lending permitted by § 109(b)?

(5) Do you feel the § 109(b) exemption for nonprofit libraries and educational institutions is harmful to the interests of copyright owners? Has there been any change in authors' income as a result of nonprofit lending of software?

(6) Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?

(7) Do you feel that new legislation is needed either to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If so, please specify as precisely as possible what provisions such legislation should contain.

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, in Room 401, James Madison Memorial Building, Library of Congress, First Street and Independence Avenue, S.E., Washington, D.C.

Dated: July 6, 1993

**Ralph Oman,**  
*Register of Copyrights.*

BILLING CODE: 1410-07

♻️ PRINTED ON RECYCLED PAPER

GENERAL COUNSEL  
OF CONGRESS

OCT 4 1993

RECEIVED

PAULA L. BASSI  
114 RODGERS STREET  
MONONGAHELA PA 15063

September 29, 1993

Comment Letter

RM 98-7

No. /

Dorothy Schrader, General Counsel  
United States Copyright Office  
Library of Congress  
Washington, D.C. 20540

Dear Ms. Schrader:

I am a member of the Board of Directors of the John K. Tener Library in Charleroi, Pennsylvania. Recently I received a letter from our district librarian asking responses to the following questions:

Question 1: Whether nonprofit libraries and educational institutions are meeting patron needs with regard to computer software, and whether the software lending provisions facilitate or impede fulfilling institutional functions.

Answer: We do not believe that any Library or educational institution is currently adequately meeting the needs of its clientele with regard to computer usage and software. The reasons for this is simply that the expense of software purchase, maintenance, and instruction for usage makes it unavailable. Most libraries are struggling to keep their doors open and provide free sources of information to the public. Costly services such as computers and software are not available to all. The John K. Tener Library of Charleroi was recently granted monies to purchase our first public use computer with start-up software. The computer and software are free to use by anyone. We have not been able to meet the needs and request for software additions simply due to lack of finances.

Questions 2: How often are institutions lending software?

Answer: Due to financial constraints, the John K. Tener Library has not been able to develop a library of software for lending. We look forward to the time, hopefully in the near future, that we can better serve the people of our community by providing them with a lending service of software.

Dorothy Schrader, General Counsel  
U. S. Copyright Office, Library of Congress  
Page Two

Question 3: Whether unauthorized copying, adaptation, redistribution, public performance or display of computer programs is occurring as a result of lending by libraries.

Answer: I have not studied the problems inherent to this subject. I can only speak for the J. K. Tener Library of Charleroi. We have not loaned any software. Neither are we aware of any copies having been made on the premises. We feel that computer software should enjoy the same copyright privilege that books have. This privilege, however, should not exclude the right of libraries to loan software.

Question 4: Whether the exemption allowing libraries to lend software is harmful to the interests of copyright owners.

Answer: Libraries and schools are at the heart of every community's academic mission. For hundreds of years books have been shared and used by more than one. Computer software is simply another means of obtaining information. The library purchases a book for lending just as it purchases software for lending. The explosion of technology and information have made it impossible and at times impractical for man to depend only on a book for sources of information. It is imperative that we as a society seeking to promote education and stimulate intellectual growth responsibly respond to our Country's needs for information by making it readily available to all.

To regress to a time in history when only the wealthy were granted the privilege of access to information would be unconscionable. Let us not be dictated to by policies akin to third world countries that suppress access to information rather than make it freely available. A free nation must be supportive to freely sharing sources of information that will allow its people to grow.

Books provide valuable sources of information, research, reference and entertainment. This same information can be provided on computer disc and CD ROM. Once the library has made the initial investment of computer hardware and instruction, it can make available to the public this computer access. The computer allows us to provide greater volumes of information more economically and with greatly enhanced speed than the traditional method of access only through books. Prohibiting the use in libraries and lending by libraries can only serve to greatly stunt the intellectual growth of our Country. Information must be shared.

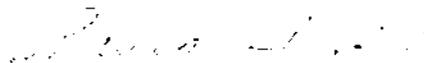
Dorothy Schrader, General Counsel  
U. S. Copyright Office, Library of Congress  
Page Three

Question 5: Whether new legislation is needed to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users.

Answer: We ask that new legislation continue to allow the public use of computers and software in libraries. We implore you to continue to allow libraries to loan software. New legislation should not be such that it impedes the access to information or limits it only to those of financial means. We support the author's right to copyright and earnings for their product. We support the author's right not to have the product copied and redistributed for the gain of others. We ask that any new legislation not be such that it deters incentive by the inventor or author to concentrate on research and development for new products in the delivery of information.

Thank you for this opportunity to express these thoughts and concerns regarding this very important issue.

Very truly yours,



Paula L. Bassi



The College Of  
**WILLIAM & MARY**

Marshall-Wythe Law Library

804/221-3255

Fax 804/221-3261

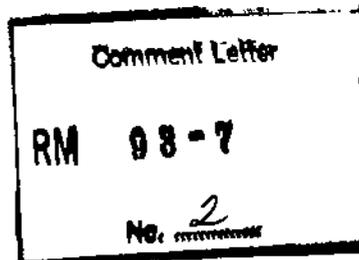
Williamsburg, Virginia 23185

GENERAL COUNSEL  
OF COPYRIGHT

OCT 8 1993

October 7, 1993

RECEIVED



Dorothy Schrader  
General Counsel  
United States Copyright Office  
Library of Congress - Department 17  
Washington, D.C. 20540

Dear Ms. Schrader:

I am pleased to provide to the Copyright Office ten copies of the joint statement of the American Association of Law Libraries, the Association of Research Libraries, and the Special Libraries Association as to whether the Computer Software Rental Amendments Act of 1990 has achieved its intended purpose with respect to lending by nonprofit libraries.

Sincerely,

*James S. Heller*  
James S. Heller  
Director of the Law Library and  
Professor of Law

Chair, Copyright Committee  
American Association of Law Libraries

GENERAL COUNSEL  
OF COPYRIGHT

OCT 8 1993

RECEIVED

Copyright Letter

RM 93-7

No. 2

**STATEMENT BY THE AMERICAN ASSOCIATION OF LAW LIBRARIES,  
THE ASSOCIATION OF RESEARCH LIBRARIES, AND THE SPECIAL  
LIBRARIES ASSOCIATION TO THE UNITED STATES COPYRIGHT OFFICE  
AS TO WHETHER THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT  
OF 1990 HAS ACHIEVED ITS INTENDED PURPOSE WITH RESPECT TO  
LENDING BY NONPROFIT LIBRARIES**

The American Association of Law Libraries (AALL), headquartered in Chicago, Illinois, is a nonprofit organization of more than 5,000 members serving the law and law-related information needs of legislators, judges and other public officials at all levels of government, law professors and students, lawyers in private practice, corporate and small business persons, and members of the general public.

The Association of Research Libraries (ARL) is an association of 119 research libraries in North America. ARL programs and services promote equitable access to, and effective use of, recorded knowledge in support of teaching, research, scholarship, and community service.

The Special Libraries Association (SLA), also based in Washington, D.C., is an international organization comprising members of the information profession, including special librarians and information managers, brokers, and consultants. Special libraries are located in organizations with specialized or focused information needs, such as corporations, law firms, news organizations, government agencies, associations, colleges, museums, and hospitals.

The American Association of Law Libraries, Association of Research Libraries, and Special Libraries Association are pleased to respond to the United States Copyright Office's invitation to provide written comments about the lending of computer programs for nonprofit purposes.

**1. Whether nonprofit libraries and educational institutions are meeting patron needs with regard to computer software, and whether the software lending provisions facilitate or impede fulfilling institutional functions?**

Our member libraries are able to meet their patrons' needs with respect to the lending of computer software. The software lending provisions of the Computer Software Rental Amendments Act of 1990 (17 U.S.C. § 109(b)(2) neither facilitate nor impede our members fulfilling their institutional functions.

We must add that without the library provision it would be a significant hinderance to the role of libraries to make information available to their clients regardless of format. Lending computer software is a legitimate activity of libraries, and the provision of the Computer Software Rental Amendments Act of 1990 that allows nonprofit libraries to lend computer software is both appropriate and essential.

**2. How often do our member institutions lend software to other nonprofit libraries and nonprofit educational institutions or to staff or users of the library?**

Practices change from library to library regarding the lending of software. Based on a survey of some of our members, some libraries lend software, others do not. The libraries that lend software generally do so in-house only. Many of our members have licensing agreements with software providers that permit them to load software on library-run computer networks and much software never is lent to library patrons.

Some copyright owners expressly permit the lending or copying of their software. For example, the Center for Computer-Assisted Legal Instruction (CALI) expressly permits their educational programs to be copied to disk and loaded onto personal computers in one's home. Libraries that have acquired CALI software do lend the software to their patrons.

We believe, however, that whether a work of intellectual property may be lent by libraries should not depend on the format of the work. Section 109 of the Copyright Act permits other intellectual property to be lent, sold, or leased that also are easily copied -- for example, print media and audio cassettes. We are concerned that the software amendments portend future diminutions of users rights based on the format of a work, a distinction that, with few exceptions, Congress chose not to make in drafting and passing the Copyright Act of 1976.

**3. Whether the regulations in 37 CFR 201.24 requiring warning labels represent an onerous burden?**

The warning of copyright notice that must be attached to software does not present an undue burden to our members. Because software may be loaded onto a personal computer's hard drive or on a local or wide area network, many patrons never see the software package itself and the accompanying warning. Some libraries are exploring alternative methods of providing warning notices. Some have affixed warning notices to library-owned computers, and others have installed a warning notice that appears automatically when the software program is called up.

**4. Whether unauthorized copying, adaptation, redistribution, public performance or display of computer programs is occurring as a result of lending by libraries?**

We have no evidence of unauthorized copying, adaptation, redistribution, public performance or display of computer programs in our members libraries as a result of lending software for nonprofit purposes. The warning label attached to library-owned software provides adequate notice to borrowers that the software is protected by copyright and that uses not permitted by the Copyright Act are infringing.

Many of our members educate their students, faculty, staffs, and other institutional users about the permissible and impermissible uses of copyrighted works, including computer software, through educational programs, drafting and circulating policy statements and directive memos, putting notices on equipment, and posting signs in areas in which library computers are used.

We must point out that our members patrons are both users and creators of intellectual property. Faculty, librarians, researchers, students, and other institutional employees write books and articles, create audiovisual works, and develop software. While we continue to emphasize the importance of sections 107 and 108 of the Copyright Act in striking the appropriate balance between creators' and users' rights, we have an obligation to our patrons and to our larger institutions to help ensure that owners rights are not abused within our libraries.

**5. Whether the exemption allowing libraries to lend software is harmful to the interests of copyright owners, and whether there has been any change in authors' income as a result of nonprofit lending of software?**

We do not believe that the exemption harms copyright owners, nor are we aware of any change in authors' income as a result of nonprofit lending of software. Libraries acquire software for internal use and, occasionally, for lending. Obviously, libraries would not purchase software for lending if they were prohibited from engaging in that activity. A prohibition against lending all software for any purpose would in certain circumstances result in fewer sales to libraries, and fewer profits for software producers.

Some of the lending that takes place is to other libraries or to other departments within the larger institution (e.g., the university). Such lending results in more sales of the software if the borrower decides that the software is indeed useful and decides to purchase it. Rather than harming the copyright owner, lending software for nonprofit purposes may provide a financial benefit to the copyright owner.

**6. Whether we are aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?**

Based on a survey of selected members we have no evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software.

**7. Whether new legislation is needed to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users.**

We do not believe that any legislation is needed to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users. The exemption that permits nonprofit libraries to lend software for nonprofit purposes under the Computer Software Rental Amendments Act of 1990 provides the appropriate balance between the rights of copyright owners and the needs of users in nonprofit organizations.

We understand and appreciate copyright owners concern over infringing activities, including unlawful copying, adaptation, redistribution, or public performance or display, and we recognize that computer software may be particularly vulnerable to such unlawful uses. Although we view The Computer Software Rental Amendments Act of 1990 as a regrettable but justifiable limitation on the first sale doctrine, we are concerned that continued erosion of the doctrine would severely limit legitimate borrowing activities.

Lending educational, recreational and utility computer software is a legitimate activity of libraries and is a core or library service. Furthermore, such lending is an innocent activity, and no causal connection has been shown between library lending and software infringement.

Copyright owners create works in a variety of formats, and libraries collect mixed media information products that include software components -- books with software appendices and software-driven interactive video programs are two such examples. Prohibiting the lending of the software component of a mixed media work may make the remainder of the work functionally non-circulating, and in certain circumstances may make the entire work unusable.

American libraries have a vested interest in helping to ensure that infringing activities of all types of copyrighted works do not occur. Librarians want to avoid even the perception that they are involved in infringing activities. Librarians also realize that copyright infringement results in diminished sales, which in turn

results in higher costs to purchase or lease intellectual property. As consumers of information, librarians want to see the cost of all creative works, including books, periodicals, microforms, CD-Rom products, and computer software remain as low as possible.

### **Conclusion**

The American Association of Law Libraries, Association of Research Libraries, and Special Libraries Association believe that the section 108 library exemption and the fair use provisions of the Copyright Act of 1976 provide the appropriate balance between the rights of owners and needs of users of intellectual property. We believe that the nonprofit lending exemption of the Computer Software Rental Amendments Act of 1990 provides a similar appropriate balance for nonprofit libraries and that the Act has achieved its intended purpose with respect to nonprofit libraries.



