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April 27, 2006

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DELIVERED VIA EMAIL

RE: Written Comments Concerning the Section 108 Study Group On Copyright Exceptions for Libraries and Archives

Pursuant to the Notice published by the Copyright Office in the Federal Register of February 15, 2006 (p. 7999-8002), the Association of American Publishers ("AAP") submits these Written Comments on behalf of its members regarding certain issues relating to the exceptions and limitations applicable to libraries and archives under Section 108 of the Copyright Act.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing print materials, AAP members are active in the emerging market for e-books, while also producing computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

Introduction

When it was enacted in 1976, Section 108 could have been a potential nightmare for book and journal publishers. By providing libraries and archives with special exceptions to the exclusive rights of copyright owners, Section 108 could have empowered such entities to directly compete with these publishers in distributing and providing access to copies of copyrighted literary works for the general public. Moreover, it could have significantly interfered with the library community's growth as one of the publishing community's

most important markets, and with the archival community's evolving partnership with publishers in the service of preservation interests.

Fortunately, however, in enacting Section 108, Congress understood the need to qualify the special privileges it was creating for libraries and archives with conditions and limitations designed to avoid turning publishers' customers and partners into competitors.

For book and journal publishers, the Section 108 Study Group's charge to examine how Section 108 of the Copyright Act "may need to be amended, specifically in light of the changes produced by the widespread use of digital technologies," is a very complicated matter. From the comments below, it will be evident that the various book and journal publishing communities represented within AAP's membership view some of these issues from very different perspectives based on having different products, business models, markets, and experiences with the use of digital technologies.

However, AAP's members share a common interest in ensuring that, in any revision of Section 108, Congress will again understand and act appropriately upon the need to qualify new or expanded privileges with conditions and limitations that will ensure publishers can continue to exploit their rights under copyright in the marketplace without unjustified interference from unnecessary government mandates.

TOPIC 1: ELIGIBILITY FOR SECTION 108 EXCEPTIONS

Should further definition of the terms "libraries" and "archives" (or other types of institutions) be included in section 108, or additional criteria for eligibility be added to subsection 108(a)?

As any possible revision and expansion of the activities subject to these exceptions are considered, it is important to similarly consider more specific definitions of the entities that would be the beneficiaries of these changed exceptions. Such definitions should clearly describe such entities and distinguish them from each other based on their respective purposes and functions. Insofar as such entities would, in certain circumstances, be entitled to engage in the reproduction and/or distribution of copies of copyrighted works without permission from or compensation to the copyright owners, such definitions must also functionally distinguish "libraries" and "archives" (as well as any potential additional beneficiaries) from "publishers" so that the exception does not, as a matter of law, enable these entities to compete with publishers' exercise of such copyright rights in the marketplace and interfere with publishers' customer relations (including with such entities), actual or potential sources of revenue, or incentives to invest in and produce new products and services based upon their exploitation of such rights.

Should eligible institutions be limited to nonprofit and government entities for some or all of the provisions of section 108? What would be the benefits or costs of limiting eligibility to institutions that have a nonprofit or public mission, in lieu of or in addition to requiring that there be no purpose of commercial advantage?

As a general rule, only nonprofit entities should be permitted to benefit from statutory exceptions to the exclusive rights of copyright owners because it would be fundamentally unfair for copyright law to designate certain for-profit entities as permitted to "free-ride" on the investments and assets of other for-profit entities. However, this important consideration for eligibility cannot be adequately addressed solely on the basis of such entity "status" determinations. It also requires that the exceptions under Section 108 remain subject to the current qualification that requires the persons permitted to exploit such exceptions to do so "without any purpose of direct or indirect commercial advantage." See Section 108(a)(1). The meaning of this standard of conduct, which appears in other provisions of the Copyright Act, should be made clear with respect to any revision of Section 108 because evolving business models for the creation, storage, retrieval and use of digital content may blur the distinctions that the standard was intended to embody.

