



# Research Library Issues

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### **Report of the Task Force on International Interlibrary Loan and Document Delivery Practices**

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# Report of the Task Force on International Interlibrary Loan and Document Delivery Practices

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ARL affirms that it is the right of North American research libraries to participate in international interlibrary loan and document delivery activities.

## Introduction<sup>1</sup>

**R**esearch libraries have an important and longstanding role in facilitating the growth of knowledge and the sharing of information. These libraries provide resources to faculty, researchers, students, and members of the public to engage in research, education, and learning and to advance knowledge. Increasingly, collaboration among these communities of users is interdisciplinary and global. As a result, the sharing of resources occurs within the universities' campuses and centers in the US and abroad, in formal relationships between research institutions at home and abroad such as joint or shared academic degree programs, and in agreements between libraries in the US and abroad.

One way that research libraries strive to meet the needs of patrons is through interlibrary loan (ILL). The mission of ILL is to provide access to materials for local patrons and to lend materials to other institutions. ILL services supplement libraries' collections by providing access to materials needed for research, scholarship, and private study that are not available at a user's home institution.

ILL is a research library activity that occurs between two different institutions. Research and academic libraries place ILL requests on behalf of faculty, staff, and students for returnable items (e.g., books, audiovisual materials, microfilm) and non-returnable items (e.g., copies of journal articles, conference papers), usually to obtain material that is out of scope for the home collection or to support the specialized research interest of one of their users. ILL offices supply materials from a variety of countries to other countries.

Over the past year, questions have been raised concerning the current ILL practices of some US research libraries. In particular, the focus is on the delivery of resources from US libraries to non-US libraries. The concerns seem to be that these international, non-US libraries do not have to adhere to US copyright law.

ARL established a Task Force on International Interlibrary Loan and Document Delivery Practices to better understand the current international ILL practices of research libraries, to evaluate the concerns of selected scientific, technical, and medical (STM) publishers, and to formulate a response to publisher concerns. One tenet of the task force deliberations was to ensure that the research library community takes full advantage of its legal privileges and practices.

## **Data Gathering and Analysis**

In support of the task force's work, ARL convened three Working Groups on International Interlibrary Loan, Trends in Licensing, and US Law and International Interlibrary Loan. Members of the working groups are expert practitioners in the community and work within ARL libraries and ARL. Working group members collaborated over a period of several weeks to provide timely background and analysis to inform the task force's deliberations. For example, members of the Working Group on Trends in Licensing examined the negotiated licenses at two ARL libraries, the generic licenses on the EBSCO site, as well as the STM publisher association member list. The Working Group on US Law and International Interlibrary Loan reviewed copyright law and international agreements pertaining to ILL. And the Working Group on

International Interlibrary Loan reviewed current ILL practices, both domestic and international, and the importance of international ILL to achieving the mission of research libraries. Finally, the task force conducted a survey of international relationships of the ARL membership, which garnered 85 responses. These data portray a rich and complex environment within which ARL libraries operate. Based on their research and analysis, each of the three working groups produced a white paper, which informed this report. The three white papers follow in this issue of *Research Library Issues*.

## Findings

1. Research libraries provide access to information through multiple channels, including acquisition of copyrighted works, licensing agreements, ILL, purchase on demand, and more. These services entail significant expenditures in support of research, teaching, and learning.
2. Participation in ILL arrangements is a well-established practice in libraries in many countries. The Berne Convention and other international copyright agreements do not specify any standards for ILL thus nations have considerable discretion about the terms of allowable reproduction and distribution.
3. By engaging with international partners, research libraries build relationships with libraries and institutions in other countries, develop reciprocity, and supply the materials required. These activities support and promote scholarship.
4. The proper scope and function of ILL are embedded in well-established practices that have been openly integrated into professional standards and have been widely known to and acknowledged by authors, publishers, and others for years.
5. US copyright law supports the ability of domestic libraries to participate in ILL arrangements and to send copies of some copyrighted works to foreign libraries provided the libraries meet the requirements of the law.
6. Since the 1990s, publishers and libraries increasingly use license agreements to establish use permissions that previously had been guided by US copyright law. This shift away from copyright law to contract law has affected some aspects of resource sharing.
7. Review of ILL clauses in research library licenses indicate that the majority

- of publishers allow ILL, the majority of publishers do not restrict ILL to the same country, and there is no uniformly adopted language or permission describing ILL services.
8. The e-book environment is younger and business terms for e-books are far more elastic than those for e-journals; at the same time, their rights management issues are more complex. Many publishers embrace the notion of ILL for e-books, although it is not clear exactly what that means or how tracking and delivery will be managed.
  9. ARL institutions are expanding their global presence through the establishment of overseas campuses and centers, through joint degree programs with other universities, and through formal academic partnerships. This growth in international relations is also expanding implications for ARL libraries with the expectation that collection access, including ILL and document delivery, can appropriately be part of the arrangements.
  10. Current practice allows research libraries to fulfill their “special responsibility” to promote “universal availability of published material.” Changes that would require research libraries to provide special handling for international requests would have a negative impact on ILL operations, are unnecessary, and would not be cost-effective.
  11. As print subscriptions diminish, lending from licensed content will take on increasing importance to interlibrary lending. More restrictions on lending of licensed content will result in a larger gap between the material available to local patrons and what can be shared through ILL.