2001 L Street N.W.

Suite 400

Washington, D.C. 20036

TEL 202.872.5500

FAX 202.872-5501

REGISTER OF COPYRIGHTS

OCT 12 1993

RECEIVED

October 12, 1993

Comment Letter	
RM	93-7
No.	<u>3</u>

Hand Deliver

Office of the Register of Copyrights  
Copyright Office  
James Madison Memorial Building  
Room 407  
First Street and Independence Avenue, S.E.  
Washington, D.C. 20559  
Attention: Dorothy Schrader, General Counsel

Re: Computer Program Lending by Non-Profit Libraries

Dear Ms. Schrader:

On behalf of the Business Software Alliance, I appreciate the opportunity to respond to the Notice of Inquiry published in the Federal Register on July 13, 1993, seeking comments about the lending of computer programs for nonprofit purposes by nonprofit libraries.

The Business Software Alliance ("BSA") promotes the continued growth of the software industry through international education, public policy and enforcement programs in the United States and more than fifty countries throughout North America, Europe, Asia and Latin America. The members of the BSA include Aldus, Apple Computer, Autodesk, Computer Associates, Lotus Development, Microsoft, Novell and WordPerfect. Together, the members of the BSA produce nearly 75% of the world's packaged software published by companies based in the United States

Despite increased awareness, greater copyright protection and stepped-up enforcement activities around the globe, unauthorized duplication and distribution of computer software programs remains the single greatest threat to the viability of the software industry. The BSA estimates that losses to the domestic industry from the use of unlicensed software total \$12 billion annually. In the United States, losses due to software piracy are estimated to run as high as \$1.9 billion annually.

As the Director of the BSA's North American Anti-Piracy Campaign, I am in a position to know firsthand how prevalent this problem has become. In the United States, as in twenty countries throughout the world, the BSA operates a toll-free telephone hotline to receive reports of software piracy and to provide information about proper software practices. In the first nine months of 1993 alone, the BSA domestic hotline has received hundreds of calls reporting illegal duplication of copyrighted software -- often in willful disregard for the law -- by businesses, organizations and institutions of every size, nature and geographic location. A percentage of those reports have

Dorothy Schrader  
October 12, 1993  
Page 2

involved unlawful copying by nonprofit entities, including educational institutions and academic departments.

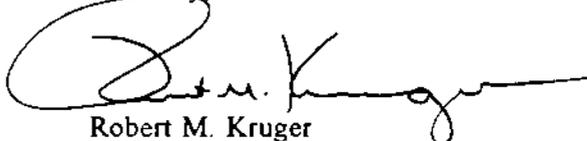
In addition to reports of software piracy made to and pursued by the software industry itself, I know that federal law enforcement authorities have independently identified, investigated and, increasingly, prosecuted software copyright violations. It is my understanding from consultation with these authorities that one particular form of software piracy -- piracy carried out by illicit bulletin board and hacker operations -- tends to disproportionately involve inhabitants of the university environment.

Unfortunately, there is no reason to believe that library patrons are exempt from the influences and behavior patterns reflected in the general population. Indeed, the industry's experience, as noted above, indicates that at least the academic environment -- in which libraries play a central role -- is quite vulnerable to software abuse. For these reasons, the industry strongly favors continued vigilance in this area and opposes any relaxation of existing requirements.

The BSA has been limited in its ability to develop empirical data about the extent to which piracy can be directly traced to the lending practices of nonprofit libraries. One reason these data have been difficult to gather is because software piracy is, almost by definition, carried out in such a way as to avoid detection. In this regard, the experience of the lending institutions responding to the Notice of Inquiry -- in particular what they report as to the type and volume of software being lent to patrons -- could help inform the BSA's view of the scope of the problem. Accordingly, the BSA would very much appreciate another opportunity to comment after information regarding the lenders institutions' experience becomes available.

Please contact me if I can be of any further assistance.

Sincerely,



Robert M. Kruger  
Director of Enforcement  
Business Software Alliance

Enclosures: 10 Copies

AMERICAN LIBRARY ASSOCIATION  
WASHINGTON OFFICE



110 MARYLAND AVENUE N.E. WASHINGTON, DC 20002 U.S.A.  
202-547-4440 FAX 202-547-7363

October 12, 1993

Ms. Dorothy Schrader  
General Counsel  
United States Copyright Office  
Office of the Register of Copyrights  
James Madison Memorial Building  
Room 407  
First Street and Independence Avenue, S.E.  
Washington, D.C. 20559

**UNITED STATES  
OF COPYRIGHT**

OCT 12 1993

**RECEIVED**

Comment Letter	
RM	93-7
No.	<u>4</u>

Re: Software availability in nonprofit libraries and educational institutions,  
pursuant to 17 U.S.C. 109 (b)(2), Docket No. RM 93-7

Dear Ms. Schrader:

The American Library Association (ALA) would like to respond on behalf of its membership to the Notice of Inquiry, published July 13, 1993 in 58 Federal Register 37757 on the exemption which nonprofit libraries and nonprofit educational institutions currently enjoy in the Computer Software Rental Amendments Act of 1990 allowing the circulation of software.

As the Chair of the American Library Association Copyright Ad Hoc Subcommittee, I thought it was important to reach the largest possible audience on this issue. I distributed a copy of the Notice of Inquiry (originally published in the Federal Register) electronically to 30 discussion lists on the Internet in order to secure comments. Discussion lists are digital conferences on specific topics, moderated by one or several editors, hosted on a given computer. There are 1,152 academic discussion lists available electronically, with hundreds devoted to specific topics in education and librarianship.

The comments that I received on the Notice of Inquiry support the continuation of the exemption for nonprofit libraries and educational institutions to continue to make software available to their patrons and clients.

First of all, software developers recognize the value of making software available in libraries and educational institutions. Phil Shapiro, the President of Balloons Software in Washington, D.C., wrote, and I quote, that

"Substantial benefits accrue to both patrons and publishers when software can be examined closely before a purchase is made. When given the chance to examine software before purchase, patrons can scrutinize both the software itself, and the accompanying documentation. Having a chance to take a close look at the documentation allows patrons to discover whether that particular program calls for a level of technical sophistication beyond what they could comfortably achieve with a reasonable amount of effort. Patrons can also discover whether the documentation achieves a balance between being complete and being to-the-point."

Gary Warner, System Programmer at Computer Services of Samford University agreed, arguing that individuals do not have the opportunity to test software before purchase. Individuals are handicapped in that software usually cannot be returned after a seal on packaging is broken, so there is no chance to really test a product. He mentioned, and I quote from his electronic note, that

"If a user is trying to decide between several competing products the opportunity for an "evaluation" might be quite valuable. As a corporate buyer, I am offered this opportunity by most software vendors, but as an individual, with buying power of ONE, no one is likely to provide this opportunity. ... I think it should be seriously examined why most software vendors refuse to allow the return of software once the diskette seal has been broken. Is it not because they feel that once the seal has broken, the user has in all likelihood stolen the product and is now returning it? Would they be more, or less trusting to someone who has no "hassle" to go through but can freely use the software and return it with no questions asked."

Prescott Smith, of the University of Massachusetts at Amherst, noted that software developers fail to recognize the value of making software available in libraries and educational institutions. He wrote

"My guess is that developers would benefit far more from it than they lose. The difficult part of selling software is getting someone to try it and recognize the benefits of it." [emphasis mine]

There are indeed economic benefits to software developers by making their products available for use in libraries and educational institutions. Pat McCall, of the Learning Resources Center at the Tulsa (Okla.) Junior College, remarked that

"In some cases, patrons say they are going to buy the software after trying the library's copy at home."

Indeed, I would argue that the library and educational communities should work together with software developers to test more rigorously this link between the availability of software and its sale. Libraries and educational institutions promote the sale of software, by making it available for intelligent evaluation. Libraries and educational institutions provide uncompensated support to software developers by educating patrons and students in the use of their products and by making equipment and printed materials available to assist in the optimal functioning of programs.

Libraries and educational institutions manage software in completely different ways from other materials in order to protect the interests of software developers. Librarians tend to "err on the side of access," to quote Karl Miller of the University of Texas at Austin, in protecting the rights of copyright owners. The labels — that libraries and educational institutions currently use on

circulating software — are difficult to create, unreadable, and expensive. To quote Michael Cohen of the Instructional Materials Center at the University of Wisconsin at Madison

"There seems to be no commercial vendor who is selling labels with the exact copyright warning text as specified by law. We had labels typeset, reduced, and printed locally--which seems like a lot of duplicate effort if everyone is doing the same thing. Also, is the full 3 paragraph text really necessary on every piece of software? We got the copyright warning reduced to a 2"x3" label--which I'm sure nobody can read."

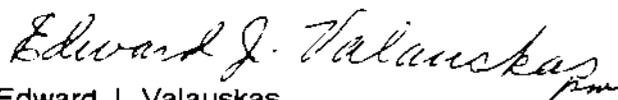
For some libraries, according to Prescott Smith of the University of Massachusetts at Amherst, these requirements add to our "administrative burden at a time when budgets have been slashed so severely the main functions of the library cannot be maintained, let alone new services." The alternatives are economically impractical, according to John Danek of the Media Center of the Niskayuna (N.Y.) High School, who wrote and I quote that

"I'd hate to think what would happen if I couldn't continue to offer this service. As an educational institution funded by hard earned taxpayer dollars I couldn't buy a copy for each and ever student for their personal use. The instructional program would die and we wouldn't buy what we already are."

I hope these comments, collected from electronic letters posted on the Internet, provide you with some sense of the importance of this exemption to nonprofit libraries and nonprofit educational institutions.

If you have any questions, contact me at your convenience.

Sincerely,



Edward J. Valauskas  
Chair, American Library Association Copyright Ad Hoc Subcommittee

The following notice was distributed electronically via the Internet:

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Nonprofit libraries and nonprofit educational institutions currently enjoy an exemption in the Computer Software Rental Amendments Act of 1990 allowing the circulation of software. Software in circulation requires a copyright notice, using text as described by the Register of Copyrights, but no other requirements are made on nonprofit libraries and educational institutions.

The Copyright Office has been asked to report on the extent of software circulation in nonprofit libraries and educational institutions, and to report on the impact of this form of software availability to patrons, libraries, educational institutions, software distributors, and software developers. In order to reach the largest possible audience, I have been asked to distribute the Notice electronically in order to secure comments.

If you have any questions, contact me at your convenience.

Edward Valauskas  
Chair, American Library Association Copyright Ad Hoc Subcommittee  
g0094@applelink.apple.com  
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Library of Congress  
U.S. Copyright Office

#### Notice of Inquiry: Computer Program Rental by Libraries

The Copyright Office of the Library of Congress is preparing a report for Congress on the extent to which the Computer Software Rental Amendments Act of 1990 has achieved its intended purpose with respect to lending by nonprofit libraries.

The Act permits lending of a computer program for nonprofit purposes by a nonprofit library, if each copy lent by such library has affixed to the package containing the program a warning of copyright in accordance with regulations prescribed by the Register of Copyrights. 17 U.S.C. 109(b)(2).

The Office seeks public comment on and information about such lending of computer programs for the purpose of evaluating how well the provision maintains the integrity of the copyright system while providing nonprofit libraries the capability to fulfill their function.

The Copyright Office is interested in receiving comments about any issues relevant to § 109(b)(2) which concern copyright owners, librarians, and library patrons. Of particular interest are the following questions:

1) If you are a librarian in a nonprofit library or educational institution, do you feel you are meeting the needs of your patrons with regard to computer software? Does § 109(b)(2)(A) facilitate or impede fulfillment of your function to provide information to your patrons in your nonprofit library or educational institution?

2) How often do you lend copies of computer programs to other nonprofit libraries or nonprofit educational institutions? How often do you lend computer programs to staff or users of your own institution?

3) Do the regulations in 37 CFR 201.24 pertaining to the warning of copyright for software circulation represent an onerous burden?

4) Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display is occurring as a result of the lending permitted by § 109(b)?

5) Do you feel the § 109(b) exemption for nonprofit libraries and educational institutions is harmful to the interests of copyright owners? Has there been any change in authors' and developers' income as a result of nonprofit lending by libraries?

6) Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?

7) Do you feel that new legislation is needed to either clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If so, please specify as precisely as possible what provisions such legislation should contain.

Effective date: Comments should be received on or before October 13.

1993.

Addresses: Interested persons should submit their comments electronically to: Edward J. Valauskas, Chair of the American Library Association Copyright Ad Hoc Subcommittee, g0094@applelink.apple.com

Comments by mail should be sent to: Dorothy Schrader, General Counsel, United States Copyright Office, Library of Congress, Department 17, Washington, D.C. 20540.

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4 p.m., Monday through Friday, in Room 401, James Madison Memorial Building, Library of Congress, First Street and Independence Avenue, S.E., Washington, D.C.

For further information, contact Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20540, (202) 707-8380.

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Requests to post this Notice were sent to the following discussion lists on the Internet.