While it is thus important to focus on the nature and purpose of the activities at issue, as well as on the "status" of the entities or persons engaging in them, such "status" nevertheless should itself be a disqualifying factor for eligibility with respect to "State entities" that, as a matter of law, can assert "sovereign immunity" from federal court jurisdiction for an award of damages to a copyright owner under Section 504 of the Copyright Act. Although the Eleventh Amendment case law that established such immunity has left little practical recourse for Congress to redress the unfair way in which the legal landscape of rights and remedies has been tilted in favor of State entities under copyright law, there is no justification for Congress to ratify the manifest injustice of this situation through new legislation permitting entities such as State libraries and archives to continue to benefit from special exceptions to the exclusive rights of copyright owners while being largely unanswerable under the established remedies scheme for their own acts of infringement in violation of such rights. Accordingly, "government" entities that are entitled to claim "sovereign immunity" against any award of damages for copyright infringement should not be eligible to assert the special exceptions under a revised Section 108 unless such assertion is tied to a waiver of such immunity.

Should non-physical or "virtual" libraries or archives be included within the ambit of section 108? What are the benefits of or potential problems of doing so?

It is a relatively easy matter in today's world for almost anyone to establish a web site or other Internet-based space that could claim to be a "library" or "archive" whose "collections" satisfy the current minimal (i.e., "availability") requirements that specifically address the nature of such entities under Section 108(a)(2). But, given the ephemeral nature of cyberspace platforms and the difficulties in identifying and locating the persons responsible for them, it is almost impossible to ensure that such entities would be accountable for their use of copyrighted works in the context of Section 108.

Therefore, even if the eligibility of a "library" or "archive" is linked to more specific definitions of these respective entities, a "virtual" (i.e., non-physical) library or archive that otherwise would meet the eligibility requirements for exploiting the special

exceptions under Section 108 should be ineligible for such privileges in the absence of an institutional affiliation with an entity, such as a university or public library system, that has a physical presence and acknowledged relationship with such library or archive sufficient to ensure full accountability for the activities of such library or archive.

The precise nature of such an "affiliation" requirement may take a number of different forms, and there are other means that, in combination with such "affiliation" requirements, might be employed to provide the requisite assurance of accountability. For example, a certification requirement might help provide reasonable assurance of accountability if it identifies the appropriate individual(s) responsible for the operation of the library or archive, and requires such individual(s) to file a notice with the affiliated institution or the U.S. Copyright Office that provides verifiable information to facilitate contact and service of legal process relating to the actions of the library or archive, and commits such individual(s) – subject to the risk of personal liability – to ensuring that the library or archive acts in strict accordance with the exemption.

In considering these issues, "virtual entities" should be distinguished from non-virtual entities that have "virtual collections." Even with a physical presence, an eligible entity that purports to exploit the exceptions in Section 108 with respect to its virtual collection(s) of copyrighted works should be subject to some reliable form(s) of accountability under Section 108.

Should the scope of section 108 be expanded to include museums, given the similarity of their missions and activities to those of libraries and archives? Are there other types of institutions that should be considered for inclusion in section 108?

AAP and its members believe it is be appropriate to consider whether museums should qualify as eligible beneficiaries under Section 108, but urge that careful consideration should be given to examining the nature of their missions and activities, including the potential commercial nature of their likely uses of copyrighted works, e.g., public display as part of an exhibition, and/or reproduction and distribution in a catalog, poster or other publication. Unlike most libraries and archives, many museums – despite their status as "nonprofit" entities – routinely charge admission for their permanent and/or special exhibitions, and sell posters, books, postcards and other items that constitute reproduction and distribution of copies of copyrighted works. As in the current consideration of "orphan works" legislation, it will be necessary to determine whether and to what extent such activities may require that a museum's exploitation of the exceptions provided under Section 108 might be subject to conditions that are different from those that may apply to libraries and/or archives. See *Report on Orphan Works: A Report of the Register of Copyrights*, January 2006, p. 119.

At present, it is unclear whether any other types of institutions should be considered for eligibility as beneficiaries under Section 108.

How can the issue of outsourcing be addressed? Should libraries and archives be permitted to contract out any or all of the activities permitted under section 108? If so, under what conditions?

Eligible institutions should be permitted to outsource activities permitted under Section 108 on a particularized basis, but only under clearly defined terms and conditions ensuring the accountability (including liability) of both the vendor for outsourced services and the outsourcing institution for such activities. The cost effectiveness of outsourcing under the particular circumstances; the responsibility of the outsourcing institution to monitor and direct the vendor's performance; a prohibition against vendors retaining, reproducing or distributing copies of institutional materials outside the scope of the specific outsourced activity; and provisions establishing penalties for repeated or egregious violations of outsourcing restrictions, should be among the accountability considerations and conditions imposed on the determination of the nature and circumstances of permissible outsourcing.