## Conclusion and Recommendations

The International Federation of Library Associations and Institutions (IFLA) guidelines for international lending summarize the situation well: “Just as no library can be self-sufficient in meeting all the information needs of its users, so no country can be self-sufficient.”<sup>2</sup> Challenges to current international ILL practices could significantly undermine this carefully crafted and balanced set of resource-sharing activities. ARL affirms that it is the right of North American research libraries to participate in international interlibrary loan and document delivery activities. It will be important for ARL members to understand the changing ILL landscape, especially given the shift away from reliance on

copyright law to license agreements and the growing adoption of e-books.

Given the importance of resource sharing to research libraries and to the communities they serve, members of the research library community should continue to participate in international interlibrary loan and document delivery arrangements and actively promote inclusion of ILL privileges not limited to national boundaries when negotiating license agreements. One way to accomplish this would be to include a provision stating that nothing in the license may restrict exceptions permitted under copyright law.

- The result of moving to licensed electronic versions rather than purchased print versions may leave research libraries with no right to lend to or obtain non-subscribed materials from peers if ILL privileges are limited by licensing agreements or if the agreements do not include a provision acknowledging that nothing in the license may restrict exceptions permitted under copyright law.<sup>3</sup>
- The rapid adoption of e-books presents an opportunity for libraries to work with publishers on licensing terms and conditions. It will be important for research libraries to actively promote including ILL privileges in e-book license agreements and ones that are beneficial to the reader, e.g., the ability to loan an entire work, not just a chapter.
- It would be useful to articulate clearly ILL clauses that are consistent with research libraries' mission, ILL best practices, and ILL management tools. There is need for greater understanding and education of ILL workflow and the tools to support it particularly as licenses are being negotiated. Development of model ILL license language would be of great value. Key features to include in license language are: confine constraints on ILL permissions to the lending libraries, do not restrict ILL to the same country, and allow the use of a digital copy of the electronic article without printing prior to sending through Ariel or Ariel-like software.

<sup>1</sup> ARL is deeply grateful to the following individuals for their work in support of the Task Force on Interlibrary Loan and Document Delivery: Anne K. Beaubien, Brandon Butler, Marlayna Christensen, Kenneth D. Crews, Trisha Davis, Selden Durgom Lamoureux, Donna Ferullo, Jennifer Kuehn, David K. Larsen, Mary Lehane, Kevin L. Smith, and James Stemper.

<sup>2</sup> IFLA, "International Resource Sharing and Document Delivery: Principles and Guidelines for Procedure," first agreed by IFLA 1954, major revision 1978, modified 1987, major revision 2001, revision February 2009, <http://www.ifla.org/files/docdel/documents/international-lending-en.pdf>.

<sup>3</sup> Of course, while such provisions clarify and make explicit the rights libraries require, libraries typically retain their legal rights under statutory exceptions even without an explicit provision. So, unless the agreement expressly limits a library's default legal rights, it will retain the right to engage in international ILL under the auspices of Sections 107 (fair use) and 108.

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# White Paper: International Interlibrary Loan

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## Introduction

**R**esearch libraries have an important and longstanding role in facilitating the growth of knowledge and the sharing of information. These libraries provide resources to faculty, researchers, students, and members of the public to engage in research, education, and learning and to advance knowledge. Increasingly, collaboration among these communities of users is interdisciplinary and global. As a result, the sharing of resources occurs within the universities' campuses and centers in the US and abroad, in formal relationships between research institutions at home and abroad such as joint or shared academic degree programs, and in agreements between libraries in the US and abroad. This white paper focuses on resource sharing activities by US research libraries.

## Background and Current Environment

One way that research libraries strive to meet the needs of patrons is through interlibrary loan (ILL). The mission of ILL is to provide access to materials for local patrons and to lend materials to other institutions. ILL services supplement libraries' collections by providing access to materials needed for research,



scholarship, and private study that are not available at a user's home institution.<sup>1</sup> ILL is a research library activity that occurs between two different institutions. Research and academic libraries place ILL requests on behalf of faculty, staff, and students for returnable items (e.g. books, audiovisual materials, microfilm) and non-returnable items (e.g. copies of journal articles, conference papers), usually to obtain material that is out of scope for the home collection or to support the specialized research interest of one of their users.

ILL offices supply materials from a variety of countries to other countries. The requesting process is transparent, and requests are automatically forwarded to the next possible supplying library in the system when a request cannot be filled. Much interlibrary lending is of materials that are old, out of print, and not available online; a broad spectrum of resources are requested.

As discoverability of published material has become easier due to technological advances, library patrons see more information resources that they want. This knowledge has created an increased demand for both in-print and out-of-print books. In addition, more information resources are now published outside the US, and library patrons do not generally look at the publisher's country of origin—they look only at an item that they need. Finally, OCLC has loaded significantly more foreign library records. As a result, it is far easier to know who has what and acquire and/or request those materials; thus the "walls" between countries become permeable.

It is standard ILL practice to look within the home country first and then search internationally (as other countries come to the US when material is not available locally). This practice is consistent with the well-considered International Federation of Library Associations and Institutions (IFLA) best practices, which have a long history dating back to 1954.<sup>2</sup> US research libraries work within this tradition. As we borrow more internationally we build relationships with libraries in other countries, develop reciprocity, and supply the materials that they require. If US research libraries are unable to lend materials to international libraries, it would jeopardize our ability to borrow resources from other countries that are needed locally and thus would impair scholarship.

All non-returnables are delivered using a standard suite of options, including Ariel,<sup>3</sup> Relais,<sup>4</sup> Odyssey,<sup>5</sup> fax, e-mail, courier service, and postal service. Delivery from library to library is normally electronic, but there are different approaches for delivery to the patron. Some research libraries deliver paper copies, while

other academic libraries provide requested documents to their users electronically (usually in the form of a non-searchable, image-only PDF). In this scenario, when a requested article arrives it is posted to a secure web server and the user is given a URL with which to access the article. Access to the article is limited via password or other means of authentication to the user who requested it, and the user has a limited time frame and a limited number of views before the article is automatically deleted. Most academic and research libraries do not send articles via e-mail because it is not secure, e-mail boxes may not be large enough, and articles could easily be forwarded.

