



AMERICAN SOCIETY OF
MEDIA PHOTOGRAPHERS

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**WRITTEN COMMENTS IN RESPONSE TO §108 STUDY GROUP
REQUEST**

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**Respectfully submitted by:
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The American Society of Media Photographers' mission is to protect and promote the interests of professional photographers who make photographs primarily for publication. Founded in 1944 by a handful of the leading photojournalists of the era, ASMP is the oldest and largest trade association of its kind in the world. ASMP thanks the Copyright Office and the §108 Study Group for the opportunities to appear at the Public Roundtables and to file these comments. ASMP has chosen to respond to those questions raised under Topic B of the Federal Register notice.

Background Considerations

In considering any changes to §108, one must keep in mind the fact that this Section may well be expanded to include museums. Museums, like archives which are already included, are much more likely to have large collections of photographs than libraries. This means that amending the Section to allow digital copies (and circulation of those digital copies) of non-text works will have even more of an impact on photographers than if museums were not to be included.

One must also remember that the collections of photographs in both museums and archives contain substantial numbers of images for which there is no information as to the photographer, the copyright owner or how the institution obtained or received the image. It is even conceivable that those photos that are completely without provenance constitute the majority of the photography collections held by some museums and archives.

ASMP does not have any objection to limited digital copying of photographs for preservation purposes by authorized institutions under §108. In fact, such copying might provide some relief for the problem currently faced by photographers of digital images that are created and/or stored in formats that become obsolete, unsupported or otherwise problematic. Such problems often occur because of the abandonment of old technologies by the manufacturers of digital cameras, combined with their refusal to allow others access to the digital technologies that they choose to abandon. Naturally, to be of any benefit to the photographers and copyright owners, they would need to be entitled to access to the preservation copies.

Of utmost importance is the fact that, in the digital and cyberspace environments, once a photograph exists in digital form, the genie is out of the bottle, and there is great risk of widespread distribution of unlimited original clones. That is true whenever a photographer today creates a digital photograph and/or makes it available over the web. However, in that case, that has been the photographer's decision, and that decision is often implemented in conjunction with appropriate technological and other safeguards; in the §108 situation, however, the photographer has no choice, or possibly even knowledge, of the digitization of his or her images. Photographers can be at great risk of being victimized by infringing digital uses of their images without even knowing it, even photographers who have intentionally stayed away from digital storage and/or distribution because of those very risks.

ASMP's real concerns are not with the creation of copies under §108, but with downstream access to and distribution of those copies. If digital copying and distribution of photographs are to be allowed, they must be accompanied by safeguards that are in proportion to the substantial risks entailed. Access to and distribution of digital copies has to be limited to the non-profit world: the identity of the user would have to be non-profit, and the nature of the use have to be non-revenue-producing. In ASMP's view, "non-profit" would also include individuals (not just non-profit institutions) when they are making uses for non-revenue-producing purposes and activities.

A related issue that arises in the §108 context is whether a photograph that appears in a larger work, such as a collective work or compilation, is an entire work or merely part of a larger work. The answer is that a photograph is a work in and of its own. It is no less of a work because other material may be added to it. For example, Everyman's Library publishes a single volume containing the four books about Harry "Rabbit" Angstrom by John Updike, entitled Rabbit Angstrom: The Four Novels. That fact does not mean that Rabbit Run, or any of the other three novels in the series, is not an entire work.

Topic B

Turning to the specific questions presented under Topic B in the Federal Register Notice of a Public Roundtable, the first is the

General Issue, whether §108 should be expanded to include non-text works (i.e. photographs, as far as ASMP is concerned). Right now, §108 already includes photographs that are combined with text works, such as collective works and compilations. ASMP does not have any objection to expanding the coverage of §108 to include photographs, as long as the appropriate limitations and safeguards are provided.

Next, turning to the specific questions, Numbers 1 and 2 are essentially overlapping and, to a great extent, different ways of asking the same question. Accordingly, ASMP will address them jointly.

ASMP has already discussed its views on whether the exceptions for photographs under §108 should be eliminated. Our concerns with doing so are that:

A. There will now be a digital, and infinitely usable, clone of the image (and one that was not authorized by the photographer).

B. Once digital copies (actually, duplicate originals) are accessed by anyone, whether directly, via distribution from the "home" library, museum or archive ("Institution"), or via distribution from another Institution downstream, that person now has possession of a digital clone that can be improperly and illegally used and distributed ad infinitum.

C. Those uses and further improper distributions could destroy the marketplace value of the image entirely. For example, if the photograph in question is one that normally is used for fine print or poster sales, someone "borrowing" the copy from the library etc. is in a position in effect to go into competition with the photographer, to price gouge, to produce inferior quality prints and copies, etc. All of those acts would destroy the image's value in the market.

D. For images that are not normally sold as prints or posters, but that are typically licensed to third parties for reproduction and other uses, multiple uses by an unauthorized "borrower" would destroy any ability to charge a premium for an exclusive license. In addition, the unauthorized uses could be frequent enough, or in sufficiently undesirable contexts, as to make the image undesirable for any potential licensees. This would destroy the marketability, and therefore the market value, of the image.

In order to address these and other problems, it is ASMP's position the following requirements and limitations must be included in any changes in §108, in exchange for allowing the making of digital for permitting them to be and distributed to other Institutions and individual borrowers.

A. Copies for preservation can and should be of the highest quality possible.

B. However, copies for distribution should be protected, at a minimum, as follows:

1) They should be low resolution thumbnails.

2) They should be embedded with metadata, which should:

a. be persistent and robust,
b. include all available attribution information as to the photographer, copyright holder, "home" Institution, contact information, etc.,

c. include any digital identifiers that may become commonly used,

d. identify the nature of the copy and the nature and location of its source material (the original),

e. a copyright notice to the extent that the information is available,

f. a warning that no further copying or distribution is permitted,

g. a warning that no use other than research may be made.

3) They should be accompanied by technological measures to prevent further copying and, if and when technologically possible, to prevent distribution beyond the first borrower from Institution.

C. Any changes in the language of §108 must allow for technology to change and improve over time and to allow protections that may not currently exist.

With regard to the third question on whether there should be different restrictions on copies for users versus copies for inter-library loans, ASMP believes that all copies should be treated with the same restrictions and security measures that would apply to copies distributable to users. As discussed earlier in these comments, placing digital copies of photographs in the hands of users opens the

door to infringements. Accordingly, all copies, whether intended for distribution to users or for inter-library loan, should be treated as if they are going to end up in the hands of users and as if those users may be infringers. All of the kinds of restrictions and security measures described above should be imposed on all copies.

Finally, ASMP suggests that the owners of copyrights to photographs be allowed to opt out of permitting any downstream distribution to individuals. ASMP recognizes the practical difficulties presented by such a suggestion, but hopes that the very technologies that allow easy and inexpensive digital copying and distribution will also allow the easy and inexpensive implementation of such a proposal.

Respectfully submitted,

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