Background

Section 108(g)(2) of Copyright Law of the United States indicates that:

. . . nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

Ohio State University Libraries has previously followed the chapter 4 guidelines of the 1978 National Commission on New Technological Uses of Copyrighted Works (CONTU) Final Report to identify when the procurement of copies through interlibrary loan (ILL) might be a substitute for a subscription. Under the CONTU guidelines, a royalty fee is required for the sixth article or more published in the last five years which is filled for the OSU community from a single serial title in a calendar year.

The CONTU guidelines, however, are not law and reflect a standard of what might constitute as a substitute for a subscription in 1978 rather than in 2018. For this reason, Ohio State University Libraries will no longer adhere to these guidelines. Instead, the heads of Interlibrary Services and Collections Strategy will annually review instances where aggregate quantities of ILL copy requests for a title may substitute for a subscription and will determine the appropriate outcome in accordance with following Copyright Law rather than the CONTU guidelines. Possible outcomes of this annual review may include:

- The ILL requests fell within scope of section 107 (Fair Use) or 108 (copying by libraries and archives) of the 1976 Copyright Act and no ILL copyright fee is due;
- The ILL requests were beyond Fair Use and “in such aggregate quantities as to substitute for a subscription to or purchase of such work” and ILL royalty fees will be paid;
- A subscription to a serial title is made.

Procedure

1. Interlibrary Services will maintain records of ILL article requests filled for Ohio State University users.
2. The Head of Interlibrary Services and the Collections Strategist will annually review these article requests for copyright compliance and potential subscription.
3. Review factors for potential subscription or ILL royalty payment consideration may include, but are not limited to:
   a. Number of borrowing requests filled for articles published in the last 5 years of a serial title;
   b. Number of local patrons making those requests;
   c. Frequency/pattern of requests within a calendar year and across years;
   d. Subscription list price and Copyright Clearance Center ILL royalty fee;
   e. Patron recommendations/requests for title subscription (for subscription consideration);
   f. Publisher/provider website turnaways (for subscription consideration).
4. The Head of Copyright Services, Electronic Resources Officer, and Collection Development Librarians at the OSU Law, Health Sciences, and regional campus libraries will be consulted in an advisory role as needed.
5. Based on this review of high-demand titles, the Collections Strategy team will make strategic and informed collection building decisions for potential serial subscription, and the Interlibrary Services department will initiate payment to the Copyright Clearance Center for articles that are in “aggregate quantities as to substitute for a subscription”.