Generally within the US, research and academic libraries set up reciprocal arrangements with very specific and limited numbers of partner libraries. There may also be formal relationships between institutions. It is worth mentioning that standard practice is to serve users through local document delivery, which provides materials to a library's own institutional affiliates (whether at home or abroad). Some institutions have campuses abroad. Document delivery for such campuses, which occur on an international level, is still internal to the institution. An affiliate is part of a licensing agreement.

ARL institutions are expanding their global presence through the establishment of overseas campuses and centers, through joint degree programs with other universities, and through formal academic partnerships. This growth in international relations is also expanding implications for ARL libraries with the expectation that collection access, including ILL and document delivery, can appropriately be part of the arrangements.

## **International ILL**

International ILL requests are on the rise due to a number of factors. The worldwide increase of access to the Internet and the ease with which information is discovered facilitate the growth of requests. OCLC and DOCLINE have facilitated locating materials from around the world by aggressively loading participating libraries' local holdings records. As of 2010, 57.5% of OCLC records are non-English, and this percentage of non-English records is growing. Though OCLC headquarters may reside in Ohio, the organization is global in scale and is continually increasing the number of foreign members. Along with membership, those libraries are loading their holdings and expanding what is discoverable. Once a user has discovered the information, the next step is simply to request the item(s). Libraries transmit requests to one another using OCLC, DOCLINE,

or one of a number of library networks, like RapidILL. If a library does not participate in an organized network, an IFLA form or a simple e-mail message will suffice in getting the request started.

In most cases, journals published outside of the US are available in US research library collections where discovery, requesting, and payment for ILL transactions are facilitated by resource-sharing services. Lending of returnables presents a number of challenges. Libraries are generally unable to lend originals internationally because international mail service may be unreliable, because shipments usually cannot be tracked, and because of difficulties passing material through customs. Finally, even when libraries are willing to lend originals across borders, costs for shipping are frequently prohibitive for both the requesting and the supplying libraries.

Interlibrary loan services are becoming more seamless for both the libraries and the user. The requesting process has become almost invisible to both the user and the borrowing library. In fact, the borrowing library staff may not even be involved in the request, other than learning that the request has been made and fulfilled (delivered electronically). In the automated environment, the user requests a desired title. The system identifies holding libraries based on pre-set profiles that locate the item and create a request. The request routinely progresses until a library indicates that they are able to fulfill it. Any transaction fees are automatically levied and delivered based on the lending and borrowing libraries' profiles. Outside of networks, payments are becoming increasingly simpler. More libraries are able to handle transaction fees using credit cards and electronic fund transfers (EFT), which eliminate the challenges of exchange rates.

As the world continues to discover the explosion of information available, there comes the realization that not all of it is available at our doorstep. Like good global neighbors, research libraries must continue to provide as well as receive. There are many other ways that research libraries acquire materials in addition to ILL. For example, research libraries pay publishers for the rights to provide selected materials to users, whether through acquiring copyrighted works or through licensing agreements. These libraries measure and pay copyright fees as expected, according to the established guidelines and laws. There is also a growing trend for libraries to purchase on demand. Libraries check domestic suppliers before going to international locations. Many publishers have the electronic documents available almost immediately upon payment.

## Impacts on Research and Libraries if International ILL Practices Are Modified

The Interlibrary Loan Code for the US states, “Interlibrary loan transactions with libraries outside of the United States are governed by the International Federation of Library Associations and Institutions’ International Lending: Principles and Guidelines for Procedure.”<sup>6</sup> The IFLA guidelines state that “each country has a special responsibility to supply its own national imprints to libraries in other countries” in order to promote “universal availability of published material.”<sup>7</sup> The guidelines stipulate that “all reasonable efforts should be made to satisfy international requests,” but also affirm the importance of respect for copyright, indicating that “each supplying library should be aware of, and work within, the copyright laws of its own country” and that “the requesting library should pay due regard to the copyright laws of the supplying library’s country.”<sup>8</sup>

Current practice allows research libraries to fulfill their “special responsibility” to promote “universal availability of published material.” Changes to these practices in the US could limit scholarship while imposing new costs on libraries and their institutions. Changes that would require US research libraries to provide special handling for international requests would have a negative impact on ILL operations, are unnecessary, and would not be cost-effective.

Although mechanisms do not exist for supplying libraries to track international lending requests, requesting libraries throughout the world have tools through which they can pay rights holders for copies. For example, the Copyright Clearance Center (CCC) collects approximately US\$39.4 million in rights payments annually from international sources.<sup>9</sup>

Libraries already devote considerable effort and expense to ensuring compliance with copyright laws. If additional requirements for fulfilling international ILL requests were imposed, it would place new burdens on research libraries with regards to workflow and costs. Although guidelines issued by the Commission on New Technological Uses of Copyrighted Works (CONTU) do not have the full force of law, these guidelines have become the de facto practice for US libraries. These guidelines place the burden for paying copyright fees on the requesting libraries, and it would be both undesirable and impractical to transfer responsibility for ensuring compliance to supplying libraries for only international requests.