<b>List</b>	<b>Moderator</b>	<b>Moderator's e-address</b>	<b>subject speciality</b>
PUBLIB	Jean Armour Polly	jpolly@nysernet.org	public libraries
CNI-Copyright	Mary Jensen	mjensen@charlie.usd.edu	copyright
KIDSPHERE	Bob Carlitz	carlitz@vms.cis.pitt.edu	K-12 computing & education
ARLIS-L	Mary Molinaro	molinaro@ykcc.uky.edu	art libraries
CIRCPLUS	Dan Lester	dlilesta@idbsu.idbsu.edu	library circulation
COLLDV-L	Lynn Sipe	lsipe@vm.usc.edu	library collections development
GEONET-L	Lois Heiser	heiser@ucs.indiana.edu	geoscience librarians
ILL-L	Patricia Mardeusz	pmardeus@uvmvm	interlibrary loan
INFO+REF	John B. Harlan	ijbh200@indyvax	information and referral services

<b>LIBRARY</b>	<b>John B. Harlan</b>	<b>ijbh200@indyvax</b>	<b>libraries</b>
<b>LAW-LIB</b>	<b>Elizabeth St. Goar</b>	<b>estgoar@ucdavis.edu</b>	<b>law libraries</b>
<b>LIBADMIN</b>	<b>Pamela Bluh</b>	<b>pbluh@umab</b>	<b>library administration</b>
<b>LM-NET</b>	<b>Mike Eisenberg</b>	<b>mike@suvvm.acs.syr.edu</b>	<b>school library media</b>
<b>MEDLIB-L</b>	<b>Nancy Start</b>	<b>hs1start@ubvm.cc.buffalo.edu</b>	<b>medical libraries</b>
<b>EDAD-L</b>	<b>Ed Lilley</b>	<b>u5b35@wvnm</b>	<b>educational administration</b>
<b>EDNET</b>	<b>Prescott Smith</b>	<b>pgsmith@ucsvax.ucs.umass</b>	<b>education &amp; the Internet</b>
<b>EDTECH</b>	<b>Vicki Banks</b>	<b>21602vb@msu</b>	<b>educational technology</b>
<b>ICU-L</b>	<b>Jim Gerland</b>	<b>listmgr@ubvm</b>	<b>computing in education</b>
<b>AAUA-L</b>	<b>Jerry Neuner</b>	<b>neuner@canisius</b>	<b>university administration</b>
<b>COMMCOLL</b>	<b>Anne Kearney</b>	<b>jecannek@ukcc</b>	<b>administration at two-year academic institutions</b>
<b>COMP- ACADEMIC- FREEDOM- TALK</b>	<b>Carl Kadie</b>	<b>kadie@eff.org</b>	<b>academic freedom</b>
<b>IPCT-L</b>	<b>Zane Berge</b>	<b>berge@eguvax.georgetown.edu</b>	<b>education and computing connectivity</b>
<b>SOFTPATS</b>	<b>Garrett A. Wollman</b>	<b>wollman@emily.uvm.edu</b>	<b>software patents</b>
<b>COMP-CEN</b>	<b>Rich Hintz</b>	<b>opsrjh@uccvma.ucop.edu</b>	<b>computer centers</b>
<b>HDESK-L</b>	<b>Roman J. Olynyk</b>	<b>u0ba9@wvnm</b>	<b>computer help desks</b>
<b>SLA-PAM</b>		<b>sla-pam@ukcc.uky.edu</b>	<b>special libraries</b>

These 26 discussion lists represent only 2% of the 1,152 academic discussion lists on the Internet. They reach probably only a small portion of the 23 million computers estimated to be hooked in one way or another to the Internet. It would be extremely difficult to estimate the size of the audience reached by postings to discussion lists. These lists are subscribed by thousands of individuals around the world; individuals may have re-posted the Notice to other lists and colleagues as well. Responses to the request varied. Some moderators replied that they would be happy to post it; others

did not reply. It is unclear that the Notice appeared on all of these lists, because the lists were not moderated during the experiment. The amount of traffic generated by all of these lists would have made it impossible to track each for any length of time. Subscriptions to SLA-PAM and CNI-Copyright indicated that the Notice was posted on those lists, and the kinds of responses indicate that the Notice appeared on many of the lists noted above. The addresses for many of these lists were found in Diane K. Kovacs, "Directory of scholarly electronic conferences." In: Directory of Electronic Journals, Newsletters and Academic Discussion Lists. 3rd ed. Washington, D.C.: Association of Research Libraries, 1993, pp. 143-328.

Requests for comments were also sent to the following organizations and individuals via the Internet.

<b>Organization</b>	<b>Contact</b>	<b>Contact's e-address</b>	<b>function</b>
Niles & Associates (Berkeley, CA)	Avi Rappaport	niles.assoc@applelink	software developers
CASPR (Sunnyvale, CA)	Norman Kline	caspr@applelink	software developers
Northwestern Univ. Computer Center (Evanston, IL)	Brian Nielsen	bnielsen@merle.acns	academic
Balloons Software (Washington, DC)	Phil Shapiro	pshapiro@aol.com	software developers
Univ. of Houston (Houston, TX)	Tom Wilson	lib4@jetson.uh.edu	academic
Univ. of Vermont	Merri Beth Lavagnino	mlavagni@uvmvm.uvm	academic
Meckler Corp. (Westport, CT)	Nancy Nelson	meckler@jvnc.net	publishers
Voyager Corp. (Santa Barbara, CA)		voyager@applelink	software developers
Brown Univ. (Providence, RI)	Helen Schmierer	ap010043@brownvm	academic
Microsoft Corp.	Tom Stephens	tomste@microsoft.com	software developers
Faxon Corp.	Karen Roubicek	roubicek@faxon.com	periodical distributors

Digital Publishing  
Association

dpa@genie.geis.com

professional association

Computer  
Professionals  
for Social  
Responsibility

Nikki Draper

draper@csl.stanford.edu

professional association

Responses to the above noted organizations and individuals varied, too. Some wrote a reply quite quickly with suggestions on other contacts; others did not respond electronically at all.

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Item 3744740                      7-Oct-93    19:37

From: PSHAPIRO@AOLCOM@INTERNET#    Gateway to Internet/BITNET/UUCP

To: G0094                              Valauskas, Edward,GOV

INTERNET# Document Id: <9310072237.m55642@aol.com>

---

Sub:    Re: software circulation

----- Internet E-mail Header -----

From: pshapiro@aol.com

X-Mailer: America Online Mailer

Reply-To: <pshapiro@aol.com>

Errors-To: <pshapiro@aol.com>

Sender: <pshapiro@aol.com>

To: g0094@appletink.apple.com

Hi Ed -

As it happens, you've sought comment on an issue that's close to my heart. Speaking as a software developer and software publisher, I wholeheartedly support the circulation of microcomputer software by non-profit libraries and educational institutions. Substantial benefits accrue to both patrons and publishers when software can be examined closely before a purchase is made.

When given the chance to examine software before purchase, patrons can scrutinize both the software itself, and the accompanying documentation. Having a chance to take a close look at the documentation allows patrons to discover whether that particular program calls for a level of technical sophistication beyond what they could comfortably achieve with a reasonable amount of effort. Patrons can also discover whether the documentation achieves a balance between being complete and being to-the-point.

Microcomputer software publishers, on the other hand, require assurances that their hard work is not unlawfully appropriated through software piracy. To understand the dimensions of the piracy problem it is sufficient to know that a single floppy disk, representing several thousand hours of programming work, can be easily duplicated in under a minute.

The facility with which microcomputer software can be unlawfully appropriated

suggests that libraries that choose to circulate commercial microcomputer software ought to take proactive steps to diminish the possibility that circulated software is illegally copied.

Society depends on the ingenuity and resourcefulness of software publishers to develop newer and better tools for all of us. If software publishers' work is unlawfully appropriated, the entire society is harmed by the scaling back of new software development.

In the balance, the circulation of microcomputer software has the potential of promoting the interests of libraries, the public, and the software publishers. These interests can further be promoted if efforts are made to impress upon patrons their legal and moral duty to use the software for legitimate evaluation purposes only.

- Phil Shapiro, President  
Balloons Software

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Item 9721786                      8-Oct-93    08:05

From: GLWARNER@SAMFORD.BITNET@INTERNET#

To: G0094                      Valauskas, Edward,GOV

INTERNET# Document Id: <9310081529.AA19220@guardian.apple.com>

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Sub: Library Software Lending

---- Internet E-mail Header ----

From: THE GAR <GLWARNER@SAMFORD.BITNET>

Organization: Samford University Computer Services

To: Edward Valauskas <g0094@applelink.apple.com>

Edward Valauskas

Chair, American Library Association Copyright Ad Hoc Subcommittee

Software lending by libraries will always lead to the illegal copying of software by some patrons.

First, consider the case of Business software applications. How likely is it that someone would want to borrow, as an example, a spreadsheet program such as Lotus 1-2-3, and use it for a period of three days. If the user were to enter a budget for his household into Lotus, when he legally returned the program, he would have no way of updating, or for that matter VIEWING his budget. In the case of a word processor, most word processors require weeks of use before one can be fully productive. Most of the lending terms I have seen for software lending in libraries are so short that the average user could not possibly become productive enough to write anything of substance during the term of the loan.

Consider also that very few programs on the market can actually be executed from the distribution diskettes. Most require that an installation process be performed. This process may take as long as an hour or more. Recent examples of both business software, such as Lotus 1-2-3 Release 4, or entertainment software, such as Maxis' SimEarth, require in excess of 10MB of hard disk space. If someone is going to go to the effort to install a product of such magnitude, and there is no way for anyone to know that he has done so, how likely do you feel it is that he will delete the software upon its return? In order to USE the software he must make a personal copy of it. The crime is not copying the software, it is failing to delete it.

The copying is NECESSARY to make the products function.

I can see only one plausible excuse for allowing the distribution of business applications. If a user is trying to decide between several competing products the opportunity for an "evaluation" might be quite valuable. As a corporate buyer, I am offered this opportunity by most software vendors, but as an individual, with buying power of ONE, no one is likely to provide this opportunity. The problem is that a true evaluation may take longer than the lending term, and once the user has the software, many are unlikely to go pay someone for what they already have.

By the way, I think it should be seriously examined why most software vendors refuse to allow the return of software once the diskette seal has been broken. Is it not because they feel that once the seal has broken, the user has in all likelihood stolen the product and is now returning it? Would they be more, or less trusting to someone who has no "hassle" to go through but can freely use the software and return it with no questions asked.

Software is not at all like books. If one steals a book, the library no longer has it. To photocopy a book would usually require more money than to buy another copy of the book, and is thereby unlikely, except in the cases of books which are no longer available for sale, in which case no one is losing any profit as a result. If one steals software, the library still retains a copy, and no one is aware of the theft. And software can be stolen for a cost of pennies on the dollar.

It is an entirely different issue than the lending of books, and surveys have shown that many computer users do not consider software piracy a crime. Part of the battle is to make someone feel that they have committed theft when it is so easy to justify away. John Sculley, former CEO of Apple Computers, pointed out in his introduction to the Software Publisher Association's "White Paper on Computer Piracy", that people who would never think about stealing a candy bar from a drug store have no qualms about copying a \$500 software package. Here is the logic that is applied by many "pirates":

I have stolen nothing. Although I retain a copy of this item, I have returned to the library exactly what they willingly loaned me, in the exact condition I have received it. The fact I still have a copy hurts the library in no way.

I have defrauded noone. I certainly do not have the \$495 to buy this business software in a store, and I would never spend \$65 on a simple entertainment program. Therefore the company would never have received any revenue from me. My use of the software for free is therefore not defrauding the publisher or any vendor, because if it

were not free I would not be using it.

I feel it is necessary to have strong laws on the books to prevent computer piracy. In the USA last year \$1.9 BILLION worth of software was stolen (PC Week June 28, 1993) accounting for 35% of all domestic software distributed (Computer Reseller News, June 7,1993). In Europe, 86% of all software is an illegal copy, and in Asia, the figure skyrockets to 99% (according to the Business Software Alliance). It is hard to imagine software vendors, who are concerned enough about piracy that we now have laws on the book making software rental illegal, would consent to allowing pirates to have FREE copies of their software, which they can borrow for days at a time, and then return with no questions asked! The cost of piracy is passed on to the end users in the form of higher software prices. Everything possible should be done to help stop the flow of illegal software. The library lending act is having the OPPOSITE effect and should be strongly discouraged.

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/+++++  
+++++\n! Later + Systems Programmer !  
! Gary Warner + Samford University Computer Services !  
! + II TIMOTHY 2:15 !  
  
\+++++  
+++++/
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Item 4914541                      8-Oct-93    08:19

From: JD287@ALBANYVMS.BITNET@INTERNET# Gateway to  
Internet/BITNET/UUCP

To: G0094                      Valauskas, Edward,GOV

INTERNET# Document Id: <01H3VH1E00B08WYW2P@albnyvms.BITNET>

-----  
Sub: Software/Circ/ILL

---- Internet E-mail Header ----

From: John Danek <JD287@ALBANYVMS.BITNET>

Content-Transfer-Encoding: 7BIT

X-Vms-Cc: JD287

Mime-Version: 1.0

X-Vms-To: IN%"g0094@applelinkapple.com"

X-Envelope-To: g0094@applelinkapple.COM

To: g0094@applelinkapple.COM

Date sent: 8-OCT-1993 14:59:55

We at NCS would like to believe that we are 100% copyright compliant. We spend a great deal of money for computer software to support our curriculum, both in single copy and network license. We extend circulation privileges to all those involved on an overnight, weekend and holiday basis.

To the best of my knowledge none of it have been copied. We plaster the software with ownership and copyright labels. And the same people continue to sign out the same curricular material, as taught. They wouldn't do that if it were copied.

I'd hate to think what would happen if I couldn't continue to offer this service. As an educational institution funded by hard earned taxpayer dollars I couldn't buy a copy for each and ever student for their personal use. The instructional program would die and we wouldn't buy what we already are. I doubt if other schools could either. The implications are obvious, and unacceptable in this global society.