TOPIC 2: AMENDMENTS TO CURRENT SUBSECTIONS 108(b) AND (c)

Three Copy Limit

Should the three-copy limit in subsections 108 (b) and (c) be replaced with a flexible standard more appropriate to the nature of digital materials, such as "a limited number of copies as reasonably necessary for the permitted purpose"? Would such a conceptual, as opposed to numerical, limit be sufficient to protect against potential market harm to rights-holders? What other limits could be used in place of an absolute limit on the number of copies made? As an alternative, should the number of existing or permanent copies be limited to a specific number? Or, would it be sufficiently effective to instead tighten controls on access? Are there any compelling reasons to also revise the three-copy limit for analog materials?

It is difficult to respond in a meaningful way to these questions regarding the three-copy limit in subsections 108(b) and (c) because the questions as framed do not take into account a number of relevant considerations, such as (1) differences between the usage of "digital copies" that are embodied in DVDs and CDs and those that are accessed or distributed via online transmission; (2) differences in the nature and usage of permanent and temporary digital copies; (3) differences in the subject matter and purpose(s) for privileged reproduction under Subsection 108(b) [i.e., addressing "unpublished works" for purposes of preservation and security or deposit for research use in another eligible institution] and Subsection 108(c) [i.e., addressing "published works" for the purpose of replacing unusable copies in the lending collection]; and (4) differences in the potential impact of permitting privileged reproduction and, in the case of 108(b), distribution with respect to analog-to-analog, analog-to-digital, digital-to-digital, and digital-to-analog copying.

With respect to digital copies, specific numerical copy-limits may seem unavoidably arbitrary in the context of copies stored and used online, but not unreasonable in connection with copies of DVDs and CDs. Conceptual, as opposed to numerical, limits (such as a "limited number… as reasonably necessary for the permitted purpose" standard) might make sense for the former, provided that meaningful distinctions can be drawn based on the stated "purpose" (i.e., if the copies are for the access collection, then the number can be limited to reasonable lending usage, as distinct from where the copies are only for preservation purposes) but not for the latter. Similarly, maintaining a numerical limitation on *permanent* copies of digital works would seem to make sense in the preservation context, although a conceptual limitation may be more practical with respect to *temporary* copies that may be made for cataloguing or other activities associated with preservation functions.

While there does not appear to be any compelling reason to revise the three-copy limit for analog materials, consideration of this issue will also depend upon the subject matter and purpose(s) of the privileged reproduction. It will also depend upon whether the particular purpose for privileged reproduction can be served under the circumstances by either a digital or analog copy, or only one format or the other.

Ultimately, the risks associated with privileged reproduction in digital formats rather than analog formats, for permanent copies rather than temporary copies, and for access and use, rather than for preservation, will be of more concern to publishers in connection with any change in the three-copy limit for digital copies than with any change in the same limit for analog copies. Any proposed revision must take into account the need to ensure that privileged reproduction (and, where permitted, distribution) in digital formats does not increase the likelihood that the activities of eligible institutions will encroach unnecessarily and unfairly on the rights and abilities of publishers to commercially exploit their works in the marketplace.

Additional Triggers under Subsection 108(c)

To address the potential of loss before a replacement copy can be made, should subsection 108(c) be revised to permit the making of such copies prior to actual deterioration or loss? Specifically, should concepts such as "unstable" or "fragile" be added to the existing triggers – damaged, deteriorating, lost, stolen, or obsolete – to allow replacement copies to be made when it is known that the media is at risk of near-term loss? In other words, should libraries and archives be able to make "pre-emptive" replacement copies before deterioration occurs for particularly unstable digital materials – bearing in mind that a search must first be made for an unused copy? If so, how should such concepts be further refined or defined so as not to include all digital materials? Are there any analog materials that similarly are so fragile that they are at risk of becoming unusable and unreadable almost immediately – and where the ability to create stable replacement copies prior to loss would be equally important? What are the risks to rights-holders of expanding subsection 108(c) in this manner? How could those risks be minimized or addressed?