Libraries not only respect and voluntarily pay copyright fees when appropriate, but they also constitute the bulk of the market for the content

produced by academic rights holders. In 2007–2008, the 123 libraries comprising the Association of Research Libraries alone spent approximately US\$870 million on current serial subscriptions.<sup>10</sup> Libraries expend ever-larger portions of their increasingly stretched budgets on materials, especially scientific, technical, and medical serials, the costs of which have increased at staggering rates in the past decades. Rather than attempting to avoid paying rights holders, libraries are the chief source of revenue for academic publications.

Libraries work with publishers to establish license agreements that allow interlibrary lending, which is factored into the price of the agreement. Overall, ILL offices work very hard to conform to agreements, laws, and guidelines in their practices, often erring on the side of not providing licensed content when lending rights are silent or unknown. As print subscriptions diminish, lending from licensed content will take on increasing importance to interlibrary lending. If there are more restrictions on lending of licensed content there will be a larger gap between the material available to local patrons and what can be shared through ILL. That distinction is new, as licensed content becomes the preferred format in collections.

Library lending internationally is an important activity of research libraries. If limits are placed in the US on lending internationally, research libraries may find it more challenging to obtain materials from foreign countries to meet the research needs of their own users. Ultimately, this would serve to stifle research and limit creativity.

## Conclusion

As noted previously, IFLA's guidelines state that "each country has a special responsibility to supply its own national imprints to libraries in other countries" in order to promote "universal availability of published material," and "that all reasonable efforts should be made to satisfy international requests."<sup>11</sup> These guidelines succinctly describe the mission and responsibilities of libraries in support of access to knowledge. Challenges to current international ILL practices could significantly undermine this carefully crafted and balanced set of important resource-sharing activities.

Second, research and education is increasingly a global enterprise. As a result, there is an increased demand for international research resources and this demand blurs national borders. By engaging with our international partners, research libraries build relationships with libraries and institutions

in other countries, develop reciprocity, and supply the materials that they and we require. These activities support and promote scholarship. If US research libraries were unable to lend materials to international libraries, it would jeopardize our ability to borrow resources from other countries that are needed locally.

Third, research libraries provide access to information resources through multiple channels, including acquisition of copyrighted works, licensing agreements, ILL, purchase on demand, and more. These libraries devote considerable effort and expense to ensuring compliance with copyright laws and licensing terms and conditions. Libraries voluntarily pay copyright fees when appropriate, and they constitute the bulk of the market for the content produced by academic rights holders. New restrictions on current international lending by US research libraries would lead to higher costs for libraries and would limit access to knowledge, nationally and internationally.

In closing, the IFLA guidelines for international lending summarize the situation well: "Just as no library can be self-sufficient in meeting all the information needs of its users, so no country can be self-sufficient. The supply of loans and copies between libraries in different countries is a valuable and necessary part of the interlibrary loan process."<sup>12</sup>

<sup>1</sup> "The purpose of interlibrary loan...is to obtain, upon request of a library user, material not available in the user's local library...Interlibrary loan (ILL) is intended to complement local collections and is not a substitute for good library collections intended to meet the routine needs of users. ILL is based on a tradition of sharing resources between various types and sizes of libraries and rests on the belief that no library, no matter how large or well supported, is self-sufficient in today's world." American Library Association (ALA), "Interlibrary Loan Code for the United States," prepared by the Interlibrary Loan Committee, Reference and User Services Association (RUSA), 1994, revised 2001, revised 2008 by the Sharing and Transforming Access to Resources Section (STARS), <http://www.ala.org/ala/mgrps/divs/rusa/resources/guidelines/interlibrary.cfm>; "Interlibrary Loan Code for the United States Explanatory Supplement," for use with the Interlibrary Loan Code for the United States, 2008, <http://www.ala.org/ala/mgrps/divs/rusa/resources/guidelines/interlibraryloancode.cfm>.

<sup>2</sup> IFLA, "International Resource Sharing and Document Delivery: Principles and Guidelines for Procedure," first agreed by IFLA 1954, major revision 1978, modified 1987, major revision 2001, revision February 2009, <http://www.ifla.org/files/docdel/documents/international-lending-en.pdf>.

<sup>3</sup> Ariel, Relais, and Odyssey are software programs that allow the transmission of articles electronically. "Ariel allows users to send electronic images to other Ariel workstations anywhere in the world, using either FTP or email, and converts them to PDF files for easy patron delivery," Infotrieve website, accessed March 10, 2011, <http://www.publist.com/ariel/>.

<sup>4</sup> Relais software enables sending scanned documents via FTP to Ariel, and Odyssey, fax, e-mail attachment, post to web, or print, per Clare MacKeigan, Chief Operating Officer, Relais International, March 15, 2011.

<sup>5</sup> "The Odyssey software allows sites to send and receive electronic documents to other Odyssey sites, OCLC ILLiad sites, and other vendor's software that supports the Odyssey protocol," Odyssey website, accessed March 10, 2011, <http://www.atlas-sys.com/odyssey/>.

<sup>6</sup> ALA, 2008.

<sup>7</sup> IFLA, 2009.

<sup>8</sup> Ibid.

<sup>9</sup> Copyright Clearance Center, *2009 Annual Report*, accessed March 7, 2011, <http://www.copyright.com/media/pdfs/FY09-Annual-Report-2page.pdf>.

<sup>10</sup> Martha Kyrillidou and Les Bland, comps. and eds., *ARL Statistics, 2007–2008* (Washington, DC: ARL, 2009), 46, <http://www.arl.org/bm~doc/arlstat08.pdf>.

<sup>11</sup> IFLA, 2009.

<sup>12</sup> Ibid.