The issue is one of ethics instruction at all levels of education,

libraries and other lending institutions. The energy should be spent now at our elementary and secondary levels, not to mention its faculties. Perhaps info on sources could be posted on LM\_NET and PUBLIB of curricular material by level and type.

jd

John Danek                   INTERNET: jd287@uacsc1.albany.edu  
Niskayuna High School       BITNET: jd287@albnyvms.bitnet  
Media Center  
1626 Balltown Rd.           PH: 518-382-2532  
Niskayuna, NY 12309-2397   FAX: 518-382-1166

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Item 4060170                      8-Oct-93    16:08

From: PGSMITH@EDUC.UMASS.EDU@INTERNET#

To: G0094                      Valauskas, Edward,GOV

INTERNET# Document Id: <9310090308.AA22248@titan.ucs.umass.edu>

-----  
Sub: Is Ed. Rental Software Safely

---- Internet E-mail Header ----

From: Prescott Smith <pgsmith@educ.umass.edu>  
Subject: Is Ed. Rental Software Safely Circulating (fwd)  
Content-Transfer-Encoding: 7BIT  
X-Mailer: ELM [version 2.4 PL22]  
Content-Length: 6858  
Content-Type: text  
To: g0094@applelink.apple.com

>Date: Fri, 08 Oct 1993 22:24:57 -0400  
>From: Prescott Smith <pgsmith@educ.umass.edu>  
>Subject: Is Ed. Rental Software Safely Circulating  
>Sender: ednet@nic.umass.edu  
>X-Comment: Local forum on educational possibilities of the Net  
>  
>  
> Appropos Barney's reference to teachers' pirating software (was  
> that a problem?), I've agreed to re-post the following with the  
> assurance that despite what it says at the bottom, copies of the  
> full document will be made available on-line.  
>  
> If there is any library or other agency circulating  
> computer software by rental, I am unaware of it. My guess is that  
> for most of us, the current flaw in such a program is that either  
> software developers or educational institutions are unwilling to  
> experiment to find out if there is a problem with copying.  
>  
> Here at the University, a few standard communications and  
> utility programs (virus checkers) are available for inexpensive  
> purchase by students and faculty under a site license agreement.

- > These are so inexpensive, I doubt whether there is much temptation
- > to pirate and though one of my p/t jobs is in a pc lab, I have not
- > heard of any. I suspect the same would be true of rental ware and
- > it would certainly be a good way of trying out programs before you
- > plunk down the full (educational) price.

>  
 > DO NOT SEND ANY RESPONSE TO THIS TO THE LIST  
 > See Private Addresses Below

>  
 >-----forwarded message-----

>  
 >Subj: software circulation  
 >  
 >Library of Congress  
 >U.S. Copyright Office  
 >  
 >Notice of Inquiry: Computer Program Rental by Libraries

[...deletions for brevity...]

- > The Copyright Office is interested in receiving comments about any
- >issues relevant to § 109(b)(2) which concern copyright owners,
- >librarians, and library patrons. Of particular interest are the
- >following questions:

As suggested, I do not believe our University Library or any other agency of the University is circulating rental programs so that the act is ineffective due either to the unwillingness of software firms to participate or the failure of libraries or non-profit agencies in this area provide such a service.

- > 1) If you are a librarian in a nonprofit library or educational
- >institution, do you feel you are meeting the needs of your patrons
- >with regard to computer software? Does § 109(b)(2)(A) facilitate
- >or impede fulfillment of your function to provide information to
- >your patrons in your nonprofit library or educational institution?
- >
- > 2) How often do you lend copies of computer programs to other
- >nonprofit libraries or nonprofit educational institutions? How often
- >do you lend computer programs to staff or users of your own
- >institution?
- >
- > 3) Do the regulations in 37 CFR 201.24 pertaining to the warning
- >of copyright for software circulation represent an onerous burden?

They may. Libraries may not want to take responsibility

for enforcing them, reporting violations or perhaps just taking on the necessary administrative burden at a time when budgets have been slashed so severely the main functions of the library cannot be maintained, let alone new services.

>

- > 4) Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display is occurring as a result of the lending permitted by § 109(b)?

>

I work part/time in a pc lab located in a library and I am unaware of any copyright violations in regard to site licensed software purchasable from Personal Computer Support Services, a University Computer Services branch, and I suppose the same might be true of rental software if it were available.

- > 5) Do you feel the § 109(b) exemption for nonprofit libraries and educational institutions is harmful to the interests of copyright owners? Has there been any change in authors' and developers' income as a result of nonprofit lending by libraries?

My own feeling is that even where some pirating does occur, this only creates a market for the inevitable upgrade since users tend to stick with a program they are familiar with. My guess is that developers would benefit far more from it than they lose. The difficult part of selling software is getting someone to try it and recognize the benefits of it.

- > 6) Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?

As I said, I cannot comment on "lending" software since it is non-existent here, but the similar situation with site licensed software allows me to report that I have no evidence of unauthorized copying.

- > 7) Do you feel that new legislation is needed to either clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If so, please specify as precisely as possible what provisions such legislation should contain.

Perhaps a greater incentive could be created for both software owners to offer and libraries to circulate programs as long as copyright is in effect. A more complete solution would be to completely overhaul copyright law as should have been done in the

last go around and remove all restrictions on copying and distributing. Instead, using some statistical procedures to estimate the relative use (and presumed value) to reward originators of software, whether computer programs, books, films, etc.

Business inveighs against bureaucratic measures of government and their retarding effect on new business formation and profitability, efficiency and productivity of current business. Few laws are more costly in accounting, enforcement and legal fees, quite aside from restriction in the free flow of ideas and product and business creation. In the electronic era, the whole edifice becomes ridiculous and impedes the progress of new and far more promising technology.

Prescott Smith Oct. 8, 1993

>  
> DO NOT SEND RESPONSES TO EDNET OR ME. SEE ADDRESSES ABOVE

>-----  
> Prescott Smith - Univ. of Mass/ Amherst - pgsmith@educ.umass.edu  
> Ednet - a forum exploring the educational potential of the Internet  
> e-mail to: Listproc@nic.umass.edu 1st line: Sub Ednet (Your Name)

>-----  
160 Rolling Green Prescott Smith pgsmith@educ.umass.edu  
Amherst, MA 01002 413/253-5527  
>-----

---

Item 5668313                      11-Oct-93      02:37

From: PMCCALL@TULSAJC.BITNET@INTERNET#

To: G0094                              Valauskas, Edward,GOV

INTERNET# Document Id: <19931011.093710.PMCCALL@TULSAJC>

-----  
Sub: Uncl: Re:Copyrighted Software

----- Internet E-mail Header -----

From: <PMCCALL@TULSAJC.BITNET>

Subject: Uncl: Re:Copyrighted Software \$ 109(b)(2)

To: <g0094@applelink.apple.com>

To: Edward J. Valauskas

1. The law does more to facilitate than impede fulfillment of patron's needs in our library. Budget constraints and worry about viruses are more likely to discourage us from purchasing software to circulate.

2. Inter-Library Loan of a software package occurs maybe once a year. Total circulation to regular patrons is about 24 times total for all packages.

3. It is not an onerous burden to include a copy of the regulations.

4. We have seen more theft of disks than evidence of copying.

5. Not from the low activity here. In some cases, patrons say they are going to buy the software after trying the library's copy at home.

6. No.

7. no

Pat McCall, Learning Resources Center Coordinator  
Tulsa Junior College - N.E. & S.E. Campuses  
Tulsa, Oklahoma 74133  
pmccall@tulsajc.bitnet

---

Item 0076164                    11-Oct-93    07:54

From: SRBARTB@VCCSCENT.BITNET@INTERNET#

To: G0094                    Valauskas, Edward,GOV

INTERNET# Document Id: <9310111416.AA13780@alink-gw.apple.com>

-----  
Sub: Software Circulation

---- Internet E-mail Header ----

From: Bruce Bartek <SRBARTB@VCCSCENT.BITNET>

Comments: Converted from PROFS to RFC822 format by PUMP V2.2X

To: Edward Valauskas <g0094@applelink.apple.com>

The head librarian of one of our campuses has asked me to forward his response to your note about software circulation by libraries.

"It is imperative that non-profit institutions and libraries have the right to disseminate information such as computer software to its customers for education, research and personal use. Once the material is circulated, the burden of proof as to its usages for not for profit use must remain with the borrower."

Abdual J. Miah, Director  
J. Jargeant Reynolds Community College  
Downtown Campus  
Richmond, Virginia

Bruce M. Bartek                    J. S. Reynolds Comm College  
Coord. of Institutional Research    P.O. Box 85622  
PH (804) 371-3286 / FAX (804) 371-3386 Richmond VA 23285-5622  
BITNET: SRBARTB@VCCSCENT

---

Item 1183906            11-Oct-93    09:07

From: BECKYF@LAGUNA.EPCC.EDU@INTERNET#

To: G0094                Valauskas, Edward,GOV

INTERNET# Document Id: <01H3ZQ27MCPU8ZE9AZ@LAGUNA.EPCC.EDU>

-----  
Sub: Software Circulation

---- Internet E-mail Header ----

From: BECKYF@LAGUNA.EPCC.EDU

Content-Transfer-Encoding: 7BIT

Mime-Version: 1.0

X-Vms-To: IN%"g0094@applelinkapple.com",MIKEW,BECKYF

Content-Type: TEXT/PLAIN;CHARSET=US-ASCII

To: g0094@applelinkapple.com

El Paso Community College, El Paso, Tx. MIS Library has software available for check-out to College staff. We do not lend software to other institutions. Copyright notices are attached to each software package. There is no way to tell what people do with the software once it leaves the library. Hopefully, the majority of people are honest and do not make unauthorized copies. I do not feel that new legislation would help. There doesn't seem to be a feasible way to enforce rules about unauthorized copying or use.

Rebecca Falkner, Coordinator  
Documentation and Training  
EPCCntation and Training

---

Item 5514692                      11-Oct-93    09:42

From: LYAA071@UTXVM.CC.UTEXAS.EDU@INTERNET#

To: G0094                              Valauskas, Edward,GOV

INTERNET# Document Id: <9310111642.AA19024@alink-gw.apple.com>

-----  
Sub: software lending

----- Internet E-mail Header -----

From: LYAA071@utxvm.cc.utexas.edu

To: g0094@applelink.apple.com

>

- > 5) Do you feel the \$ 109(b) exemption for nonprofit libraries and
- > educational institutions is harmful to the interests of copyright owners?
- > Has there been any change in authors' and developers' income as a result of
- > nonprofit lending by libraries?

I believe there is a potential problem for some software. Most software directions begin with the suggestion that software be loaded to the user's hard disc. One does not need to photocopy a book to read it, nor does one need to tape an audio CD to hear it. I believe that libraries should not be permitted to loan software that could be considered to be an application versus software that is primarily informational in content. This may be a difficult distinction to make but I feel it may be a valid distinction. I also realize that it may be difficult to enforce such a law.

While some multimedia products, and CD-ROMs require software being loaded to a hard disc, the product is not fully functional without the CD itself being resident.

One area that has not been explored to my knowledge, is that of the mode of transmission of software. There is significant amounts of public domain software available from various sites. As libraries and library users are now equipped to ftp should there be legislation restricting what a library can mount for patron access. I am not speaking of shared applications so much, but if a library say bought ten copies of some informational software, mounted it on a file server, I believe it should be stated somewhere that this is the same as

multiple users of a given item. I mention this only since as a librarian it has been my experience that librarians have the best of intention to supply information to everyone, and unless it is clearly and very specifically outlined as to the exact meaning they will err on the side of access.

I am concerned as a media librarian who would like to have legislation address potential problems rather than have it come in after the fact. Libraries need to fulfill their mission but it is difficult for me to see how we as librarians can, in terms of a more accessible internet, determine and limit our clientele, if indeed we should. I also realize that this is just the tip of the iceberg. For instance, in the recent cable tv legislation, local cable operators could have been forced to pay for carrying local tv stations. Local tv station access is a good selling point for the cable operators, but yet most local stations in our town agreed to let the cable carry them for free.

Should libraries allow cable operators to carry library information services for free? If you can download a movie from your local cable supplier, how about downloading a movie free from the library. There are many things to consider and I sincerely hope that your group looks beyond the immediate present.

Respectfully,  
Karl Miller  
lyaa071@utxvm.cc.utexas.edu

---

Item 6013541                    11-Oct-93    13:12

From: MCOHEN@MACC.WISC.EDU@INTERNET# Gateway to  
Internet/BITNET/UUCP

To: G0094                    Valauskas, Edward,GOV

INTERNET# Document Id: <23101115124079@vms2.macc.wisc.edu>

-----  
Sub: Software Law and libraries

---- Internet E-mail Header ----

From: "Michael Cohen, IMC" <MCOHEN@macc.wisc.edu>

X-Vms-To: IN%"g0094@applelink.apple.com"

To: g0094@applelink.apple.com

The IMC at the University of Wisconsin-Madison processes computer files in accordance with the software laws, believes that the intent of the law meets our needs, and is unaware of any library patrons making illegal copies of software.

Two specific points, however, do pose problems.

1) There seems to be no commercial vendor who is selling labels with the exact copyright warning text as specified by law. We had labels typeset, reduced, and printed locally--which seems like a lot of duplicate effort if everyone is doing the same thing. Also, is the full 3 paragraph text really necessary on every piece of software? We got the copyright warning reduced to a 2x3" label--which I'm sure nobody can read.

2) As a non-lawyer, I cannot tell from the text of the law if libraries can legally circulate a copy of the software or if they must circulate the original as purchased. The law talks about making backups for archival purposes only--can the original be the archive? When you purchase software for home use you are always instructed to use a backup and put the original away, but the wording of the law seems to direct libraries to do the opposite. I have phoned the LC Copyright Office with this question and gotten different answers each time, depending on who you talk to. A clarification on this issues would be helpful.