The concept of authorizing libraries and archives to be able to make "pre-emptive" replacement copies before deterioration occurs, even on the basis of the asserted "unstable" or "fragile" nature of the format in which the works are currently held, is fraught with potential problems for publishers. Once again, however, it is impossible to provide meaningful responses to the specifically articulated questions without taking into account the very different implications that may arise depending, for example, on (1) how "unstable" or "fragile" would be defined, and (2) whether the relationship between the work to be copied and the "preemptive" replacement copy is analog-to-analog, analog-to-digital, digital-to-digital, or digital-to-analog copying. And, as noted in the previous section concerning the three-copy limit, this analysis requires a distinction between digital information on the one hand and the format(s) in which such works are accessed or delivered on the other hand (i.e., the distinction between the usage of "digital copies" that are embodied in DVDs and CDs and those that are accessed or distributed via online transmission), where it must be emphasized that publishers use certain software formats in connection with certain hardware platforms generally to accommodate user demands.

Clearly, defining any and all digital formats as "unstable" or "fragile" *per se* is unacceptable, and our collective experience in the use and storage of works in various digital formats is still too brief and limited to define these terms in the digital space with any predictive accuracy. Even with respect to works in analog formats, the definition exercise would be complicated by the realization that, in some circumstances, a copyright owner may have a deliberate strategy of distributing works in inexpensive formats that use "fragile" materials in order to save on costs and allow more competitive pricing. But, should such a strategy, which allows a library to purchase copies inexpensively, itself become the basis for a new copying privilege? And, if the purpose is not preservation but replacement, where a concern over the fragility or instability of the format will mean that the most desirable "preemptive" copy will be one in a more durable format for use, is it realistic to condition the making of "preemptive" replacement copies on a prior unsuccessful search to purchase an "unused" copy, which is generally understood to mean an unused copy in the same format? (It is worth noting that the term "unused" is a worthless concept with respect to digital copies and may no longer make sense even with respect to analog materials; ultimately, a "usable" copy is what the provision in Section 108 appears to contemplate.)

It is unclear why any exception based on this concept would be justified in circumstances where a "usable" replacement copy is available at a fair price in any format. In other words, as long as a replacement copy in the same format can be purchased in the marketplace or, in the case of replacing an analog copy with a digital one, as long as a license is available from the copyright owner to create such a copy, there is no reason why such a "preemptive copying" exception would be necessary or justified as a matter of public policy. Moreover, for certain kinds of works (e.g., college texts and professional and scholarly publications), the availability of a subsequent edition of the work should be sufficient to cut off the privilege for an eligible institution to make and/or distribute a replacement (or, for that matter, preservation) copy in all but the most unusual circumstances.

Published versus Unpublished Works

Are there any compelling reasons to revisit section 108's separate treatment of unpublished and published works in subsections 108(b) and (c), respectively? Are there other areas where unpublished and published works should receive different treatment under section 108 than those currently specified in the statute? Are there any reasons to distinguish in section 108 between unpublished digital and unpublished analog works?

In general, most book publishers are not concerned about library or archival privileges with respect to "unpublished" works except where such works may be unlawfully made or unlawfully acquired prepublication copies of works they are preparing for publication. However, given the possibility that significant revisions to some provisions of Section 108 may have significant implications for other provisions in that section, it makes sense in the context of an overall review of Section 108 to revisit the purpose and nature of the differing treatments specified in Section 108 for unpublished and published works. More specifically, it makes sense to specifically reexamine why the statute deals only with "unpublished works" for purposes of preservation and security or deposit for research use in another eligible institution, and only with "published works" for the purpose of replacing unusable copies in the lending collection.

Should section 108 take into account the right of first publication with respect to unpublished works? If so, why and in what manner? Would the right of first publication, for instance, dictate against allowing libraries and archives to ever permit online access to unpublished materials – even with the user restrictions described above?

AAP is on record in the "orphan works" proceeding as noting that "first publication" is of somewhat limited value in light of the 1992 Congressional amendment which made clear that the unpublished status of a work does not, standing alone, bar a finding of "fair use" and that such a determination should be made upon consideration of all of the "fair use" factors in Section 107 of the Copyright Act.

Should section 108 treat unpublished works intended for publication differently from other unpublished materials, and if so, how?

This is a potentially problematic area for publishers, insofar as it might inappropriately be construed as including pre-publication prints of journal articles and early drafts of manuscripts that later become published books. The question also raises concerns about the use of unpublished materials that are deposited in archives pursuant to terms and conditions specified in the provisions of contracts, wills, or other arrangements governing grants and assignments of rights. Publishers of university presses are often responsible for the publication of unpublished materials left by deceased notables, whose estates grant copyright and exclusive publication rights for such purposes. These are often

expensive undertakings that seldom recover their costs, which explains why they are typically performed by nonprofit university presses rather than by commercial publishers. Nevertheless, these university presses are publishing to a market that consists of scholars and researchers in the academic community, and they are proactively looking to new technologies for more efficient and cost effective ways of fulfilling this part of their mission. The existence of such markets for works based on unpublished materials, and the investments and efforts of the publishers who serve those markets, should be considered in any assessment of the treatment of unpublished works and other unpublished materials under Section 108.