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# White Paper: US Law and International Interlibrary Loan

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## Introduction

**V**arious recent events have raised questions about the proper scope of interlibrary loan (ILL) arrangements with non-US institutions, particularly the ability of a library to send copies of materials to non-US libraries. We believe that US copyright law supports the ability of domestic libraries to participate in ILL arrangements and to send copies of some copyrighted works to foreign libraries, provided the libraries meet the requirements of the law. Although the law is not necessarily explicit about the conditions for sending copies of works through ILL, a few simple steps taken by libraries should provide greater assurance that the arrangements are serving the needs of libraries, researchers, and copyright owners.

## Relevant Legal Provisions

Participation in ILL arrangements is a well-established practice in libraries in many countries. US copyright law allows libraries to make and distribute copies of copyrighted works in connection with ILL arrangements under Section 108 (Reproductions by Libraries and Archives)<sup>1</sup> and Section 107 (Fair Use). License agreements may constrict or augment the rights of libraries to share materials as part of ILL arrangements. Nevertheless, Section 108 is a leading legal support for the reproduction and distribution of copyrighted works in ILL.



## Status of the CONTU Guidelines

Many libraries rely on the 1978 guidelines issued by the Commission on New Technological Uses of Copyrighted Works (CONTU)—specifically, the “Rule of Five”<sup>2</sup>—to provide a framework for complying with Section 108(g)(2), which could bar libraries from using ILL arrangements as a “substitute for a subscription to or purchase of” copyrighted works. While CONTU and the Rule of Five can be helpful for libraries in establishing procedures for ILL, they are only guidelines and do not have the full force and effect of the law. Indeed, the Conference Report on the 1976 Copyright Act, which endorsed the guidelines, also acknowledged that they “are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment.”<sup>3</sup> In short, CONTU is not the law, and Congress and the CONTU drafters agreed that the law allows more than CONTU contemplates.

## Responsibilities of US Libraries

Libraries that make and supply copies in an ILL arrangement generally look for confirmation from any requesting library that it is acting within the limits of Section 108. The fulfilling library as a practical matter relies on the good faith of the requesting library in order to assure that its services are within the scope of the law. In a typical ILL transaction, a requesting library seeks a copy from a fulfilling library of a work that is in the fulfilling library’s collection. The requesting library is in the best position to know whether making the copy satisfies a statutory exception (e.g., whether it is a “substitute for a subscription or purchase”), yet the fulfilling library may have possible liability exposure (because it makes and distributes copies). Therefore, while the fulfilling library can watch for red flags that indicate bad faith, it must typically rely on requesting libraries’ representations that all ILL requests are legitimate.

Because the Berne Convention and other international copyright agreements do not specify any standards for ILL, nations have considerable discretion about the terms of allowable reproduction and distribution, or even whether to allow ILL activities at all. As a result, the law on such matters varies greatly from one country to the next. In the context of a request from a foreign library, a US library that fulfills the request is still making the copy in the US and therefore is subject to US law. The fulfilling library accordingly may still want assurances from foreign partners that can help the US library determine whether the services may run afoul

of US law. While foreign institutions may not be bound by the same legal rules as US libraries, there are many ways a fulfilling library can be assured that its foreign partners' requests are legitimate. Sources of assurance include shared library practices as well as formal commitments and representations from foreign partners.

The proper scope and function of ILL are embedded in well-established practices that have been openly integrated into professional standards and have been widely known to and acknowledged by authors, publishers, and others for years. Grounded in practical concerns as well as respect for copyright, these practices support the use of ILL ordinarily only for materials the requesting library would not otherwise license or purchase. ILL is typically an inefficient substitute for purchase or subscription where the latter is truly justified, and to the extent that it prevents a library from acquiring relevant materials for its own collection, abuse of ILL undermines library mission. Quite simply, a high volume of ILL requests for a particular item is a reliable signal of scholarly interest that should lead a research library to acquire the item for its own collection. For these reasons, academic and research libraries that follow best practices will not engage in abuse of an ILL arrangement, regardless of variations in technical legal regimes.

Fulfilling libraries also obtain assurances from international partners by formal representation. For example, most ILL request forms contain a box that requesting libraries check to indicate that their request is in compliance with US copyright law or CONTU guidelines. US libraries have no reason to believe foreign partners misrepresent themselves on these forms, which accompany each ILL request. If there is any indication of confusion, it may be helpful to explain to foreign ILL partners that US law bars domestic libraries from reproduction and lending that violates Section 108 or is not within fair use, with a clear statement that these two provisions may apply. It may also help to make the representations more explicit. For example, request forms could be changed to include verification similar to the following:

This request is in compliance with US Copyright Law, including either Section 107 (fair use) or Section 108(g)(2), which provides that requests will not be made "in such aggregate quantities as to substitute for a subscription to or purchase of such work." The requesting library represents that it complies with US law and that receiving the copy will not violate the copyright, importation, or other laws of the requesting library's country.

Such a verification, incorporating the key language of 108(g)(2), would reduce the likelihood that a foreign partner would check a box without understanding its meaning. Requesting libraries can further support the legitimacy of their requests by keeping records of requests. These procedures can help ensure that the requesting library will be able to demonstrate that its requests over time have satisfied Section 108 or Section 107.

The measures described above should be sufficient to provide domestic libraries with the confidence they need to participate in an ILL system that involves foreign institutions. With adequate assurances in place, a US library may engage in ILL arrangements with foreign institutions.