-----  
Michael Cohen                    Phone: (608) 262-7301  
Instructional Materials Center    Fax: (608) 262-6050  
University of Wisconsin-Madison    Internet: mcohen@macc.wisc.edu

---

Item 8284058                      12-Oct-93      01.53

From: JKWAN@CALVIN.USC.EDU@INTERNET# Gateway to  
Internet/BITNET/UUCP

To: G0094                      Valauskas, Edward,GOV

INTERNET# Document Id: <9310121553.AA18258@calvin.usc.edu>

---

Sub: no.195-SOFTWARE CIRCULATION

---- Internet E-mail Header ----

From: jkwan@calvin.usc.edu (Julie Kwan)

Content-Transfer-Encoding: 7bit

Mime-Version: 1.0

X-Mailer: ELM [version 2.4 PL21]

Content-Length: 1651

Content-Type: text/plain; charset=US-ASCII

To: g0094@applelinkapple.com

Cc: jtoscan@calvin.usc.edu (Joyce Toscan), lsipe@calvin.usc.edu (Lynn Sipe)

This message is a response to the Notice of Inquiry: Computer  
Program Rental by Libraries

1. As a librarian at an educational institution, I believe we are meeting the needs of our patrons while at the same time fulfilling our obligations for \$ 109. We package a copy of the software; the packaging includes the complete copyright statement using the wording from the Federal Register, v. 56, no. 38, Tuesday, February 26, 1991.

2. However, these materials are borrowed very infrequently, if at all by anyone, including our primary users. We clearly mark the book that the software is included; the books circulate, the software does not. [Note that our primary circulating software at this time is software which accompanies a book.]

3. Packaging the materials with the warning of copyright is not an "onerous" burden, but it does require more time to prepare the material. Some materials have been held up in processing because the diskette is inoperable. If the number of volumes which include software continues to increase at the present rate, these additional processing tasks may very well become a problem.

4. I do not believe that there is unauthorized copying, adaptation, redistribution, etc. as a result of lending software.

5. I do believe that circulating software is not harmful to the interests of copyright owners.

6. I know of no evidence that unauthorized copying, adaptation, redistribution, etc. of copyrighted software made available under these procedures exists.

7. I have no suggestions for further legislation.

Julie Kwan, Head Librarian  
Science and Engineering Library  
University of Southern California



---

Item 5648637                      13-Oct-93    05:15

From: GPLCCEN@CLASS.ORG@INTERNET#    Gateway to  
Internet/ BITNET/ UUCP

To: G0094                              Valauskas, Edward,GOV

INTERNET# Document Id: <Pine.3.05.9310131224.A22255-b100000@cla

---

Sub:    Software circulation

---- Internet E-mail Header ----

From: Glendora Public Library <gplccen@class.org>

Mime-Version: 1.0

Message-Id: <Pine.3.05.9310131224.A22255-b100000@class.class.org>

Content-Type: TEXT/PLAIN; charset=US-ASCII

To: g0094@applelink.apple.com

The Glendora Public Library has been circulating software to the public for about five years now. The public checks out the software packages for seven days at no charge, unless the software is returned late, damaged, or lost. The general consensus at the library is that his circulating software has a direct link to the public's purchasing of both software and hardware, because it makes the public aware of the vast possibilities of what computers and computer software has to offer. This library service builds the public's expectations, needs and desires to make personal purchases. The library only whets the public's appetite.

1. Yes, the library meets the needs of its public in regards to circulating software.
2. Our circulation of software for the 1992-93 fiscal year was 1,778 items circulated out of a grand total circulations of 357,198 (FY 1990-91 255, FY 1991-92 816).
3. No, there is no undue burden put on the library regarding the regulations of 37. CFR 201.24.
4. The library has no evidence that the public is performing unauthorized copying of software as a result of the lending permitted by 109(b), just as the library has no evidence of unauthorized copying of book material. The library affixes a warning of the copyright restrictions to every

softwarepackage.

5. The library has reason to believe that the 109(b) exception for nonprofit libraries is not harmful to the interests of copyright owners, although we do not have any statistics on the subject.
6. The library has no evidence of unauthorized copying of software.
7. The library does not see any need for new legislation.

Item 5116474 13-Oct-93 06:33

From: JINNIE\_DAVIS@LIBRARY.LIB.NCSU.EDU@INTERNET#

To: G0094 Valauskas, Edward,GOV

INTERNET# Document Id: <9310131741.AA10746@charon.cc.ncsu.edu>

-----  
Sub: Computer Program Rental by

----- Internet E-mail Header -----

From: "Jinnie Davis" <jinnie\_davis@library.lib.ncsu.edu>

Posted-Date: 13 Oct 1993 13:33:37 U

To: "Edward Valauskas" <g0094@applelink.apple.com>

Subject: Time:1:29 PM

OFFICE MEMO Computer Program Rental by Libs. Date:10/13/93

TO: Edward Valauskas

FROM: Jinnie Y. Davis, Assistant Director for Planning & Research

North Carolina State University Libraries (e-mail: jinnie\_davis@ncsu.edu)

RE: Computer Program Rental by Libraries

Here are the responses from the NCSU Libraries:

1) If you are a librarian in a nonprofit library or educational institution, do you feel you are meeting the needs of your patrons with regard to computer software? Does § 109(b)(2)(A) facilitate or impede fulfillment of your function to provide information to your patrons in your nonprofit library or educational institution

While we cannot hope to meet all the desires of our users regarding computer software, the NCSU Libraries' staff members believes that we are providing materials in this format responsive to the needs of our users. We, by policy, do not acquire general-purpose applications software such as spreadsheets or word-processing packages. The software we do acquire is almost completely material accompanying other publications that have been purchased in response to our collection development guidelines. Largely this software comprises data sets, simulation routines, etc., that accompany published texts. We are not staffed sufficiently to provide the sort of oversight that would be required to make more general-purpose software available to our users. Given the constraints on our collecting in this area, we think that the existing regulations pose no particular impediment to our providing access to software.

2) How often do you lend copies of computer programs to other nonprofit

libraries or nonprofit educational institutions? How often do you lend computer programs to staff or users of your own institution?

Software is loaned to other libraries probably no more than about once per week. To our own users we circulate about 5 to 6 pieces of software per day, virtually all of it material accompanying published works.

3) Do the regulations in 37 CFR 201.24 pertaining to the warning of copyright for software circulation represent an onerous burden?

The implementation of this warning has been no problem for us. We routinely affix the statutory warning to the folder used to circulate the software while the material is being initially processed by the cataloging staff.

4) Do you have reason to believe that unauthorized copying, adaptation, redistribution, public performance or display is occurring as a result of the lending permitted by § 109(b)?

We have no evidence that users fail to heed the warning placed on the circulation folder for the software.

5) Do you feel the § 109(b) exemption for nonprofit libraries and educational institutions is harmful to the interests of copyright owners? Has there been any change in authors' and developers' income as a result of nonprofit lending by libraries?

From our experience, we have no reason to believe that copyright owners are being adversely affected by limited circulation of software from our library.

6) Are you aware of any evidence that unauthorized copying, adaptation, redistribution, public performance or display results from nonprofit lending of computer software?

We are unaware of any such violations.

7) Do you feel that new legislation is needed to either clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users? If so, please specify as precisely as possible what provisions such legislation should contain.

No suggestions to make in this area. Our experience indicates that the current regulations appear to provide an adequate level of protection to copyright owners without impeding libraries in their ability to make available the information their clientele need, regardless of the format in which that information is provided.

---

Item 2542490                      13-Oct-93    09:29

From: MMM@CCRWEST.ORG@INTERNET#    Gateway to  
Internet/BITNET/UUCP

To: G0094                      Valauskas, Edward,GOV

INTERNET# Document Id: <9310131629.AA04476@maxima.ccrwest.org>

---

Sub:    Re: software circulation

----- Internet E-mail Header -----

From: Maxine Moser <mmm@ccrwest.org>  
To: G0094@APPLELINK.APPLE.COM

We are a small, nonprofit, private library and do not circulate software. However, floppy disks which sometimes accompany books are another aspect of this problem. Our building has a classified section and no electronic materials may go into this area; therefore, I have to remove all floppy disks from books which would normally circulate. I then file them behind the circulation desk and post notices within the book and the opac (online public access catalog) as to how to obtain the disk. If the item is requested, I have made one backup copy and circulated it instead of the original, with the added proviso that it doesn't get taken into the classified area. --Maxine Moser, IDA CCR-LJ

---

INTERNET# Document Id: <01H43MOE0NOI8WY88C@CCIT.ARIZONA.EDU>

Item 0061991                    14-Oct-93    04:07

From: ALMOND@CCIT.ARIZONA.EDU@INTERNET#

To: G0094                    Valauskas, Edward,GOV

--- Internet E-mail Header ---

From: Anita Almond--Faculty Resources for Instruction  
<ALMOND@CCIT.ARIZONA.EDU>

X-Vms-To: IN%"g0094@applelink.apple.com"

Content-Transfer-Encoding: 7BIT

Mime-Version: 1.0

X-Envelope-To: g0094@applelink.apple.com

To: g0094@applelink.apple.com

Dear Mr. Valauskas:

I'm sorry that this is a day late; I got behind in reading my e-mail. I would like to comment on the Computer Rental Act issues because I have been involved in lending out software for evaluation for five years here at the University of Arizona. We have about 950 software packages on permanent loan from companies around the country. We circulate them for two weeks at a time. Last year our total circulation was 1106 software packages.

1) For the most part, I am meeting the needs of my customers in trying to find the right tool for the job. Most customers look at 2 or more packages in a category before making a decision to purchase one. This is very important, because we in the Computer Center are able to support only a small portion of the software that is needed on a campus of 36,000 students. Faculty and staff must find software that does the job and that they can understand themselves!

Putting the Software rental act page in every package means that we copy it on to the front side of the page our Univ. software copyright policy is on. No more paper used-just a bit more copying. Not a big deal.

2) We lend perhaps 15-20 packages a year to teachers at our local community college. Last year, we lent our software 1106 times.

3) We have not found the regulations to be a burden. We want to do everything we can to comply with the law and make sure our customers understand and comply.

4) I have run across one or two situations where I suspected some illegal activities, even though we make all our customers aware of the legalities. By and large our customers are honest.

5) I believe that by making software available, I have made it possible for companies to get exposure that they might not have had, especially software manufactured by less well-know companies. I think it may have helped their income, especially as, if there is large interest in a package, we try to assist with group purchases and site licenses.

6) No.

7) Many of our evaluation copies are crippled in some way. This is a fairly simple way that companies can protect their software and still make it easy for faculty, staff, and students to evaluated it. If companies were to make it possible for people to obtain such easily via the Internet, I could work myself out of job! I really don't think we need more legislation--just smarter programmers! (I was a programmer for ten years, so I'm not talking through my hat!)

Thanks for giving me the opportunity to comment,

Anita

Anita Almond Almond@arizvms.bitnet or almond@ccit.arizona.edu  
CCIT Faculty Resources for Instruction, Computer Center 307, Bldg 73  
University of Arizona, Tucson, AZ 85721 602/621-2515

GENERAL COUNSEL  
OF COURTESY

NOV 9 1993

RECEIVED

Comment Letter

RM 93-7

attach to  
Comment  
No. 4

To:

Jennifer Hall  
U.S. Copyright Office  
Library of Congress  
Washington, DC 20540

Fax Phone Number:

12027078366

Voice Phone Number:

12027078380

Number of Pages:

3

Date:

10/23/93-16:19:21

Subject:

Hall 10/19/93

Notes:

From:

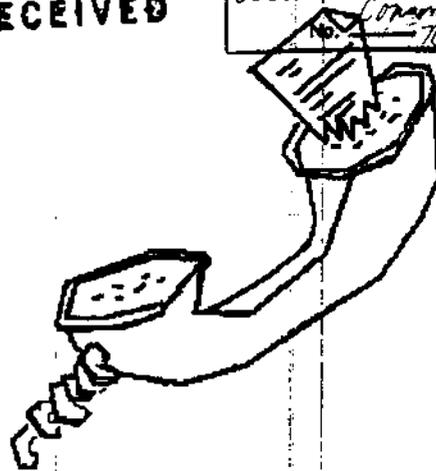
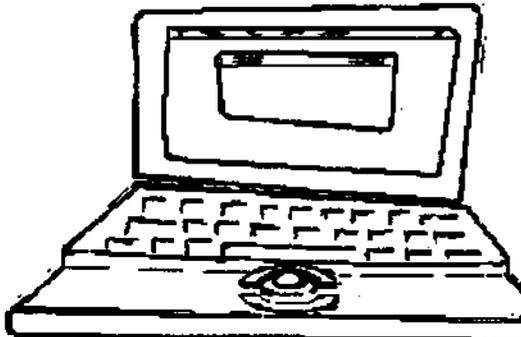
Edward Malauskas  
Information Consultant  
5850 S. Lake Shore  
Apt. 3214  
Chicago IL 60680

Fax Phone Number:

1-312-413-8424

Voice Phone Number:

1-312-363-9885



Jennifer Hall  
U.S. Copyright Office  
Library of Congress  
Washington, DC 20540

Jennifer:

Here's a late message that arrived, commenting on software circulation. I'll keep you posted if any other replies arrive.