Access to Digital Copies Made under Subsections 108(b) and (c).

Are there conditions under which electronic access to digital preservation or replacement copies should be permitted under subsections 108 (b) or (c) outside the premises of libraries or archives (e.g., via e-mail or the Internet or lending of a CD or DVD)? If so, what conditions or restrictions should apply?

There may be conditions where such access should be permitted, provided that such access would not interfere with any market for copies made available by the copyright owner, including those made available pursuant to a license. In addition, it should be noted that some copyright owners make works available digitally to the public, including libraries and archives, in ways other than through licensing. For example, time-limited access to materials at no charge is a common promotional practice, but it does not mean that the publishers who permit such access are uninterested in protecting their exclusive rights in such materials.

This is an important evolving growth area for publishers, who are already engaging in a variety of licensing activities with respect to works in digital formats, particularly in connection with libraries. Those who would consider revising Section 108 should familiarize themselves with the actions that publishers are already taking to make digital materials available directly to the public as well as to libraries and their patrons.

In order to avoid interference or competition with such legitimate activities of copyright owners, perhaps electronic access to digital preservation or replacement copies should be permitted outside the premises of libraries or archives only with respect to "orphan works" or only from eligible institutions that comply with additional eligibility requirements, such as defining a limited user community and/or restrictions that base the number of simultaneous users on the number of copies of the work in the library's collection from which the replacement or preservation copy was made. Or, perhaps it should be permitted only at the point at which a preservation or replacement copy is the only available copy.

Should any permitted off-site access be restricted to a library's or archives' "user community"? How would this community be defined for the different types of

libraries? To serve as an effective limit, should it represent an existing and well-defined group of users of the physical premises, rather than a potential user group (e.g., anyone who pays a member fee)? Should off-site electronic access only be available where a limited and well-defined user community can be shown to exist?

Any permitted off-site access certainly should be restricted to a library's or archives' "user community," which should be reasonably limited in its definition and subject to a requirement that it must be shown to exist so as to constitute an effective limitation on the provision of such access. For example, a "public" library should not be permitted to define its user community as "the general public." The "general public" can go to a library and read a book, but only library cardholders (i.e., a defined "user community") can "check out" a book for off-site use. The same should be true of a library's digital holdings – at most, general access should be limited to the library's premises, while off-site access should be limited to those in a defined, limited "user community."

Should restricting remote access to a limited number of simultaneous users be required for any off-site use? Would this provide an effective means of controlling off-site use of digital content so that the use parallels that of analog media?

Yes, restricting remote access to a limited number of simultaneous users should be required for any off-site use. Moreover, any exception for such use under Section 108 should not be permitted where it would override any contractual arrangement offered by the copyright owner. Such a restriction may help to mitigate the risks in providing online digital access, but it should not be expected to completely eliminate them. Other protections, including requiring off-site users to sign a "user agreement," should also be considered.

If a limit on simultaneous users is required for off-site access to unlicensed material, what should that number be? Should only one user be permitted at a time for each legally acquired copy? Do effective technologies exist to enforce such limits?

The NetLibrary and eBrary systems reportedly impose and effectuate "one user at a time" limitations for each legally acquired copy. Tracking and DRM technologies can help libraries and archives determine the number of users at any one time, but it may require some form of periodic human monitoring to assure that no more than a limited number of users have access at any one time.

Should the use of technological access controls by libraries and archives be required in connection with any off-site access to such materials? Do the relevant provisions of the TEACH Act (17 U.S.C. 110(2)) provide a good model?

The TEACH Act may provide some guidance for imposing requirements for the use of technological access controls by libraries and archives with respect to the provision of off-site access, but it will be necessary to adapt rather than merely adopt such requirements in recognition of the differences in the scope of privileged activities under

the TEACH Act and those already provided and under consideration for expansion in Section 108.

Would it be effective to also require library and archive patrons desiring off-site access to sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission?

As noted above, such agreements would be helpful, although it is unclear how effective they would be.