- <sup>1</sup> Specifically, Section 108(d) allows for copying of certain materials by one library for the users of another library, and Section 108(g)(2) states, "...[N]othing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."
- <sup>2</sup> The Rule of Five bars fulfilling requests by the same library within a single calendar year for more than five articles from the previous five years' worth of the same periodical. It also bars more than five requests for copies from any copyrighted non-periodical work during a calendar year. The rule is silent as to the treatment of articles more than five years old. It is also silent as to non-periodical works.
- <sup>3</sup> Discussion of the CONTU guidelines appears in H.R. Rep. No. 94-1733 at 70-74 (1976) (Conf. Rep.). In reality, reevaluation and adjustment of the guidelines has not occurred.

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# White Paper: Trends in Licensing

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**James Stemper, Electronic Resources Librarian,  
University of Minnesota Libraries**

## Introduction

Since the 1990s, publishers and libraries increasingly use license agreements to establish use permissions that previously had been guided by national copyright law. An important and traditional mission of the research library, to share resources with other libraries, has been affected by this shift away from copyright law to contract law. While copyright law recognizes and addresses interlibrary loan (ILL), there remains no single **licensing** standard for ILL. Currently, the overwhelming majority of publishers allow some form of ILL; and only a minority of publishers restrict lending to the same country.

Not all licenses, however, allow ILL, or allow it to the same degree. Given the importance of resource sharing to research libraries and to the communities they serve, research libraries should actively promote inclusion of ILL privileges when negotiating license agreements or add language stating that nothing in the license may restrict exceptions permitted under copyright law. If publishers see that libraries are willing to sign away key ILL rights for service to “secondary” user communities, increasing numbers may disallow ILL privileges. Under such circumstances, the result of moving to licensed electronic versions rather than purchased print versions would leave research libraries with no right to lend to or obtain non-subscribed materials from peers.<sup>1</sup> Finally, while many publishers show a great willingness to support ILL, the language used to express permissions is often contradictory, suggesting a lack of understanding of ILL tools and practice. There would be tremendous value in having greater uniformity and clarity in licensing terms and conditions.

## ILL and Electronic Journals

Informal surveys of ILL clauses in academic library licenses indicate two principle

findings: (1) there is considerable acceptance of ILL services, and (2) there is no uniformly adopted language or permission describing ILL services.<sup>2</sup>

- The majority of publishers allow ILL.<sup>3</sup>
- Of those publishers that deny ILL, the majority are small scholarly societies.
- The majority of publishers do not restrict ILL to same country.<sup>4,5</sup>
- The majority of publishers allow ILL, using secure e-transmission via resource-sharing software systems such as Ariel or ILLiad. It is fairly standard for publishers who allow secure e-transmission to require digitization from a printed copy rather than supplying a copy of the e-format. This point is often successfully negotiated to permit use of the electronic copy to send via Ariel or ILLiad.
- ILL language, even that taken from model licenses, is often contradictory making it difficult both to interpret and to comply with; license language may fail to show an understanding of ILL tools and workflow, making it difficult for libraries to track in appropriate ways; and it may include conditions impossible for libraries to comply with, even if willing.<sup>6</sup>
- Commission on New Technological Uses of Copyrighted Works (CONTU) Guidelines on Photocopying under Interlibrary Loan Arrangements are mentioned in a minority of licenses allowing ILL.<sup>7</sup>

## ILL and Electronic Books

The e-book environment is younger and business terms for e-books are far more elastic than those for e-journals; at the same time, e-book rights management issues are more complex. Many publishers embrace the notion of ILL for e-books, although it is not clear exactly what that means or how tracking and delivery will be managed. Informal conversations with representatives of two of the three largest scientific, technical, and medical (STM) publishers have indicated a willingness to experiment with e-book ILL.

- The basic lending unit of a print book is the entire book. A publisher's e-book license frequently allows copying and lending of chapters only via ILL. In some situations (e.g., a work of fiction) this would be insufficient access for the user.
- E-book aggregators, and services that act as e-book platforms for third-party publishers (i.e., ebrary, Ebook Library (EBL), and NetLibrary) have not made arrangements to permit ILL.

## Findings and Conclusion

As online-only subscriptions become the norm, there is an increased need to secure the right for research libraries to conduct ILL, and to do so in a standard and reasonable fashion.

Some licenses forbid ILL and prevent additional users from obtaining the materials they need. As a result, as was done last year with confidentiality clauses, ARL may wish to consider making specific ILL rights a deal-breaker. Research libraries will have to carefully decide when to insist on ILL privileges in new products and for renewal licenses that frequently have variant terms. One approach may be to make this request of publishers where our faculty editors and society officers can best assert their influence.

An important part of the strategy will be the definition of a uniform method of dealing with licenses that are silent on the issue. It appears that there is no consistent approach by legal counsel. ARL directors may wish to consult with local counsel as to what constitutes a safe harbor especially as state law and university legal policy may well vary among public institutions. (See Appendix A for further information.)

It would be useful to articulate clearly ILL clauses that are consistent with research libraries' missions, ILL best practice, and ILL management tools. In looking over the variety in licensing language used to describe ILL permissions for e-journals, it becomes clear that there is greater need on the part of publishers and negotiating librarians for understanding of ILL workflow and the tools used to support it. Certain features of ILL permissions are favored by ARL libraries because they replicate best practices established in the print environment. Library-friendly ILL license language may include such features as:

- Include a licensing provision stating that nothing in the license may restrict exceptions permitted under copyright law.
- Confine constraints on ILL permissions to the lending libraries. Just as libraries cannot control the behavior of their users, they cannot monitor or control the behavior of the borrowing library.
- Do not restrict ILL to same country. Restricting to the same country was not a condition governing print ILL, and it imposes a needless constraint at exactly the moment we are entering into an increasingly global information age. A better response to create shared understandings of what constitutes a responsible ILL transaction is to develop international standards.