Ed Valauskas

-----  
Item 8889928 19-Oct-93 05:41

From: ELMER@AOA.UTC.COM@INTERNET# Gateway to  
Internet/ BITNET/ UUCP

To: G0094 Valauskas, Edward,GOV

INTERNET# Document Id: <9310191241.AA04985@aoa.utc.com>

-----  
Sub: non-profit loans of software

--- Internet E-mail Header ---

From: elmer@aoa.utc.com (Elmer Fittery)

Content-Transfer-Encoding: 7BIT

X-Envelope-To: g0094@applelinkapple.COM

To: g0094@applelinkapple.COM

My two cents worth is as follows:

I have on many occasions copied friends software.

On no occasion, have I continued using the software after determining I really wanted the software. In general, most software is of no real use to me, and even if I have lots of bootlegged software laying around, I seldom if ever use it. On the occasion when I find something that I really need, I buy it. My experience with other people that do software development and use computers leads me to believe

they are doing the same kind of thing.

If anything, bootlegging software for personal use will cause copies of a product to be sold that would not have been sold.

My personal opinion about software bootlegging is:

Concentrate on the individuals/companies that bootleg for a profit motive.

To:

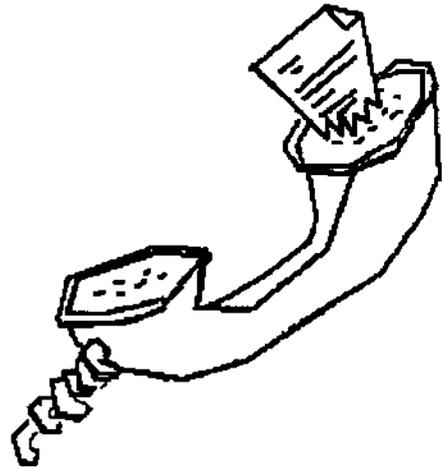
**Jennifer Hall  
U.S. Copyright Office  
Library of Congress  
Washington, DC 20540**

Fax Phone Number:

**12027078366**

Voice Phone Number:

**12027078388**



Number of Pages:

**2**

Date:

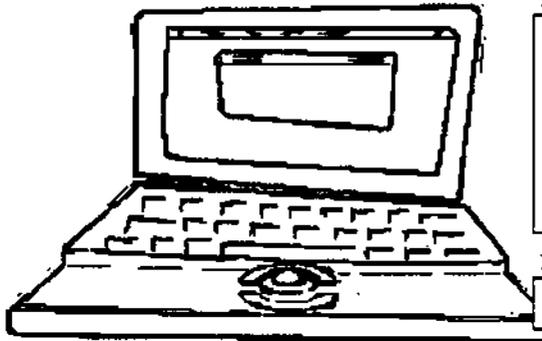
**2/11/94-12:28:43**

Subject:

**circ. software 2/10/94**

Notes:

[Empty box for notes]



From:

**Edward Ulauskas  
Information Consultant  
5050 S. Lake Shore  
Apt. 3214  
Chicago IL 60680**

Fax Phone Number:

**1-312-413-8424**

Voice Phone Number:

**1-312-363-9885**

Item 2786970

10-Feb-94 21:49

From: RONEHMKE@AOL.COM@INTERNET# Gateway to  
Internet/ BITNET/UUCP

To: G0094 Valauskas, Edward,GOV

INTERNET# Document Id: <9402110049.tn66512@aol.com>

-----  
Sub: Circulating Software

--- Internet E-mail Header ---

From: ronehmke@aol.com

X-Mailer: America Online Mailer

Sender: "ronehmke" <ronehmke@aol.com>

To: g0094@applelink.apple.com

To: Edward J. Valauskas, Chair of the American Library Association Copyright  
Ad Hoc Subcommittee

Dear Mr. Valauskas,

I have learned through my local public library of the government Copyright  
Office's inquiry into software circulation, and I want to state that I  
strongly support the right of libraries to make this material available to  
the general public without charge. As a newcomer to the computer  
revolution

(and a longtime library-user), I cannot tell you how valuable the library's  
resources have been to me as I have begun to educate myself in the capacities  
of this new tool. Many books about personal computing now come with disks  
included, and while we as a society still tend to mystify information which  
comes on a floppy disk or appears on a screen, we as a public have as much  
right to free access to that information as we do to printed texts. As I  
watch both university and public libraries in my community devote more  
and

more of their budgets and energies to placing their card catalogues and other  
resources "online," it seems obvious to me that the Library Association  
should develop a clear and coherent policy towards software which makes  
approved materials widely accessible.

Computer literacy, like any other literacy, is intimately tied to economics,  
to issues of class and demographics. With so much talk in the air about the  
"information age" and the "information superhighway," it seems both  
appropriate and necessary that we fight the tendency to privatize the new  
technology, that we resist any move to restrict access to this "information"  
to a wealthy elite.

Thank you for your time.

Software Publishers Association



VIA MESSENGER

GENERAL COUNSEL  
OF COPYRIGHT

OCT 18 1993

October 12 , 1993

RECEIVED

Comment Letter
RM 93-7
No. <u>5</u>

1730 M Street  
Northwest  
Suite 700  
Washington, DC  
20036-4510

Telephone  
(202) 452-1600

Fax  
(202) 223-8756

Ms. Dorothy Schrader  
General Counsel - U.S. Copyright Office  
Office of the Register of Copyrights  
James Madison Memorial Building  
Room 407  
First Street and Independence Avenue, S.E.  
Washington, D.C. 20559

Re: **Computer Program Lending by Nonprofit Libraries  
Pursuant to 17 U.S.C. 109(b)(2)  
Docket No. RM 93-7**

Dear Ms. Schrader:

The Software Publishers Association (SPA) wishes to respond to the Notice of Inquiry published July 13, 1993 in 58 Federal Register 37757 regarding whether the nonprofit library lending exemption to the computer program rental right, Section 109(b)(2) of the Copyright Act of 1976, 17 U.S.C. 109 (b)(2), has achieved its intended purpose of maintaining the integrity of the copyright system while enabling nonprofit libraries to fulfill their function.

SPA is the principal trade association of the personal computer software industry, with a membership of over 1,000 large and small companies that develop and market business, consumer, and education software products. Among our members' most valuable assets are the copyrights they hold in computer programs. SPA has been a leader in copyright protection for software, having testified in Senate hearings leading to the Computer Software Rental Amendment Act of 1989, and been closely involved in the felonization provisions of the Copyright Amendments Act of 1992.

Recommendation

SPA believes that the nonprofit lending exemption in its current form does not protect the integrity of the copyright system because it facilitates unauthorized copying by library patrons. To remove the harm to copyright owners, while still permitting nonprofit libraries to meet the legitimate, noninfringing needs of their patrons, SPA proposes that:

- (1) Computer programs should be available for use by patrons only within the library, and not removed from the library premises, and
- (2) A clear warning that it is illegal to copy computer programs without permission of the copyright owner, including the civil and criminal penalties for doing so, should be affixed to each computer available for use by library patrons.

This proposal balances the needs of copyright owners and nonprofit libraries by treating computer programs like library reference books, and by treating computers for public use like library photocopying machines with respect to the copyright infringement warning. SPA also encourages the Copyright Office to review the denial of rental rights to certain computer programs under Section 109(b)(1)(B)(ii).

Discussion

Article I, Section 8 of the U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Copyright law advances this purpose by rewarding creative expression while advancing public dissemination and use of copyrighted works. An important means for preserving this constitutional balance is the "first sale doctrine" in Section 109(a) of the Copyright Act of 1976, which generally permits the owner of a lawfully made copy to sell or otherwise dispose of that copy without authorization from the copyright owner.

In 1990, however, Congress was presented with "compelling" evidence that software rental for commercial advantage, then permitted by the first sale doctrine, would "encourage unauthorized copying, deprive copyright owners of a return on investment, and thereby discourage creation of new products." H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 8 (1990) ("H.R. Rep."). To restore the balance between the rights of copyright owners and the needs of users, the Computer Software Rental Amendment Act of 1989, codified as Section 109(b), created a narrowly focused exception to the first sale doctrine by prohibiting the unauthorized rental, lending, or lease of computer programs for direct or indirect commercial advantage. The importance of the rental right was underscored at a luncheon last week by Chairman William J. Hughes of the House Judiciary Committee, who supports repealing the sunset provisions of Section 109(b) to implement relevant provisions of the North American Free Trade Agreement.

There is a specific exemption to this exclusive rental right for copyrights in computer programs. Section 109(b)(2) permits "the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright."<sup>1</sup> Lending by nonprofit libraries for nonprofit purposes, as well as lending by nonprofit educational institutions among themselves and to faculty, staff, and students,<sup>2</sup> was specifically exempted

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<sup>1</sup> 37 C.F.R. 201.24 requires a clearly legible "Warning of Copyright for Software Rental" be durably affixed to the packaging containing the computer program lent by the nonprofit library in such a way that it is "readily apparent to a casual user." In part, the warning admonishes the user that "[a]ny person who makes an unauthorized copy or adaptation of the computer program, or redistributes the loan copy, or publicly performs or displays the computer program, except as permitted by title 17 of the United States Code, may be liable for copyright infringement."

<sup>2</sup> In this respect, the Notice of Inquiry appears broader than the the Copyright Office's statutory obligation to report to Congress on Section 109(b)(2). Question 5 in the Notice of Inquiry asks "Do you feel the Section 109(b) exemption for nonprofit libraries *and educational institutions* is harmful to the interests of copyright owners?" (emphasis added). The nonprofit educational institution exemption, which permits "the transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students," is in a separate paragraph. (*Continued next page*)

from the rental right based on the theory that these institutions "serve a valuable public purpose by making computer software available to students who would not otherwise have access to it." H.R. Rep., at 8. Nonetheless, the House Judiciary Committee observed that "the same economic factors that lead to unauthorized copying in a commercial context may lead library patrons also to engage in such conduct." *Id.*

These factors and the present scope of the nonprofit library lending exemption threaten to eviscerate the critical right of copyright owners to control unauthorized reproduction of computer programs. Like rental, lending computer programs for use outside the library premises simply invites library patrons to make unauthorized copies in the privacy of their own homes. The only capital equipment needed to make perfect copies of computer programs is the very computer on which the borrowed programs would be used in the first place. Then, with the push of a few keys or the click of a mouse, entire computer programs can be reproduced almost instantaneously. Unlike the burdensome process of photocopying a book, copying a computer program is easy, quick, and makes perfect reproductions. This ease encourages infringement by unscrupulous library patrons that is virtually impossible for the nonprofit library or the copyright owner to detect.<sup>3</sup>

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*(Continued from previous page)* The distinction between the nonprofit library lending exemption and the nonprofit educational institution exemption is important. First, nonprofit educational institutions are a large and important market for many software publishers. In 1992, sales of educational software totaled \$570 million for the K-12 market alone. Sales for the post-secondary market, if available, would also be substantial. Second, a variety of licensing programs developed by individual software publishers enable educational institutions to meet their needs by making multiple copies of computer programs. Therefore, if the Copyright Office intends to include the nonprofit educational institution exemption in its report, SPA respectfully requests an opportunity to address this issue before the report is submitted to Congress.

<sup>3</sup> The Warning of Copyright for Software Rental required by 37 C.F.R. 201.24 makes clear that libraries reserve the right to refuse to fulfill a loan request if, in their judgment, fulfillment of the request would lead to violation of the copyright law. 37 C.F.R. 201.24.

While SPA does not have either the resources or the information to present quantitative evidence of software sales lost to infringement of computer programs lent by nonprofit libraries, SPA believes that unauthorized copying nonetheless is a result. In the course of its campaign against commercial software rental businesses, investigators have told Executive Director Ken Wasch that commercial software rental businesses believe that community public libraries are alternative sources of computer programs for unauthorized copying. The incentive to copy, and the harm to copyright owners, could well increase with the dramatic expansion of works stored in digital form, such as books and multimedia works.

SPA has no reason to believe that nonprofit libraries are responsible for such infringement by library patrons. Nonetheless, if such unauthorized copying is being done by library patrons, it would undermine the congressional purpose for enacting Section 109(b), namely balancing rewards for creative expression with the benefits of public dissemination. See H.R. Rep., at 8. In light of this harm, SPA believes the nonprofit library lending exemption to the software rental right is too broad and should be reconsidered.

An alternative would be to modify the nonprofit lending exemption along the lines of SPA's proposal. The SPA proposal for on-site lending and warnings on computers used by library patrons relies upon the established and familiar practices of libraries for other copyrighted works and reproduction equipment. The SPA proposal would treat computer programs as if they were reference books, which patrons typically can borrow for use only in the library. Moreover, displaying the copyright warning on computers available for use by patrons would be much like those now affixed to photocopying machines used by the public in libraries pursuant to Section 108(f)(1). The SPA proposal would thus discourage unauthorized copying of borrowed computer programs at home or in the office, where there are fewer inhibitions and less supervision than in a library, while permitting nonprofit libraries to continue making computer programs available to those who would otherwise not have access to them.

For these reasons, SPA urges the Copyright Office to recommend modifying the broad reach of the nonprofit library lending exemption to discourage unauthorized copying by library patrons. Should the Copyright Office not recommend doing so, SPA strongly suggests that the decision should be reviewed in one year to assess the impact of new optical storage media, such as compact disks (CD), on the needs of library patrons and the commercial impact on software publishers.

SPA also encourages the Copyright Office to review the denial of rental rights to certain video games. Under Section 109(b)(1)(B)(ii), there is no rental right for computer programs "embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes." The House Report states that these other purposes do not include copying computer programs, and that this provision "would not apply to a computer program embodied or used in conjunction with a general use computer that is also capable of being used to play video games." H.R. Rep., at 9. Nonetheless, the phrase "and may be designed for other purposes" creates an ambiguity in the statute that cannot be resolved without referring to the nonbinding legislative history.