Should the rules be different depending on whether the replacement or preservation copy is a digital tangible copy or intangible electronic copy (e.g., a CD versus an MP3 file) or if the copies originally acquired by the library or archive were acquired in analog, tangible or intangible digital formats? What are the different concerns for each?

As a general proposition, it is more important for Congress to focus on market impact than media format in considering possible revision of Section 108. Moreover, it is unclear whether differences in risk can be meaningfully ranked according to media format. However, as previously noted, the risks for copyright owners are likely to be more significant with respect to permitted exceptions for use of intangible electronic copies (i.e., via network transmission) than for permitted exceptions for use of analog or tangible digital copies (i.e., a DVD or CD), at least in those instances in which the replacement tangible copy is distributed with copying or access controls identical or equivalent to those included with the original copy. In the absence of such controls, the ease with which digital information can be downloaded and shared makes the risks effectively the same as for copies acquired through online access.

It is worth noting at this point that none of the questions posed in this Notice address enforcement considerations. Publishers are loath to sue customers (i.e., libraries), and, as previously noted, monetary damages are unavailable as a matter of law to redress infringements by State entities. Any expansion of permissible activities under the exemption must also provide effective redress for copyright owners where the obligations or restrictions imposed on eligible institutions in connection with their reliance on the exceptions in Section 108 are not met or the afforded privileges are otherwise abused. In contemplating revision of Section 108, the Study Group and Congress must keep in mind that any expansion of the privileges afforded to eligible beneficiaries under Section 108 would further tilt an already skewed playing field against copyright owners, thus exacerbating publishers' difficulties in protecting themselves against abuse of these privileges.

TOPIC 3: NEW PRESERVATION-ONLY EXCEPTION

Given the characteristics of digital media, are there compelling reasons to create a new exception that would permit a select group of qualifying libraries and

archives to make copies of "at risk" published works in their collections solely for purposes of preserving those works, without having to meet the other requirements of subsection 108(c)?

While it is important to preserve works that might otherwise be lost, no "compelling reasons" have thus far been demonstrated regarding the need for a new copyright exception for so-called "at risk" published works. In considering such a new exception, much will depend on the meaning of "at risk" and the ability to ensure the accountability of "qualifying" entities, recognizing how the creation of a new exception would expand the "preservation" privilege from its current limitation to unpublished works.

Publishers and other copyright owners might be reassured regarding the claims that preservation activities in connection with published works do not threaten their rights under copyright if libraries and archives would be more forthcoming in disclosing their preservation practices and what they are preserving. Still, arguments for a new preservation exception should consider the extent to which publishers or other entities are already engaged in preservation activities, and the impact that a new exception might have on such activities as well as on differential pricing that publishers can offer libraries for the acquisition of works depending on whether the library wants ongoing access to archived materials.

Any consideration of a new exception for preservation of published works must make a clear distinction between preservation and granting access. In terms of works in digital formats, it is likely that such versions will continue to be available from commercial vendors (including information aggregators or print-on-demand or, in the future, "access on demand" services). Therefore, the reproduction of works in digital formats should be done for preservation purposes only at such time as the library or archive can ascertain – with reasonable certainty – that the works are no longer available in any format, including hard-copies.

Does the inherent instability of all or some digital materials necessitate up-front preservation activities, prior to deterioration or loss of content? If so, should this be addressed through a new exception or an expansion of subsection 108(c)?

As previously noted, defining any and all digital formats as "inherently unstable" is not an acceptable concept because our collective experience in the use and storage of works in various digital formats is still too brief and limited to define this concept with any predictive accuracy. Moreover, the need for such a new exception or expansion of Subsection 108(c) has not been convincingly demonstrated, especially given the risk of widespread digital reproduction and the apparent consideration of applying the revised provisions to both published and unpublished works. The premise of the "inherent instability" of all or some digital materials is simply too broad, as it would lead us to question why digital formats are used and whether their use is appropriate in the first instance. Any exception for the preservation of published works should specify reasonable triggering events and appropriate responsive steps; no blanket "preservation" exception should be available for either published or unpublished works.

How could one craft such an exception to protect against its abuse or misuse? How could rights-holders be assured that these "preservation" copies would not serve simply as additional copies available in the library or archives' collections? How could rights-holders be assured that the institutions making and maintaining the copies would maintain sufficient control over them?

It should again be noted that Section 108(c) applies only to reproduction, not distribution. "Preservation" copies need not be available to the public to fulfill their "preservation" purpose. Accordingly, a "preservation" copy should not be available as a matter of definition – if it is made available, it turns into something else like a "replacement" copy.