- Allow the use of a digital copy of the electronic article without printing prior to sending through Ariel or Ariel-like software. Ariel and Ariel-like software degrade the electronic image whether that image is made from a print or an electronic copy. There is no additional security gained by first printing then scanning the article.
- Medical and veterinary libraries may want to secure the right to include the use of LoansomeDoc<sup>®</sup>, a library-to-clinician lending software that is commonly used in these fields, and more expansive than fair use.

<sup>1</sup> Lynn Wiley, "License to Deny? Publisher Restrictions on Document Delivery from E-Licensed Journals," *Interlending & Document Supply* 32, no. 2 (2004): 94–102. In 2004, Lynn Wiley surveyed Committee on Institutional Cooperation (CIC) institutions on their policies and practices for including ILL in e-journal license negotiations. All 13 schools reported that they ask for ILL rights, but 9 of them accepted "total prohibition of ILL" (69%), while the other 4 schools had "no knowledge of licenses" (meaning ILL could potentially be prohibited at all 13 schools, i.e., no one in the CIC considers this a deal-breaker). Almost half of the schools (6 out of 13) reported that ILL was "[f]orbidden to some borrowers, i.e., commercial or foreign forbidden." When faced with the issue of canceling print copies of a journal, over half of the schools (7 out of 13) said a resulting lack of ability to loan from the remaining e-version "was important but not the first consideration, those responding no said it wasn't a large issue or that the budget was a larger priority." Wiley reported that CIC ILL departments sometimes canceled ILL requests due to restrictions in the license; "[t]he numbers were not large, no higher than 600 over a six-month period, but bear watching for any increase." In the eight years since this survey, more CIC schools have undoubtedly canceled print versions, a move that may well have resulted in less ability to provide loans to peers and a corresponding lessening in ability to obtain loans from peers.

<sup>2</sup> North Carolina State University: ILL information from 80 publishers was used in an informal sample, including information from 27 of the approximately 100 members of the International Association of Scientific, Technical & Medical Publishers. University of Minnesota: the ILL clauses of its 241 e-journal licenses were examined.

<sup>3</sup> At the University of Minnesota, the success rate is 89% (214 out of 241 licenses).

<sup>4</sup> In those licensing agreements between publishers and the University of Minnesota that allow ILL, if requested by a library in the US, (note the library usually needs to be a non-profit) this represents ~12% (25/214) of the allowing publishers. In the sample of 27 STM publishers, the percentage requiring same-country restrictions was slightly higher, though still a minority (19%).

<sup>5</sup> From the Elsevier ScienceDirect ILL policy: "A note on national boundaries: Interlibrary loan and document delivery activities and the legal basis for such activities vary from country to country. As an international publisher, Elsevier has worked hard to establish an international level playing field, where all libraries can provide documents to libraries on the same terms and conditions. Those terms are intended to support domestic ILL. They are also intended to reign in those libraries who have abused ILL and provide what is more accurately described as document delivery to anyone anywhere in the world in the name of ILL." Last updated April 1, 2011, [http://www.elsevier.com/wps/find/intro.cws\\_home/SDinterlibraryloan](http://www.elsevier.com/wps/find/intro.cws_home/SDinterlibraryloan).

<sup>6</sup> For example, "The Licensee may, subject to clause 6 below, supply to an Authorized User of another library (whether by post or fax [or secure transmission, using Ariel or its equivalent, whereby the electronic file is deleted immediately after printing]), for the purposes of research or private study and not for Commercial Use, a single paper copy of an electronic original of an individual document..." (Licensing Models, "Academic Single Institution License," accessed May 13, 2011, <http://www.licensingmodels.org/SingleAcademicInstitutionLicense.html>.) This language, on the one hand, permits secure e-transmission; on the other hand, it requires delivery of a paper copy. It also makes a request of the lending library (the licensee) that they do not have the ability to enforce, as the format delivered to the patron by the requesting library is beyond the lending library's control.

<sup>7</sup> At University of Minnesota, 29% of allowing publishers refer to the CONTU Guidelines that were established by the Library of Congress in 1979. CONTU Guidelines place the burden of tracking the number of requests on the requesting library. ILL software widely used in ILL transactions facilitates compliance with this guideline; the software does not provide the mechanism for the lending library to keep track of this data.

## Appendix A: Legal Licensing Issues

When a license agreement is silent as to the permissibility of ILL and there have been no informal discussions of the issue between the parties, institutions should assume standard ILL practice is allowed and fulfill requests accordingly. All else being equal, reasonable licensors should assume that the licensee intends to engage in whatever activities are customary and permitted by law unless the license specifies that those activities are forbidden. As most licenses that address the issue do allow ILL, and ILL (including to non-US partners) is a long-established practice, the burden should be on the licensor to specify that it wants to deviate from this default practice.

For the same reason there is no need to deliver copies of “silent license” materials in inferior formats such as scanning or faxing printouts rather than electronic delivery of files in the same format that is available to licensee’s authorized users. The default expectation should be delivery in the most useful and efficient format allowed by law.