Moreover, while this distinction may have been meaningful when Section 109(b) was revised three years ago, the video game and computer industries have technologically converged to the point where clarification is now needed. For example, computer programs embodied in CDs used in limited purpose computers, such as a Sega® video machine, would not enjoy a rental right under current Section 109(b), whereas those used with an Apple Macintosh® or IBM® PC or compatible computer would enjoy this right. New products like personal digital assistants and those employing 3DO™ 32-bit operating systems (which are essentially "family computers" incorporating state of the art computer technology) strain the definition of a "limited purpose computer." In SPA's view, computer programs that may be copied in whole or in part by the user, particularly those embodied in CDs, should enjoy an exclusive rental right under Section 109(b) regardless of the nature of the computer being used.

Software Publishers Association

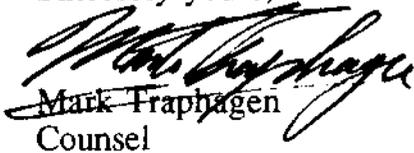
Ms. Dorothy Schrader  
October 12, 1993

Conclusion

The rental right is vitally important to computer program publishers, whose copyright would otherwise be vitiated by easy and inexpensive unauthorized copying. The nonprofit library lending exemption in its present form undermines this right because it facilitates unauthorized copying by library patrons. The SPA proposal would balance the interests of copyright owners and nonprofit libraries by diminishing the most serious harm presented by the nonprofit library lending exemption, while permitting libraries to continue fulfilling their public missions.

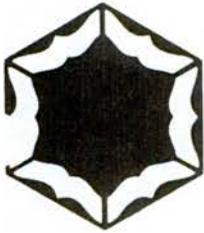
SPA appreciates this opportunity to comment on the nonprofit library lending exemption, and hopes that the Copyright Office will contact us if it has questions or needs additional information.

Sincerely yours,

  
Mark Traphagen  
Counsel

Enclosures: 10 Copies

cc: Eileen D. Cooke



# JEFFERSON COUNTY PUBLIC LIBRARY

10200 West 20th Avenue Lakewood, Colorado 80215 (303) 232-7114

October 7, 1993

**RECEIVED**  
OCT 18 1993

Comment Letter	
RM	93-7
No.	<u>6</u>

Ms. Dorothy Schrader, General Counsel  
United States Copyright Office  
Library of Congress, Dept. 17  
Washington, DC 20540

Re: Comment on Computer Software Rental Amendments Act of 1990

Dear Ms. Schrader:

Jefferson County Public Library, as part of its service to the community of library users in the County, has considered the circulation of computer software. It is our intent to make software available in this way to students and other members of the community who might otherwise not have access to it. We have been advised by the County Attorney that we probably are not able to circulate most software under the terms of the Act.

While the Act was probably intended to allow the Library to circulate software programs to its patrons, there appears to be some legal support that the software companies can, by the "shrinkwrap" license agreements affixed to the software, prohibit such circulation. The Act, it could be argued, protects only libraries which own the software program. In most cases, the library is only a license-holder not an owner: thus the library is not protected. Even if the Library were protected under the Act, the companies may prohibit circulation by including such prohibition in the contract or license agreement.

The Jefferson County Public Library would like to see the Act changed in two specific ways so that we would be able to circulate software in the way we believe the Act intended. First, the Act should clarify that the library exemption applies whether the library is the owner, license holder or otherwise lawfully in possession of the computer program.

Second, as long as software companies can prohibit the library's circulation by private agreement, any protection under the Act is vitiated. Accordingly, a provision should be added which provides that the Act pre-empts any private agreement between the library and the software company.

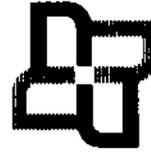
Thank you for the opportunity to comment on this important matter.

Sincerely,

William A. Knott  
Library Director

cc: The Honorable Dan Schaeffer  
The Honorable David Skaggs  
The Honorable Scott McInnis

# Niagara University



Niagara University Library  
Director of Libraries

October 12, 1993

**GENERAL COUNSEL  
OF COPYRIGHT**

**OCT 19 1993**

**RECEIVED**

Comment Letter	
RM	93-7
No.	<u>7</u>

Dorothy Schrader  
General Counsel  
U. S. Copyright Office  
Library of Congress  
Washington, DC 20540

RE: Library lending of computer software

Dear General Counsel Schrader:

In the *Interlibrary Loan Policies Directory*, fourth edition, Neal-Schuman, 1991, of which I am the compiler, I asked 1,500 libraries whether they would loan computer software. Although I never counted the positive responses, I judge it to be less than 100.

I am now in the process of compiling the data for the fifth edition. The willingness to loan computer software has not increased.

Libraries loaning software is a non-problem.

Sincerely yours,

Leslie R. Morris

LRM/dlt

**MLA**

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OCT 15 1993

OFFICE OF REGISTER  
OF COPYRIGHTS

October 12, 1993

Mr. Ralph Oman  
Register of Copyrights  
Copyright Office  
James Madison Memorial Building  
Room 407  
First Street and Independence Ave., SE  
Washington, DC 20559

GENERAL COUNSEL  
OF COPYRIGHT

OCT 20 1993

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Comment Letter
RM 93-7 ..
No. <u>8</u>

Dear Mr. Oman:

The Medical Library Association (MLA) is pleased to offer the following comments regarding the Computer Software Rental Amendments Act.

MLA is a professional organization which represents approximately 5,000 individuals and institutions involved in the management and dissemination of biomedical information in support of patient care, education, and research. MLA members include librarians who lend computer programs in their nonprofit institutions.

17 U.S.C. 109(b)(1)(B) covers an area of importance to many health sciences libraries. Providing computer software is an integral service in many health sciences libraries and is especially critical to those affiliated with academic institutions. A broad range of software typically is provided including information resources (e.g., CD-ROM-based databases abases or directories), educational materials, and office automation applications (e.g., word processing, statistics, database management). Lending software is usually confined for use within the library to qualified users, usually predominantly from within the institution.

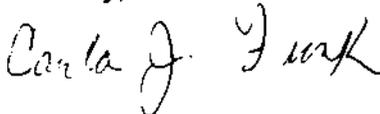
It is difficult to estimate the effect the availability of software in health sciences libraries has on authors' income. Although library users might purchase their own copies of software, more probably they would simply not use it. In educational institutions, faculty would probably be reluctant to require students to purchase software for instructional purposes. However, most libraries are conscientious about maintaining appropriate licenses and in buying sufficient copies to cover usage, so authors may earn at least an equivalent amount by the provision allowing libraries to lend software.

Mr. Ralph Oman  
October 12, 1993  
Page 2

Affixing a copyright warning statement as described in 37 CFR 201.24 has not been onerous for libraries. This can be easily incorporated into other processing procedures. However, the CFR requirements may not be achieving the desired effect. "Lending" of software in most libraries is more often performed electronically by installing the software on a computer hard drive or on a local area network file server. Lending diskettes or other physical packages is less frequently the situation. Therefore, many library users of software may never see the copyright warning statement affixed to the packaging. Perhaps a more practical approach to providing copyright information to library software users is to post the warning in the facility or at the computer where the software is used. Also, although a more minor detail, the statement itself is rather long, compared to the space available on some of the software packages.

We appreciate having the opportunity to provide our comments on the Computer Software Rental Amendments Act. Please let me know if MLA can provide further information on this issue.

Sincerely,

A handwritten signature in cursive script that reads "Carla J. Funk".

Carla J. Funk  
Executive Director



GENERAL COUNSEL  
OF COPYRIGHT

OCT 14 1993

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Comment Letter
RM 93-7
No. <u>9</u>

October 7, 1993

Dorothy Schrader  
General Counsel  
United States Copyright Office  
Library of Congress  
Department 17  
Washington DC 20540

Dear Ms. Schrader:

We are attaching comments from the University of Northern Iowa on the extent to which the Computer Software Rental Amendments Act of 1990 has achieved its intended purpose with respect to lending by nonprofit libraries.

Thank you for your consideration of these remarks.

Sincerely,

Herbert D. Safford, Ph.D.  
Director, Library Services

J. Michael Yohe, Ph. D.  
Director, Information Systems  
and Computing Services

c: Dr. Nancy Marlin, Provost and Vice President for Academic Affairs  
Mr. John Conner, Vice President for Administration and Finance  
Dr. Patricia Geadelmann, Director of Governmental Relations

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Responses to the specific concerns:

"The Office is particularly interested in comments in several areas, including:

"\* Whether nonprofit libraries and educational institutions are meeting patron needs with regard to computer software, and whether the software lending provisions facilitate or impede fulfilling institutional functions;"

We are meeting patron/student needs with regard to computer software. However, if colleges, universities, and schools were required to label or otherwise control or monitor distribution of software to workstations from file servers, this would significantly inhibit our ability to meet the needs of our students for software.

"\* How often institutions are lending software;"

The number of launches of software from our file servers is measured in hundreds of thousands per year. There is simply no way in which diskette-by-diskette distribution of software could meet student needs for access to computer software.

"\* Whether the regulations requiring warning labels represent an onerous burden;"

"Burden" would seem to imply that this could be done. But there is no effective way of labeling software launched from a file server.

"\* Whether unauthorized copying, adaptation, redistribution, public performance or display of computer programs is occurring as a result of lending by libraries;"

We do not and cannot police the use of software. We do take every reasonable precaution to prevent and/or discourage violation of copyright and license agreements.

"\* Whether the exemption allowing libraries to lend software is harmful to the interests of copyright owners;"

On the contrary, people who borrow or otherwise have access to software and like it are those most apt to purchase the software for use on their own computers. This manner of learning about the features and capabilities of software is one of the mechanisms which has fueled the dramatic growth in sales of new and of upgraded software.

"\* Whether new legislation is needed to clarify existing legislation or to rectify any imbalance between the rights of owners and the needs of users."

As noted above, the purchaser should be able to make the sole determination of how the software is used. The prohibition should be against proliferation of unauthorized copies. Legislation intended to restrict access to software in order to maximize developer or vendor revenues is almost certain to have the opposite effect..

University of Northern Iowa  
Comments on  
Lending of Software for Nonprofit Purposes by Nonprofit Libraries  
October 1, 1993

The language of this request for comments requires clarification in light of contemporary circumstances. At the least, one requires clear definitions of "lending," of "software" and of "library" which take into account changes in technologies and institutions in the past several years.

Points of clarification:

With respect to "lending":

- 1) does supplying a copy of a network-licensed program from a file server to a network workstation constitute "lending"? If so, then colleges and universities across the country would be adversely affected by legislation controlling the "lending" of software.
- 2) what if the workstation is not hard-wired to the network, but accesses the network, for example, by dial-in from a remote (off-site) location?
- 3) does using the same copy of software on different computers \*at different times\* constitute "lending"? If so, then most people who have bought software and subsequently upgraded their computers would probably be adversely affected by such legislation.
- 4) does using software in a classroom (for demonstration or to display information or for use by the students in the class) constitute "lending"? If so, legislation to restrict lending would severely impede the use of technology in education.

Purchase of software should give the purchaser the right to use that software whenever, wherever, and however the purchaser chooses. The only restriction should be that the user be prohibited from generating unauthorized copies of the software. Borland International's "no nonsense license agreement" is an excellent model for the industry.

With respect to "software":

- 1) does the term "software" refer exclusively to computer programs?
- 2) would CD-ROM and other databases be considered "software"?

With respect to "library":

- 1) is an entity a "library" if and only if it is called a "library"? If so, the legislation could be circumvented by merely changing the name of the entity. If not, what is the definition of a "library"?
- 2) is a university computer laboratory a "library"?
- 3) is a university classroom or laboratory a "library"?
- 4) is a primary or secondary school classroom or laboratory a "library"?
- 5) is an Educational Media Center a "library"?



Liverpool Public Library  
 310 Tulip Street  
 Liverpool, N.Y. 13088-4997

Fay Ann Golden Library Director  
 (315) 457-0310  
 FAX LINE (315) 453-7867  
 TDD LINE (315) 453-7873

*Noted and referred  
 to CO/OCC -  
 MJK  
 1/26/94*

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JAN 24 1994

OFFICE OF REGISTER  
 OF COPYRIGHTS

January 13, 1994

Ms. Barbara Ringer  
 the Register of Copyrights  
 Library of Congress  
 Department 17  
 Washington, D. C. 20540

Comment Letter	
RM	93-7
No.	10

Dear Ms. Ringer:

Although no one from the Liverpool Public Library was able to attend the discussion on nonprofit lending of computer programs, we are vitally interested in the outcome of the study you are preparing. We feel that lending software is compatible with the mission of public libraries, which have historically aided underprivileged people in their efforts at self-education. Our computer lab is the outgrowth of the philosophy of making available to everyone the intellectual works they need. The lending of software follows logically.

Some of the issues raised in your letter do not effect us, but I have some thoughts about the posting of warnings about copyright violations. We feel that alerting our patrons to this issue is an important part of protecting their access to the software. We also prominently post signs about copyright laws near the photocopiers. We have not been aware of violations of copying laws by patrons who use our circulating collection. Comments from people who want to try expensive software before making a purchase are fairly common. We feel that our computer lab and lending program have stimulated the market rather than discouraging it.

We at LPL urge that the nonprofit exemption be maintained in any revision to copyright law.