If any such exception is to be crafted, the purpose(s) of the exception should be clearly articulated, access and use policies for "preservation" copies should be clearly stated and strictly limited, and appropriate sanctions for abuse should be included. The requirement to employ technological protection measures would be desirable and probably necessary to safeguard against abuse. Imposing the current standard for replacement (i.e., "cannot be obtained at a fair price") as an additional "trigger" for a preservation exception would be desirable insofar as "replacement" availability inherently should preclude any "at risk" assessment and justification for engaging in reproduction pursuant to the exception. In many circumstances, the market availability of a subsequent edition of the work considered for preservation will also militate against an "at risk" finding. It is also worth exploring whether the creation of "preservation copies" of digital works should be subject to additional licensing by the copyright owner, and whether any preservation exception should be available only to trusted, third-party repositories, rather than to any or all institutions that are otherwise eligible to exercise the exceptions under Section 108.

Should the exception only apply to a defined subset of copyrighted works, such as those that are "at risk"? If so, how should "at risk" (or a similar concept) be defined? Should the exception be applicable only to digital materials? Are there circumstances where such an exception might also be justified for making digital preservation copies of "at risk" analog materials, such as fragile tape, that are at risk of near-term deterioration? If so, should the same or different conditions apply?

If "at risk" preservation is permitted, it should be permitted for analog as well as digital works, but the applicable conditions should address the different considerations that are attributable to the different formats in terms of risk to the copyright owner. In general, the conditions permitting copying of a digital work should generally be tougher than those applicable to the copying of a work in an analog format, but should also apply when permitting the making of digital copies of analog works. .

Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies? Should eligible institutions be required to establish their ability and commitment to retain materials in restricted (or "dark") archives?

Yes, to the first question. The mere existence of the cop(ies) will fulfill the "preservation" purpose; access and use of such copies present separate issues.

On the second question, it should be recognized that not every eligible institution under Section 108 should be permitted to engage in preservation copying, so there is no need for every eligible institution to be required to establish their ability and commitment to retain materials in restricted (or "dark") archives.

Should only certain trusted preservation institutions be permitted to take advantage of such an exception? If so, how would it be determined whether any particular library or archives qualifies for the exception? Should eligibility be determined solely by adherence to certain statutory criteria? Or should eligibility be based on reference to an external set of best practices or a standards-setting or certification body?

The concept of allowing only certain trusted preservation institutions to be permitted to take advantage of such an exception is worth pursuing because there is no reason why every eligible institution under Section 108 should be permitted to engage in preservation copying.

Eligibility should be determined by reference to both statutory criteria and a standards-setting or certification body that would include representatives of producers of copyrighted works.

Should institutions be permitted to self-qualify or should there be some sort of accreditation, certification or audit process? If the latter, who would be responsible for determining eligibility?

It is doubtful that self-qualification will promote the necessary assurances of competence and accountability that are required to win support for such an exception. Some sort of accreditation, certification and audit process should be required, with eligibility being determined by a well-known, established institution with acknowledged expertise and experience in preservation matters, such as the Library of Congress or the National Archives and Records Administration ("NARA").

What are the existing models for third party qualification or certification? How would continuing compliance be monitored? How would those failing to continue to meet the qualifications be disqualified? What would happen to the preservation copies in the collections of an institution that has been disqualified?

It is unclear which existing model for third party qualification or certification, if any, would be appropriate to follow for preservation functions. However, continuing compliance could be monitored through appropriate audit and reporting requirements. Those institutions that fail to comply with requisite terms and conditions for eligibility should be subject to disqualification by whatever authority qualified them in the first instance. Preservation copies in the collections of a disqualified institution could be

transferred to the collections of other qualified institutions, with appropriate provisions for transfer to include remuneration sufficient to offset the costs of such transfer.

Further, should qualified institutions be authorized to make copies for other libraries or archives that can show they have met the conditions for making copies under subsections 108(c) or (h)?

No, a limited of number of repositories should be sufficient to serve legitimate preservation needs. Allowing qualified libraries and archives to populate redundant archives would greatly increase the risk of leakage and abuse, and effectively turn such institutions into publishers. Such authorization is neither necessary nor appropriate.

