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Memorandum

To: SLC
From: Arnie Lutzker
Re: Section 108(a)(3) Notice Requirement
Dated: August 19, 1999

This memo will address an issue that has arisen regarding interpretation of Section 108(a)(3) of the Copyright Act, 17 U.S.C. § 108(a)(3), as amended in the Digital Millennium

Key Points:

- The changes to Section 108(a)(3) of the Copyright Act were made to update the section to ensure that libraries would be responsible for including some notification that an item may be protected by copyright, since the law, as of the Berne Convention Implementation Act of 1988, no longer requires the copyright notice to appear.
- If the copyright notice does not appear on an article in a journal issue or an article in a volume of separately authored essays, stamping the article with a notice that the work may be under copyright is sufficient ("NOTICE: This material may be protected by Copyright Law

- If copying a chapter from a book in which the chapters do not carry separate attribution, one should copy the copyright notice from the front of the book. If the notice cannot be found, stamping is sufficient.

Analysis:

Section 108(a)(3) establishes, as one of the conditions for a library or archive to copy works in its collections, the following:

> (3) the reproduction or distribution of the work includes a notice of copyright *that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section*. (Italics supplied).

The italicized portion of the quoted text represents the material change included in the DMCA. Although the legislative history is inconclusive on the precise explanation of this requirement, when the text was being negotiated, the principal rationale for the change was that since the Copyright Act has no formalities, the law does not require that copyright notice appear on the work for copyright law to apply. Thus, consistent with a growing demand by representatives of copyright owners that institutional users, like a library or archives, educate their patrons about copyright law rights and responsibilities, ownership interests wanted some burden on the libraries to notify their patrons that the work being reproduced *might* be protected under copyright law, even in the absence of notice. Without the change, the prior statutory language could have been read to allow no reference to copyright if no notice appeared.

The key question raised by the inquiries is "what is the *work*?" Is the "work" the article that is being copied or the journal issue or collected essays from which the article is taken? It is an important question because if the article does not contain separate copyright notice, but the journal issue or volume of essays does have formal notice, must the library or archive copy the journal issue's or the volume's copyright notice when the article is reproduced?

First, it is clear under copyright law individual articles written for a journal (such as *The New Yorker* or *Harvard Law Review),* a periodical or a collection of essays, constitute separate works. *See* 17 U.S.C. §101 [definition of *collective work*: "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, *constituting separate and independent works in themselves*, are assembled into a collective work." Italics supplied.] These articles have independent authors, and the articles were completed most likely at different times and in different places. Copyright attaches to them individually.

Second, under copyright law, the journal issue or the volume of essays also qualifies as a copyrighted compilation of the publisher. *See* 17 U.S.C. §101 [definition of *compilation*: "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that *the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works* supplied.] The Copyright Act specifically provides that a separate contribution to a collective work may bear its own notice; however, the notice of the collective work can suffice for the compilation "as a whole . . to invoke the provisions of sections 401(d) or 402(d). " 17 U.S.C. §404(a)[1] [copyright notice in the journal issue is sufficient evidence to counter an argument of innocent infringement when considering damages]. However, for purposes of Section 108(a)(3), the compilation "as a whole "represents a different "work "and its notice is not the notice referenced in section 108, when it identifies an individual article. Moreover, given the variations

[1] 17 U.S.C. §404(a) provides in pertinent part: "A separate contribution to a collective work may bear its own notice of copyrighted, as provided by section 401 through 403. However, a single notice applicable to the collective as a whole is sufficient to invoke the provisions of sections 401(d) or 402(d), as applicable with respect to the separate contributions it contains…."

in contractual agreements between authors and publishers, the copyright notice for the collected work may or may not apply to the individual article.

Therefore, in interpreting the Section 108(a)(3) requirement, if the work being copied were an independent work that could contain its own notice, but does not, it would be sufficient for the library to stamp the copy "This work may be protected by copyright "or with words to that effect. There is no specific obligation to look at the notice for the journal issue or the volume, because the journal is, in reality, a *different* work. Its copyright notice is intended to cover that entire work, of which the reproduced article is only one part.