The inclusion of a generic savings clause, such as “All rights not specifically granted to Licensee are expressly reserved,” has no effect on a library’s rights under fair use and Section 108, and hence does not bar lending under ILL arrangements. A publisher’s rights are expressly limited by the exceptions in the law, including Sections 107 and 108, so they have no right to forbid activities that Sections 107 and 108 allow. It is often said that “a license trumps fair use,” but this isn’t entirely accurate. **Conflicting provisions** in a license do override default rights under fair use and other exceptions, but the mere fact that a license exists does not alter the default legal rules that govern the use of copyrighted materials. Libraries do not need a publisher’s permission to engage in these activities, so a publisher’s declaration that its grant of permission is limited is irrelevant to activities covered by statutory exceptions. Only an affirmative promise by the library that it will not engage in activities other than those specifically discussed in the license would be sufficient to bar a library from engaging in ILL. Such a provision should raise red flags for libraries, which should resist this kind of erosion of their legal rights. In addition, judges construe ambiguous provisions against the drafter of the agreement (almost always the publisher), especially in one-sided negotiations, which are typical in this context. So a generic savings clause will not be construed broadly to limit the rights of libraries where, as here, there is a better interpretation that is friendly to libraries.

Some license agreements appear to include language to the effect that articles in the database cannot be downloaded, reproduced, transmitted, and so on, “except as permitted by [national/international/applicable] law.” This language is likely meant to give licensees permission (or, consistent with the discussion above, to be clear that the library is not waiving its rights) to take advantage of exceptions and limitations such as fair use and Section 108. However, an attorney would have to see the full text of a license agreement to be sure of any provision’s meaning. For example, language in the JSTOR license allowing ILL if in compliance with “international copyright laws, guidelines, or conventions” appears designed to give licensees rights (or, again, to make clear that licensees are not waiving rights) to do whatever ILL practices are legal or customary in licensee’s country or community. In short, this kind of language is likely meant to preserve libraries’ default rights, not take them away, and should be interpreted to allow ILL in compliance with US law.

—Brandon Butler, Director of Public Policy Initiatives, ARL



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## News

### ARL Transitions

**California, Irvine:** Lorelei Tanji, Associate University Librarian for Collections, was appointed Acting University Librarian, effective March 1, 2011. Gerald Lowell, Interim Library Director and Assistant Dean of the Claire Trevor School of the Arts, retired February 28, 2011.

**California, Santa Barbara:** Denise Stephens has been named University Librarian, effective July 1, 2011. She is currently the Strategic and Organizational Research Librarian at the University of Kansas.

**Harvard:** Helen Shenton, a member of the Harvard Library Implementation Work Group and a veteran of the British Library, has been named Executive Director of the Harvard Library.

**National Library of Medicine:** Becky J. Lyon, Deputy Associate Director, Library Operations, retired on April 29, 2011.

**Tennessee:** Steven Escar Smith has been appointed Dean of Libraries, effective July 1, 2011. He is currently Interim Executive Associate Dean at Texas A&M Libraries.

**Yale:** Susan Gibbons has been appointed University Librarian, effective July 1, 2011. She is currently Vice Provost and the Andrew H. & Janet Dayton Neilly Dean of the River Campus Libraries at the University of Rochester.

### ARL Staff Transitions

**Kaylyn Groves**, Communications Program Officer, returned from maternity leave March 28, 2011. Her temporary replacement, **Sarah Lippincott**, is pursuing a master's degree at the University of North Carolina at Chapel Hill's School of Information and Library Science.

### Honors

**Peter Suber**, SPARC Senior Researcher, has been named by the American Library Association (ALA) as this year's winner of the L. Ray Patterson Copyright Award. The annual award recognizes contributions of an individual or group that pursues and supports the Constitutional purpose of the US Copyright Law, fair use, and the public domain.

## Grants

The Institute of Museum and Library Services (IMLS) awarded its first round of Sparks! Ignition Grants, which are designed to help libraries and museums solve challenging problems. Four ARL libraries are among the grant recipients:

### **Purdue University and Penn State University**

Amount: \$24,594

Project: Creating Databib, an annotated online bibliography of research data repositories

### **Cornell University**

Amount: \$25,000

Project: Collaborating with other campus partners to address high attrition rates among doctoral students in the humanities

### **New York Public Library**

Amount: \$25,000

Project: Crowdsourcing the transcription of a digital collection of historical menus

## ARL Calendar 2011

<http://www.arl.org/events/calendar/>

|                |   |
|----------------|---|
| July 27–28     | ARL Board Meeting<br><i>Washington, DC</i>  |
| August 22–25   | Northumbria International Conference<br>on Performance Measurement<br><i>York, UK</i> |
| October 11–14  | <b>ARL Board &amp; Membership Meetings</b><br><i>Washington, DC</i>                   |
| December 12–13 | CNI Fall Membership Meeting<br><i>Arlington, Virginia</i>                             |

### **ARL, LibQUAL+®, and SPARC at ALA Annual in New Orleans, June 24–July 1**

<http://www.arl.org/events/arlala/>

|                                 |   |
|---------------------------------|---|
| June 24–27                      | ARL/LibQUAL+®/StatsQUAL® booth (#2162)                                |
| June 24<br>9:00 a.m.–Noon       | ClimateQUAL® Partners Meeting   |
| June 24<br>12:30 p.m.–2:00 p.m. | ARL Library Assessment Forum  |
| June 24<br>2:30 p.m.–4:00 p.m.  | ARL Survey Coordinators<br>and SPEC Liaisons Meeting                  |
| June 25<br>4:00 p.m.–6:00 p.m.  | SPARC-ACRL Forum on Emerging Trends<br>in Scholarly Communication     |
| June 27<br>8:30 a.m.–10:30 a.m. | LibQUAL+® Share Fair  |
| June 27<br>Noon–5:00 p.m.       | Basic Skills for Analyzing Library Service<br>Quality Data Assessment |
| June 27–July 1                  | METS Workshop: The Basics and Beyond                                  |

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