TOPIC 4: NEW WEBSITE PRESERVATION EXCEPTION

Given the ephemeral nature of websites and their importance in documenting the historical record, should a special exception be created to permit the online capture and preservation by libraries and archives of certain website or other online content? If so, should such an exception be similar to section 108(f)(3), which permits libraries and archives to capture audiovisual news programming off the air?

Internet search engines now make limited uses of materials posted to web sites for indexing purposes, apparently relying on the "implied consent" doctrine in connection with the absence of meta-tags, robot.txt files, or similar technologies that block web sites or pages from being crawled. But the capture, permanent storage and possible provision of access to such materials is qualitatively different, and even if done by libraries and archives, should not be justified or permitted on the same basis. AAP members have a range of views on this matter, but generally seem to agree that such online capture by eligible institutions under a special exception in Section 108 for preservation purposes should generally be allowed only on a "permission" basis and not pursuant to the "opt-out" or "implied consent" basis through which search engines conduct their capturing crawls.

Because permission to capture audiovisual news programming off the air is not really comparable to permission to capture all manner of copyrighted works that publishers and other copyright owners may place online, Section 108(f)(3) does not provide a good model for a proposed web site preservation exception.

Should such an exception be limited to a defined class of sites or online content, such as non-commercial content/ sites (i.e., where the captured content is not itself an object of commerce), so that news and other media sites are excluded?

Limiting such an exception to a defined class of sites or online content might be a helpful limitation but it would also place great burdens on publishers to tag or otherwise prevent archiving of their copyrighted materials. Such tagging may interfere with their ability to market materials or to make them easily accessible to users generally. Apart from the

difficulties that will be encountered in attempting to define such classes of sites or online content, the presumption should be that any site containing copyrighted works is off limits, except perhaps for preservation in a "dark archive" that permits access and use of such materials only after it has been determined that copies of such materials are no longer available from any source in any format, or after copyright has expired.

Should the exception be limited to content that is made freely available for public viewing and/or downloading without access restrictions or user registration?

It is worth exploring whether such an exception might be limited to sites that are freely available for public viewing and/or downloading without access restrictions or user registration requirements. It is also worth considering whether certain types of content can be excluded from the exception.

Should there be an opt-out provision, whereby an objecting site owner or rights-holder could request that a particular site not be included? Should site owners or operators be notified ahead of the crawl that captures the site that the crawl will occur? Should "no archive" meta-tags, robot.txt files, or similar technologies that block sites or pages from being crawled be respected?

As previously noted, publishers have a range of views on these issues, but generally appear to agree that an opt-out approach based on the concept of implied consent is probably inappropriate here, where the interests are different from those involved in search engine crawling activities for index purposes.

However, if such an opt-out approach were to be adopted, web site owners should anticipate such crawls for capture in the same manner as they anticipate search engine crawls for indexing; however, the entity initiating the crawl may want to give prior notice so sites have the opportunity to disarm such "no archive" mechanisms to facilitate capture designated specifically for preservation purposes. Similarly, if an exception were to be adopted which does not require permission from the web site owner, then of course eligible institutions should be required to respect "no archive" meta-tags, robot.txt files, or similar technologies that block sites or pages from being crawled. In addition, assuming the adoption of an opt-out approach, the use of non-technological means to opt-out should be permitted as an alternative or adjunct to such technological means.

Should the library or archive be permitted to also copy and retain a copy of a site's underlying software solely for purposes of preserving the site's original experience (provided no use is permitted other than to display/use the website)?

Once again, publishers have mixed views. The question may be technical, depending on whether the software is on the web site or on the server from which the web site is hosted. If copying and retention of the underlying software is permitted, use of the downloaded software should be limited to display and use of the web site and its collectible contents, recognizing that neither the host nor any relevant software publisher

should have any obligation to make available, maintain or otherwise support such software.

If libraries and archives are permitted to capture online content, should there be any restrictions on public access? Should libraries and archives be allowed to make the copies thus captured and preserved available electronically, or only on the premises? If electronically available, under what conditions? Should the lapse of a certain period of time be required?

Since the exception would justify capture of online content as being for "preservation" purposes, such content should not be subject to public access for the same reasons discussed in connection with earlier comments on exceptions for making "preservation" copies of copyrighted works in other contexts.

Should labeling be required to make clear that captured pages or content are copies preserved by the library or archive and not from the actual site, in order to avoid confusion with the original site and any updated content?

Yes, if such capture is permitted. However, access to such captured pages or content should remain restricted as discussed above.

Respectfully Submitted,

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