GENERAL COUNSEL  
 OF COPYRIGHTS

JAN 27 1994

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Sincerely,

Fay Ann Golden

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**NATIONAL SCHOOL BOARDS ASSOCIATION**


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**OFFICE OF  
GENERAL COUNSEL**August W. Steinbiber  
*General Counsel*Cwendolyn H. Gregory  
*Deputy General Counsel*Nancy E. Glitzin  
*Staff Attorney*Susan R. Butler  
*Director of Administration*Jennifer A. Williamson  
*Manager, Legal Services***RECEIVED****FEB 16 1994****OFFICE OF REGISTER  
OF COPYRIGHTS**William M. Snuk  
*NSBA President*Thomas A. Shannon  
*NSBA Executive Director*Harold P. Seaman  
*NSBA Deputy Executive  
Director*

February 16, 1994

**SEND BY FAX 202-707-8366**Barbara Ringer  
Acting Registrar of Copyrights  
The Library of Congress  
Department 17  
Washington, DC 20540ORIGINAL SENT  
BY FAX**FEB 23 1994****RECEIVED**

Comment Letter
RM 93-21
No. //

**SUBJECT: Software Lending Study**

Dear Barbara:

Thank you very much for inviting me to comment on the study for Congress on nonprofit lending of computer programs. Sorry that I could not get my comments to you by February 11 but with my workload combined by the last several weeks of bad weather I could not reply on time. Please forgive me for the delay.

The National School Boards Association's statement can only relate to the issue of the activities of a not-for-profit educational institution but not a not-for-profit library. The distinction is very important.

This office was very much involved in the development of the copyright amendments as they related to the first sale doctrine. Specifically, we did not want our activities covered by the library language. "Transfers" by a not-for-profit education institution are not lending; therefore, the first sale restrictions relating to lending do not apply to our schools. The rationale is that software owned by a school system can be treated in the same manner as textbooks. Students can use the software, return the same to be transferred to the next



student for the following semester or the next student in the following class, as the case may be. Thus, the not-for-profit education institution can do with its property as it pleases, as long as it is within "first sale" doctrine, fair use and other permitted uses under the law.

The entire discussion of library signs does not make sense in our context. If we send a computer and accompanying software to a "home bound handicapped student," where is the sign to be placed? Transfers of school district owned curriculum material, no matter what the format, will likely come from a curriculum center not a school library.

During some of the discussions years ago, one software producer was concerned with our position in that the software would be reproduced by the student at home. Our answer to that comment is that the software that we are talking about is curriculum-related, not computer games. Students do not copy text books and it is highly unlikely they will copy programs which are related to the curriculum. Bare in mind, we are talking about elementary and secondary school children.

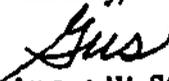
The next concern raised by that same software producer, was that the school district, itself, would make many additional copies and thus, there was a need for additional protection. Of course, my answer was that, in itself, the described activity was an infringement and bears no relationship to "transfers." Infringing school districts must stop any illegal action and should be sued if necessary. The conversation reminded me of the old story of a person who, upon finding out that someone was violating the current law, suggested that the answer was to pass another law.

Turning now to negotiations between owners of copyright and users of copyright, NSBA has long taken the position that the marketplace should decide most issues. School districts should have the right to negotiate greater rights from the copyright owner than as a user they have under copyright law. The software manufacturer is interested in selling to this market, the manufacturer should be subject to the same negotiations as any other supplier in the school market. We contend that shrink-wrapped licenses have never been the subject of negotiations between the buyer and the seller and have never been formally ruled upon by Congress and are probably unenforceable against school districts.

In short, we view our rights, particularly as they relate to the first sale doctrine and fair use, as the basis upon which we can negotiate greater rights.

I was somewhat concerned that there is even any discussion concerning CD ROM as something other than software. The transfer of a CD ROM to a student to do a term paper is no different than the transfer of an accounting software to do an accounting problem for a business class. We see no conceptual difference.

Sincerely,

  
August W. Steinhilber  
General Counsel

AWS:amcomputer

GENERAL COUNSEL  
OF COPYRIGHT,

FEB 28 1994

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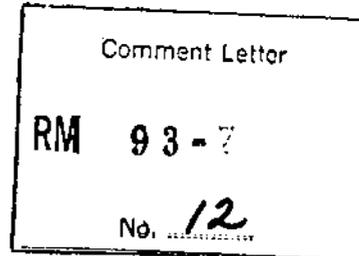
FEB 18 1994

OFFICE OF REGISTER  
OF COPYRIGHTS

January 10, 1994

Barbara Ringer, Acting Register of Copyrights  
Library of Congress  
Department 17  
Washington DC 02540

Dear Barbara,



Thank you for your letter of January 4, 1994 inviting us to participate in the January 12 ACCORD meeting in Washington. Distance and time preclude our attending the meeting, but we offer the following comments as contributions to that discussion or for such other purpose as you may think appropriate.

1. ISSUE: What is the distinction between library "lending" and "transfers" by nonprofit educational institutions?

We do not have the text of the legislation; hence we are unsure of the intent of the question.

"Transfer" would imply a permanent reassignment of ownership or rights under a license agreement. "Lending", by contrast, would imply no transfer of ownership and a temporary reassignment of usage rights.

We believe that within a nonprofit, educational institution "lending" of computer software or other electronic resources to those substantively affiliated with the institution (e.g. students, faculty, staff, student teacher supervisors in the K-12 schools) should be permitted on the same basis as the lending of traditional library materials.

"Transfer" (for consideration or not) should be permitted:

- within the educational institution for use in the originally-agreed-upon manner without restriction;
- to other nonprofit, educational institutions for use in the originally-agreed-upon manner without restriction;
- without restriction when the material is obsolete [defined as being no longer available from nor supported by the originator or heirs or assigns].

"Transfer" should not be permitted except as above:

- when the transfer would result in uses not included in the terms of any special pricing attending the original purchase;
- when ownership of the material has been claimed as the basis for purchase of an "upgrade" to the material at a price available only to holders of the material.

2. ISSUE: Electronic (online) distribution:

"Electronic distribution" needs to be defined carefully.

Within the computing community, "file transfer" refers to the creation on one computer of a complete local copy of a computer file originally located on a different computer. We would refer to this as "electronic TRANSFER."

By contrast, use on a second computer of a capability that is located on a first computer (without creating a complete [or stand-alone] local copy of that capability on the second computer) could still be regarded as "electronic distribution." We would refer to this as "electronic ACCESS" (whether or not various program segments or data snapshots were transferred to the memory of the local computer). This electronic ACCESS [rather than TRANSFER] would pertain, for example, when workstations [second computers] are attached to a file server [first computer] which would "launch" "applications" to the workstations [second computers].

We believe that in the case of "electronic ACCESS," it is the institution's responsibility to enforce any restrictions on number of concurrent users of an electronic resource. This might be done, for example, by using software such as SiteLock on a Novell network to ensure that the number of copies of software in use at a given time does not exceed the number of copies of that software licensed to the institution.

(a) Whether "transfer or "lending" include electronic distribution;

Electronic transfer is indeed transfer.

Electronic access should not be regarded as either transfer or lending.

The EDUCOM/ADAPSO policy statement is a reasonable and appropriate statement of principle. Subscribing to and enforcing the principles stated therein should be sufficient evidence that an institution is committed to protection of the intellectual property rights of those originating and marketing electronic products and services.

(b) whether the warning notice of copyright requirement applies to online distribution or display;

In our opinion, and assuming we are talking about electronic access, it should not so apply.

In cases where electronic access is intended but electronic transfer is possible, it would be appropriate for the warning notices to be provided. The warning would apply only to transfer, not to access.

(c) whether the warning notice should be required on line or affixed to library computer terminals.

"Library" would need to be defined in this context; see Issue 5, Part (d).

We recommend that appropriate notices be posted in any community-access environment where activities of users might expose the institution to liability from infringement of intellectual property rights. We see no reason for notices to be physically attached to each workstation.

Note that the posting of warning notices in any manner within community-access facilities does not guarantee that users of the resources will see the warnings. Networks are increasingly making these resources available from offices and homes (or other residential units). It is impossible to require that warning notices be affixed to individually-owned equipment or posted in a private office or residence.

For this reason, we recommend that the electronic material itself incorporate such appropriate warnings as are determined by the developer and/or supplier of the material.

Furthermore, electronic access to material subject to copyright protection should be available only upon proper identification. The access procedure should include appropriate notices of the individual's responsibility with respect to intellectual property rights.

3. ISSUE: Licenses:

As a general principle, holding a license for an electronic product (software or other intellectual property) should permit the licenseholder use of the product by one person on one machine at a time, but should not limit use to a particular person or machine.

A copy of a product should be physically lendable within the scope of the above, provided that appropriate warnings are included. Such warnings might be either affixed to the package or included in the electronic material itself.

The Borland International software license agreement is a model which we commend to the attention of the entire industry. For reference, we quote that statement:

"Borland's No-Nonsense License Statement!

"This software is protected by both United States copyright law and international treaty provisions. Therefore, you must treat this software just like a book, with the following single exception: Borland International authorizes you to make archival copies of the software for the sole purpose of backing-up our software and protecting your investment from loss.

"By saying, 'just like a book,' Borland means, for example, that this software may be used by any number of people and may be freely moved from one computer location to another, so long as there is \*no possibility\* of its being used at one location while it's being used at another. Just like a book that can't be read by two different people in two different places at the same time, neither can the software be used by two different people in two different places at the same time. (Unless, of course, Borland's copyright has been violated.)"

(a) Do individually-negotiated software licenses preempt the lending exemption?

In our opinion, the more liberal terms should apply.

(b) Do "shrink-wrap" licenses preempt the lending exemption?

In our opinion, the more liberal terms should apply.

(c) Does the lending exemption apply to owners of copies, or to license holders?

In view of the stipulation in some license agreements that the ownership of the copy remains vested in the developer or supplier, the exemption should apply to license holders.

(d) Does the first sale doctrine in Article 109 which applies to owners of copies also apply to owners of copies of software?

We are not familiar with the legislation and do not understand the question. As we understand the narrative on Page 5 of the Hall memorandum, however, we believe the answer should be "Yes." That is, nonprofit libraries (and nonprofit educational institutions) should have the same rights with respect to software and other electronic intellectual property that they have with respect to intellectual property contained on/in "traditional" media.

4. ISSUE: What is the copyright significance of making a copy for the hard drive?

Installation on the hard drive of an institutionally-owned machine carries no copyright significance beyond the normal strictures (e.g., the same copy should not be installed and used on multiple machines at the same time).

In view of the difficulty of controlling use, it is not appropriate to install the same copy on more than one machine if any of the machines is a community-access machine. (It should be permissible, for example, for one to install the same copy on both home and office machines, provided nobody at home will use the software at the same time it is being used at the office, but this should not apply in the case of community-access machines).

If the applicable license agreement (including any site-license provision) is more liberal, the more liberal terms should apply.

In the case of physical lending of a software package, it may be appropriate for the borrower to sign an affidavit that any software installed on a personally-owned machine was removed prior to the return of the package.

Clearly, in this case it is not possible for an institution to verify that the removal has occurred. However, most software is of limited utility without documentation, so we would presume that retaining an illegal copy of software would be accompanied by illegal copying of the documentation, which is equivalent in most cases to the illegal copying of any other book.

There is general agreement that no deterrent is sufficient to foil a determined thief.

5. ISSUE: Lending:

(a) Does "lending" mean a change of physical possession/ allowing patrons to take the software out?

In our opinion, yes.

(b) Do we accept the analogy between library reference books and software?

No. We accept the analogy between circulating library books and software.

(c) Whether an Article 117 archival "back-up" copy may be lent or circulated?

Yes. A library should be permitted to circulate an "archival" copy and retain the distribution copy for archival purposes. That way, if a patron destroys the circulated copy, the library may generate another copy for circulation. If only the distribution copy may be circulated, the library's investment is lost when that copy is damaged. Libraries can and do repair damaged paper documents, but electronic media are far easier to damage or destroy and far more difficult to repair (physically) than are paper documents.

(d) What is the definition of a "library"?

For the case under discussion, a library is any organization lending or circulating software or other electronic items; but not those organizations simply providing electronic access. That is, in-house or on-premises use should not be regarded as library "lending."

See also the discussion under Issue 3.

6. ISSUE: Software:

(a) whether "software" includes CD-ROM and other databases.

Whether the operative term is "software" or another term, the definition needs to be broad enough to cover all electronic intellectual property.

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(b) Whether the definition of "computer program" in the Copyright Act is adequate.

See above. We do not believe the Copyright Act should be limited in scope to just "computer programs." We feel there is no way of upholding distinctions between "computer programs" and other intellectual property over time.

7. ISSUE: Whether unauthorized copying occurs as a result of nonprofit library lending. Whether there is any way to tell if it is occurring.

Yes, and No.

We would be unduly naive to believe that no patron ever made an unauthorized copy of something borrowed.

Even when there are software "locks" to prevent theft, there is sub-rosa software available to defeat the locks. There is no reasonable way to prevent unauthorized copying of software, any more than there is a reasonable way to prevent unauthorized copying of traditional media.

The same problem obviously occurs with books, records, audio tapes, video tapes, and so on. The same principles should apply to electronic information and programs as apply to information recorded in the more traditional media.

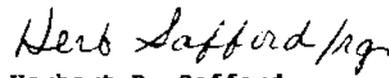
8. ISSUE 1: Can the copyright warning be cut down/reduced in size?

See discussion under Issue 2(c).

We hope these comments are helpful. We would welcome an opportunity to participate in future discussions and deliberations if you believe our participation would be beneficial to the outcome of these important processes.

Sincerely,

  
J. Michael Yohe  
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Services

  
Herbert D. Safford  
Director, Library Services and Computing